Neutral citation number: [2023] UKFTT 00268 (GRC)

Case Reference: EA/2022/0213

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: determination on the papers

Heard on: 14 December 2022
Decision given on: 9th March 2023

Before

TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER EMMA YATES
TRIBUNAL MEMBER STEPHEN SHAW

Between

JASON MILLAR

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Balancing Test:	The last question of the Legitimate Interests Test, as referred to in paragraph 52.
Commissioner:	The Information Commissioner.
Council:	Wigan Metropolitan Borough Council.
Decision Notice:	The Decision Notice of the Information Commissioner dated 28 July 2022, reference IC-137282-M7S6.

DPA:	The Data Protection Act 2018.
EIR:	The Environmental Information Regulations 2004.
FOIA:	The Freedom of Information Act 2000.
Land:	The land which was subject to the TPO.
Legitimate Interests Basis:	The basis for lawful processing of personal data specified in Article 6(1)(f) of the UK GDPR, as set out in paragraph 44.
Legitimate Interests Test:	The three-part test for establishing the Legitimate Interests Basis, referred to in paragraph 51.
Request:	The request for information made by the Appellant in October 2021, more particularly described in paragraph 9.
Requested Information:	The information which was requested by way of the Request.
TPO:	The tree preservation order which was the subject of the Request.
UK GDPR:	The General Data Protection Regulation (EU) 2016/679, as it forms part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal) Act 2018.

2. We refer to the Information Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the date of the Request and the date of the Appellant's subsequent complaint to the Commissioner.

3. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

4. This is an appeal against the Decision Notice, which held that the information which was disclosed by the Council in response to the Request was correctly redacted under the exception for third party personal data (regulation 13 of the EIR) and that, on the balance of probabilities, the Council held no further relevant information relating to the Request.

5. The Decision Notice did not require the Council to take any steps.

Mode of Hearing

6. The parties consented to this appeal being determined by the Tribunal without a hearing.

7. The Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.

Background to the appeal

8. The background to this appeal is as follows.

The Request

9. In October 2021[1], the Appellant contacted the Council requesting information in the following terms, in respect of a plot of land to the rear of a named property in Wigan:

"*Tree preservation orders where our on this land in the eighties to stop future development your officer [redacted] informs me. I seek all information internal memos, borough solicitor notes in regard to this application*

As above legal due process that was followed amenity value submission on what basis submission made".

The Council's reply and subsequent review

10. The Council responded in October 2021[2]. It provided information within the scope of the Request and advised the Appellant that some of the information was redacted under regulation 13 of the EIR, as it comprised personal data relating to third parties.

11. The Appellant contacted the Council by email on 18 October 2021 stating that he believed that some information was missing from the Council's response, linked to the Appellant's views about the legal process associated with the making of tree preservation orders. The Appellant asked to inspect the relevant records which he had requested.

12. On 26 October 2021, the Council emailed the Appellant, explaining that it had supplied all information held within the scope of the Request, subject to the redaction of personal data.

13. On 27 October 2021, the Appellant sent a further email to the Council complaining about the response and again providing his views regarding the legal process associated with the making of tree preservation orders. The Appellant expressed concern that records had been destroyed relating to the TPO and he considered that due process had not been followed when the TPO was made.

14. Following an internal review, the Council contacted the Appellant by letter dated 8 December 2021. It explained to the Appellant that the Requested Information required a combined response from two Council departments (namely, the Planning Department and the Legal Department). The Council reiterated that it had supplied all information held by the Planning Department within the scope of the Request (subject to the reactions of personal data). The Council did, however, disclose some

[1] The exact date of the request is not clear from the documents provided to us, but it appears to be accepted by the parties that it was made in October 2021. It is known, though, that the Appellant emailed the Council on 18 October 2021 in relation to the response provided to the request.

[2] Although the Decision Notice states that the Council responded on 18 October 2021, the exact date of the response is also not clear from the documents provided to us, but (as noted) the Appellant emailed the Council on 18 October 2021 in relation to the response provided.

further information from the Legal Department which was held electronically (again, subject to personal data redactions), which the Council stated had been missed due to a technical issue with the original searches. The Council also explained that it no longer held certain information as it had been destroyed in accordance with its document retention schedule.

15. The Appellant contacted the Commissioner on 27 October 2021 (and again on 8 December 2021 following the Council's internal review) to complain about the Council's response to the Request. The Appellant stated that he believed that the Council held more information than it sent in response to the Request. The Appellant also made certain allegations regarding abuses in the process relating to the making of the TPO.

The Decision Notice

16. The Commissioner decided, by way of the Decision Notice, that the Council was entitled to redact certain third party personal data, in accordance with regulation 13 of the EIR, in relation to the information which was disclosed by the Council in response to the Request.

17. The Decision Notice set out the Commissioner's views on the applicable law, including the exception under the EIR for disclosure of information which comprises personal data. In summary:

    a. the Commissioner formed the view that some of the Requested Information comprised personal data relating to certain third parties; and

    b. having formed that view, the Commissioner then considered whether the disclosure of that personal data would breach any of the data protection principles.

18. On the latter point, the Commissioner addressed the data protection principle set out in Article 5(1)(a) of the UK GDPR, relating to (amongst other things) personal data being processed lawfully. In considering the lawfulness of processing personal data in connection with the Request, the Commissioner concluded that the most applicable lawful basis was the Legitimate Interests Basis. The Decision Notice explained that the Commissioner applied the Legitimate Interests Test, setting out his consideration of certain factors.

19. The Commissioner's application of the Legitimate Interests Test concluded, in essence, that the Appellant was pursuing legitimate aims by way of the Request, that disclosure of the relevant personal data would be necessary to achieve those aims, but (in respect of the Balancing Test) there was insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms.

20. The Decision Notice also included the Commissioner's determination that, on the balance of probabilities, the Council held no further relevant information relating to the Request, beyond the information which it had already disclosed to the Appellant (subject to the personal data redactions). The Decision Notice set out the Commissioner's reasons for reaching that determination.

The appeal

21. Regulation 18 of the EIR provides that the enforcement and appeals provisions of FOIA (namely Part IV, including Schedule 3, of FOIA and Part V of FOIA) apply for the purposes of the EIR, subject to certain modifications.

22. The Decision Notice was given in response to the Appellant's complaint to the Commissioner relating to the Council's response to the Request, made under section 50 of FOIA as applied by regulation 18 of the EIR. This is an appeal against the Decision Notice made by the Appellant pursuant to the EIR, in accordance with section 57 of FOIA as applied by regulation 18 of the EIR.

23. We consider that it is important to stress what is outside of the scope of the appeal. This appeal is not about the validity of any tree preservation orders, nor the circumstances in which they were made, nor whether or not any associated documentation should have been retained by the Council. This appeal does not relate to the Council's compliance with any legal process (including any relevant policies and procedures) in respect of the TPO or any other tree preservation orders. This appeal is also not about the merits of the TPO, nor the conduct of any individuals working for the Council. The Tribunal has no power to determine those issues and nothing we say should be interpreted as an expression of opinion on any of those issues. The remit of the Tribunal is limited to that set out in section 58 of FOIA (as applied pursuant to regulation 18 of the EIR), having regard to the applicable law, as we explain below.

Grounds of appeal

24. In his grounds of appeal, the Appellant made some assertions about the laws relating to the making of tree preservation orders and made certain allegations to the effect that the Council had improperly applied the TPO.

25. The Appellant also argued that, essentially, the redaction of information in the Council's response to the Request meant that information was being wrongly withheld and that missing information supported his concerns about impropriety in respect of the TPO. The Appellant stated that all information 'stored' by the Council should be in the public domain and made available to members of the public.

The Commissioner's response

26. In his response to the appeal, the Commissioner relied on the reasons given in the Decision Notice in support of his view that the appeal should be dismissed. The Commissioner asserted that the Appellant had failed to engage with the reasoning set out in the Decision Notice and had failed to set out in his grounds of appeal why the Decision Notice was not in accordance with the law or that the Commissioner ought to have exercised his discretion differently. The Commissioner also provide some submissions regarding the applicable law, by way of an annex to his response.

The Appellant's reply

27. Whilst we acknowledge all of the specific points made by the Appellant in his reply to the Commissioner's response, his additional submissions and supporting information

included (in summary) the following:

a. the Appellant provided some information regarding a meeting between the Appellant and a representative of the Council during which the issue of tree preservation orders was discussed.

b. the Appellant asserted that the Council's representative had stated at that meeting that tree preservation orders were used to stop development, which the Appellant contended was a breach of legal due process.

c. the Appellant also contended that legal due process was not followed in respect of the TPO, on the basis that the owner of the Land was not contacted, and applicable statutory notices were not served.

d. the Appellant considered that a notice relating to the TPO was served on someone who was not the landowner of the Land and the Council had made assumptions regarding who the landowner was, confusing the objector with the actual owner of the Land.

e. the Appellant considered that the redaction of data provided in response to the Request was intended to cover up the alleged abuse of the legal due process in respect of the TPO and he stated that full disclosure: "…*may expose maladministration and negligence common with local authorities within the UK*".

f. the Appellant cited issues with another piece of land owned by him under the control of West Lancashire Council, in respect of which he considered that there had been an abuse of process relating to the making of tree preservation orders. Linked to that, the Appellant considered that a 'freedom of information notice' provided to him by West Lancashire Council was evidence of such an abuse of process. The Appellant requested that the evidence from that response be taken into account in respect of this appeal and he stated that the information provided by that council was not redacted.

g. the Appellant contended that he had a legitimate interest in receiving the Requested Information, on the basis that he owned the Land.

h. in respect of the issues raised by the Commissioner regarding third party personal data, the Appellant argued that anyone who objects to a planning application has their name and address published on the planning portal and likewise the Appellant considered that anyone objecting to a tree preservation order would also accept that their information would enter the public domain. He also argued that the objector to the TPO could have objected anonymously but provided their details and "*Perhaps by doing this they had the intention that their data could be disclosed*". Moreover, the Appellant argued that the objectors' details were available for personal public inspection at the Council's offices in unredacted format and consequently this had been in the public domain for twenty years. Further, he argued that many old planning applications and associated objections had been electronically uploaded onto a planning portal in any event.

28. The Appellant provided certain information and documentation in support of some of the above views, including copies of emails from the previous owner of the Land, copies of email correspondence between the Appellant and a representative of the

Council and copies of information he received from West Lancashire Council. He also cited extracts and summaries of policies for objecting to tree preservation orders and a redaction policy for planning applications and associated documents, stating that these were taken from "a standard local authority".

29. The extracts provided by the Appellant relating to that redaction policy referred to the online publication of personal data for both planning applicants and objectors and to the information which would be provided to make them aware of such publication. Those extracts went on to explain the criteria for redaction for certain types of personal data, which did not refer to redaction of individuals' names and postal addresses (as had happened with information provided by the Council in response to the Request). The Appellant argued that "*It is accepted now that if you make an objection your name and address will appear online. It was most certainly accepted in 2006 when this objection was made that the letter would exist and has existed on the planning file for nearly twenty years un-redacted.*".

The Tribunal's powers and role

30. The powers of the Tribunal in determining the appeal are set out in section 58 of FOIA (which applies pursuant to regulation 18 of the EIR), as follows:

"(1) If on an appeal under section 57 the Tribunal considers –

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

31. For the purposes of the appeal, therefore, the Tribunal's remit is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based, and the Tribunal may come to a different decision regarding those facts.

The law

The statutory framework

32. Information which is within the scope of the EIR is exempt from disclosure under FOIA. Section 39(1) of FOIA provides:

"*Information is exempt information if the public authority holding it –*

(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.".

33. Accordingly, requests for environmental information held by a public authority must be dealt with under the EIR rather than FOIA.

34. The term 'environmental information' is defined in regulation 2(1) of the EIR as follows:

"*…any information in written, visual, aural, electronic or any other material form on –*

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements.

(d) reports on the implementation of environmental legislation.

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);".

35. Regulation 5(1) of the EIR provides individuals with a general right of access to environmental information held by public authorities. It provides:

"*…a public authority that holds environmental information shall make it available on request.*".

36. Accordingly, under regulation 5(1) of the EIR, a person who has made a request to a public authority (such as the Council) for environmental information is entitled to have that information made available to them, if it is held by the public authority. However, that entitlement is subject to the other provisions of the EIR, including some exceptions and qualifications which may apply even if the requested environmental information is held by the public authority. The opening wording of regulation 5(1) of the EIR (that is, the wording immediately preceding the extract quoted above) provides:

"*Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations…*".

37. It is therefore important to note that regulation 5(1) of the EIR does not provide an unconditional right of access to any environmental information which a public authority does hold. The right of access to information contained in that regulation is subject to certain other provisions of the EIR. Part 3 of the EIR, referred to above,

contains various exceptions to the duty to disclose environmental information which has been requested. Within Part 3 of the EIR, regulations 12 and 13 are applicable for the purposes of the appeal.

38. Regulation 12(4)(a) covers the position where a public authority does not hold the information, which is requested, at the time of the request. So far as is relevant, regulation 12(4) of the EIR provides:

"*…a public authority may refuse to disclose information to the extent that –*

(a) it does not hold that information when an applicant's request is received…".

39. Regulation 12(3) of the EIR relates to requested information which includes personal data. It provides:

"*To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.*".

40. So far as is relevant, regulation 13 of the EIR provides:

"*(1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if –*

(a) the first condition is satisfied…

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations –

(a) would contravene any of the data protection principles…".

41. Succinctly put, therefore, a public authority must refuse to disclose environmental information which is requested under the EIR if the disclosure of that information would contravene any of the data protection principles.

42. Regulation 2(1) of the EIR sets out definitions which are applicable for regulation 13, by reference to other legislation, the applicable parts of which are as follows:

    a. section 3(2) of the DPA defines "*personal data*" as "*any information relating to an identified or identifiable living individual*".

    b. the "*data protection principles*" are those set out in Article 5(1) of the UK GDPR, and sections 34(1) and 85(1) of the DPA. The first data protection principle, under Article 5(1)(a) of the UK GDPR, is that personal data shall be: "*processed lawfully, fairly and in a transparent manner in relation to the data subject*"; and

    c. a "*data subject*" is defined in section 3 of the DPA and means "*the identified or identifiable living individual to whom personal data relates…*".

43. The "*processing*" of such personal data includes "*disclosure by transmission, dissemination or otherwise making available*" (section 3(4)(d) of the DPA) and so includes disclosure under the EIR. It should also be noted that disclosure of information under the EIR essentially equates to disclosure to the world at large.

44. To be lawful (for the purposes of the first data protection principle), the processing

must meet one of the bases for lawful processing set out in Article 6(1) of the UK GDPR. One such basis is where: "*processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*" (Article 6(1)(f) of the UK GDPR).

45. Article 6(1) of the UK GDPR goes on to include an exception to the Legitimate Interests Basis, stating that it does not apply to processing carried out by public authorities in the performance of their tasks. However, regulation 13(6) of the EIR provides that such exception is to be omitted for the purposes of regulation 13 of the EIR, meaning that the Legitimate Interests Basis can be taken into account in determining whether the first data protection principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information by a public authority under the EIR.

46. Another basis of lawful processing (for the purposes of the first data protection principle) is where the data subject has given their consent to the processing in question (Article 6(1)(a) of the UK GDPR). The other bases are not relevant in the circumstances of this appeal.

47. The first recital to the UK GDPR is also germane. This provides: "*The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.*". The second recital to the UK GDPR also includes the following: "*The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data.*".

Case law

48. We turn first to case law regarding the definition of 'environmental information' set out in regulation 2(1) of the EIR.

49. It is well established that 'environmental information' is to be given a broad meaning in accordance with the purpose of the underlying European Council Directive which the EIR implement (Direction 2004/4/EC). The broad scope of the definition was explained by the Court of Justice of the European Union in Case C-316/01 *Glawischnig v Bundesminister fur soziale Sicherheit und Generationen* ([2003] All ER (D) 145).

50. In the case of *Department for Business, Energy and Industrial Strategy v The Information Commissioner and Alex Henney* ([2017] EWCA Civ 8444), the Court of Appeal confirmed the appropriateness of a broad approach to defining environmental information, which may include information that is not directly connected to a measure. It also established that the definition of 'environmental information' in the EIR should be construed purposively, but that this will also be dependent on the specific facts in any given case.

51. We turn now to case law on the issue of personal data and the application of regulation 13(1) of the EIR. The Legitimate Interests Basis is the only basis for lawful processing listed in Article 6(1) of the UK GDPR which contains a built-in balance between the rights of a data subject and the need to process the personal data in question. There is

a test which must be undertaken in order to determine whether or not the Legitimate Interests Basis can apply in any relevant scenario. This test involves consideration of three questions, as set out by Lady Hale in the Supreme Court's judgment in the case of *South Lanarkshire Council v Scottish Information Commissioner* ([2013] UKSC 55 [paragraph 18]):

"*(i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?".

52. The wording of question (iii) is taken from the Data Protection Act 1998, which has been superseded by the DPA and the UK GDPR. Accordingly, that question should now reflect the wording used in the UK GDPR such that the third question should now be: '*Are those interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?*'. This last question of the Legitimate Interests Test specifically addresses the balance between the rights of a data subject and the need to process the personal data in question.

53. The approach set out above in the *South Lanarkshire* case was subsequently reiterated in the Upper Tribunal in the case of *Goldsmith International Business School v Information Commissioner and Home Office* ([2014] UKAT 563). In the *Goldsmith* case, Upper Tribunal Judge Wikeley also provided further helpful guidance relevant to this appeal, setting out various propositions derived from the relevant case law. We refer to those propositions in more detail below.

54. Finally, we turn to case law relating to the question of whether information is held by a public authority for the purposes of the EIR. It is important to note that, notwithstanding regulation 5(1) of the EIR, it is not the role of either the Commissioner or the Tribunal to determine conclusively (or, in other words, with certainty) whether or not information is actually held by a public authority for the purposes of that regulation.

55. In the case of *Bromley v Information Commissioner & the Environment Agency* (EA/2006/0072), the First-tier Tribunal (in a case relating to whether information was held by a public authority for the purposes of FOIA) held that: "*the test to be applied [by the Commissioner and the Tribunal] was not certainty but the balance of probabilities.*" [paragraph 13]. In simple terms, the 'balance of probabilities' means that something is more likely than not to be the case. The decision in *Bromley* is not binding on this Tribunal, but we note that this test has become established, and a similar approach has been taken in numerous Tribunal decisions since. We see no reason to depart from that view.

56. In the case of *Oates v Information Commissioner* (EA/2011/0138), another decision of the First-tier Tribunal relating to FOIA, it was concluded that:

"*As a general principle, **the IC was ... entitled to accept the word of the public authority and not to investigate further in circumstances where there was no evidence as to an inadequate search**, any reluctance to carry out a proper search or as to motive to withhold information actually in its possession. Were this to be otherwise, the IC, with its limited*

resources and its national remit, would be required to carry out a full-scale investigation possibly onsite, in every case in which a public authority is simply not believed by a requester." [paragraph 11] (emphasis added).

57. Again, that decision is not binding on this Tribunal, but we note that this principle has become established, and a similar approach has been taken in numerous Tribunal decisions since. Again, we see no reason to depart from that view.

Evidence

58. The Tribunal read and took account of an open bundle of evidence and pleadings comprising a total of 116 pages (including cover sheets and index pages). The Tribunal also read and took account of a closed bundle comprising a total of 39 pages (including cover sheets and index pages). The closed bundle contained unredacted material which had been redacted in the open bundle.

Discussion and conclusions

Outline of relevant issues

59. As we noted in paragraph 23, certain matters are not relevant for the purposes of the appeal. The remit of the Tribunal is limited to the matters we have set out in paragraph 30. Accordingly, certain issues raised by the Appellant are outside of the scope of the appeal, including those relating to allegations of corruption, concerns about the process or merits relating to the TPO or other tree preservation orders, and matters relating to another public authority. The Tribunal has no power to determine any of these issues.

60. The Appellant had also referred, in his reply to the Commissioner's response, to the Commissioner being able to "*look at the redacted information and confirm that this objector was not considered by the LPA as the owner and did not object in any capacity as the owner of the land*". That was not part of the Commissioner's role in dealing with the Appellant's complaint to him relating to the Request and likewise, for the reasons we have referred to, it is outside of the remit of the Tribunal.

61. The fundamental issues which we need to determine in the appeal are essentially whether or not the Commissioner was correct to decide, by way of the Decision Notice, that:

    a. the EIR were engaged in respect of the Requested Information.

    b. the Council was entitled to redact the third-party personal data in relation to the information which was disclosed in response to the Request; and

    c. on the balance of probabilities, the Council held no further relevant information relating to the Request.

Analysis and discussion; application of the law

<u>Application of the EIR</u>

62. We first briefly address the issue of the application of the EIR (as opposed to FOIA) in respect of the Request, notwithstanding that the Appellant did not challenge the application of the EIR in connection with the Decision Notice.

63. We consider that the Commissioner was correct to determine that the EIR applied in respect of the Requested Information. The Requested Information fundamentally relates to the existence of the TPO, including associated records relating to the basis on which it was made. There can be no doubt that tree preservation orders, in dealing with (amongst other things) the protection of trees, of course relate to information 'on' the environment for the purposes of the definition of 'environmental information' in regulation 2(1) of the EIR. Likewise, the other records requested are associated with the TPO and comprise measures affecting or likely to affect, or measures designed to protect, the state of elements of the environment for the purposes of that definition. Accordingly, we are satisfied that all of the Requested Information falls within the scope of the EIR.

Personal data and the application of regulation 13 of the EIR

64. We therefore turn now to the issue of the personal data contained in the Requested Information and the application of regulation 13 of the EIR.

65. As we have noted, personal data means any information relating to an identified or identifiable living individual. Therefore, the two main elements of 'personal data' are that the information must relate to a living person and that the person must be identifiable.

66. Obviously, if the Requested Information did not include personal data then regulation 13 of the EIR cannot apply. In his reply to the Commissioner's response, the Appellant queried whether the Council or the Commissioner had confirmed whether any individual who may be identifiable in the Requested Information is still living, given that the Requested Information dated back to around 2006. This particular point was not addressed in the Decision Notice. However, there was no evidence before us that any individual who may be identifiable in the Requested Information is deceased. In the absence of any indication to the contrary, we do not consider that it was necessary or appropriate, in the circumstances of this case, for the Commissioner (or the Council) to take steps to confirm whether or not any such individual was deceased.

67. If it was incumbent on any public authority, on receiving a request for information under the EIR or FOIA, to take steps to identify whether or not any individuals who may be identifiable in the requested information were living or dead then this is likely to create a disproportionate burden on the public authority in dealing with that request. Indeed, we could envisage scenarios where (depending on the circumstances) an obligation to take such steps could be amongst relevant factors taken into account by a public authority in refusing to disclose requested information on the basis that a request was manifestly unreasonable (under regulation 12(4)(b) of the EIR) or vexatious (under section 14(1) of FOIA), or perhaps because the cost of compliance would exceed the appropriate limit for the purposes of section 12 of FOIA. Evidently it would be far from satisfactory if otherwise valid requests for information were refused because of the need to take those steps. We should stress, though, that these are hypothetical potential scenarios which would depend on the circumstances of the request and the nature of the requested information in any given case. It may well be appropriate and necessary for public authorities to take such steps in certain circumstances, particularly if the context of the request involves the need to know if individuals are living or not. Likewise, a request for information could specifically relate to, or encompass information relating to, individuals who are evidently deceased (but, of course, in that scenario a public authority could not rely on the

relevant exemptions under the EIR or FOIA relating to personal information anyway).

68. However, as we have noted, in the current case there is no indication or evidence to support any view that any of the individuals whose information is included in the Requested Information are deceased. Equally, the focus of the Request is not to ascertain whether or not any specific individuals are living or dead. Accordingly, we do not consider that it was necessary or appropriate, in the circumstances of this particular case, for the Council (or the Commissioner) to have to take any steps to ascertain whether or not individuals are still living. Therefore, in our view the Commissioner was entitled to treat such individuals as living and therefore (if the individuals were identifiable) for the relevant information to be personal data. Given that the names of such individuals were linked to a residential address or were evidently Council employees, we are also satisfied that the individuals were identifiable, and that the information was therefore personal data. It follows that we accept that regulation 13 of the EIR was engaged in respect of the relevant elements of the Requested Information. As we noted in paragraph 43, disclosure of information under the EIR which includes personal data would constitute the 'processing' of that personal data.

The applicable condition for regulation 13 of the EIR

69. We are satisfied that the relevant condition, for the purposes of this appeal, is the first condition contained in regulation 13(2A) of the EIR. As we have already outlined, this means that the Council must refuse to disclose environmental information if the disclosure of that information would contravene any of the data protection principles. We agree with the Commissioner's position that the first data protection principle is relevant, namely that personal data must be processed lawfully (amongst other things).

Lawfulness of the relevant processing of personal data

70. As we have noted, there are only two relevant bases of processing which would make it lawful for the Council to disclose the personal data comprised in the Requested Information. One of those relates to consent of the data subjects (Article 6(1)(a) of the UK GDPR). That basis is not applicable regarding the Requested Information, as there was no evidence before us that the relevant data subjects have given their consent for disclosure of their personal data to the public under the EIR.

71. That leaves only consideration of the Legitimate Interests Basis as a potential lawful basis for the Council to disclose the personal data in question. Given the legal framework which we have outlined, we consider that it is helpful to address the propositions from the *Goldsmith* case which we briefly noted above. As mentioned, in that case Upper Tribunal Judge Wikeley listed (from paragraph 35 onwards of his judgment) various propositions derived from case law as to the correct approach to be adopted. We set out seven of those propositions below (some of which we paraphrase or otherwise summarise) and we address each in turn with regard to the facts of this appeal. For completeness, we should mention that Upper Tribunal Judge Wikeley also referred to an eighth Proposition in the *Goldsmith* case, but this related to tests which were applied in relevant case law and which does not alter the other seven propositions we refer to.

72. Applying the propositions is not a sequential process, in that some later numbered propositions need to be considered and determined before returning to earlier

numbered propositions. Moreover, some earlier numbered propositions may be superfluous after applying later numbered propositions.

73. *Proposition 1:* The three questions set out in the *South Lanarkshire* case (as we have addressed above; namely, the Legitimate Interests Test) must be applied. Consequently:

    a. *Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?* In this case, it would be the Appellant to whom the relevant personal data are disclosed. The Appellant's aim in seeking the Requested Information is, in essence, to ascertain the legitimacy of the TPO and (as a connected point) to ensure transparency regarding any alleged wrongdoing in connection with the TPO. We agree with the Commissioner that such aim is legitimate and hence that there are legitimate interests being pursued by the Appellant by way of the Request.

    b. *Is the processing involved necessary for the purposes of those interests?* In order to address this, we need to turn to Propositions 3 to 5 (inclusive), which we do below.

    c. *Are those interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?* Given Proposition 2, we do not address this question at this stage, but comment on this later.

74. *Proposition 2:* The test of "necessity" under the second of those questions must be met before the third question can be considered. Again, this requires us to turn to Propositions 3 to 5 (inclusive).

75. Propositions 3 to 5 (inclusive) all relate to the concept of 'necessity' and so we group them together before commenting on them:

    a. *Proposition 3:* "Necessity" carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

    b. *Proposition 4:* It follows that the test is one of "reasonable necessity", reflecting the European jurisprudence on proportionality (albeit this may not add much to the ordinary English meaning of 'necessity').

    c. *Proposition 5:* The test of reasonable necessity itself involves the consideration of alternative measures, and so "*a measure would not be necessary if the legitimate aim could be achieved by something less*"; accordingly, the measure must be the "*least restrictive*" means of achieving the legitimate aim in question.

76. In our view, we need to consider all three of those propositions in assessing whether or not the processing (disclosure) of the personal data of the data subjects was necessary for the purposes of the legitimate interests being pursued by the Appellant by way of the Request. We also note that, with regard to those three propositions, Lady Hale, in the *South Lanarkshire* case, stated that the word "necessary" must be considered in relation to the processing to which it relates.

77. As we have noted, the legitimate interests being pursued by the Appellant are, essentially, to ensure transparency regarding any alleged wrongdoing in connection with the making of the TPO. In the facts of the current case, we agree with the

Commissioner that it is necessary (within the meaning outlined in all three of those propositions) for the personal data in question to be disclosed in order to achieve those legitimate interests.

78. At this juncture, we should return to Proposition 2. As noted, this requires the test of "necessity" under the second of the questions in Proposition 1 to be met before the third of those questions can be considered. As we have determined that the processing would be necessary for the purposes of the legitimate interests being pursued by the Appellant, we need to go on to consider the third of the questions in Proposition 1. This means applying the Balancing Test between the legitimate interests of the Appellant and the rights and freedoms of the data subjects whose personal data is in issue - but we first address Propositions 6 and 7.

79. *Proposition 6:* Where there are no issues regarding an individual's privacy rights, the question posed under Proposition 1 can be resolved at stage (ii) of the three-part test referred to (that is, the question can be resolved at the 'necessity' stage of the Legitimate Interests Test). Clearly, this appeal involves issues regarding the privacy rights of individuals (namely, the privacy rights of the data subjects whose personal data is included in the Requested Information – being both the members of the public and the Council's employees) and therefore Proposition 6 is not applicable.

80. *Proposition 7:* Where there are issues regarding an individual's privacy rights, the question posed under Proposition 1 can only be resolved after considering stage (iii) of the three-part test referred to - namely, the Balancing Test. For the reasons given, this appeal involves issues regarding the privacy rights of data subjects. Accordingly, we need to apply the Balancing Test, as we have already noted.

Application of the Balancing Test

81. In our view, the Commissioner was correct, in applying the Balancing Test, to consider the factors referred to in paragraphs 40 and 41 of the Decision Notice, including if the data subjects would not reasonably expect that their personal data would be disclosed to the public under the EIR. We therefore agree with the Commissioner's view (as set out in paragraph 42 of the Decision Notice) that:

"*…a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.*"

82. The Appellant appears to accept that this is a key issue. However, as noted in paragraphs 27 to 29, he has argued that the individuals concerned would have had a reasonable expectation that their personal data would be disclosed. In support of those arguments, the Appellant has provided some information relating to another public authority's policies on tree preservation orders and planning applications, including in respect of the redaction of personal data.

83. That information provided by the Appellant is not evidence of the applicable policies in place at the Council. Even if (hypothetically) the Council had similar policies in place, we consider that it would not be a strong argument that the data subjects in the current case would have an expectation that their information would be made publicly available. First, evidence of a current policy (or even one in place several years ago) is

not evidence that the same policy was in place at the time the personal data in question was originally processed (in this case, in 2006). Secondly, the information provided by the Appellant relating to the redaction of personal data relates to planning applications and therefore (again, even if hypothetically a similar policy existed for the Council) it does not necessarily cover the position in respect of personal data for individuals regarding the making of tree preservation orders. For these reasons, we cannot attach weight to this evidence or the Appellant's related arguments.

84. Similarly, with regard to the Appellant's argument that it is now accepted that any objection would result in the online publication of the objector's name and address, that is a mere assertion with no direct evidence to support it (and, of course, that argument relates to the current position and not the position in 2006). In respect of the Appellant's further argument thought this was "most certainly accepted in 2006", again this is nothing more than mere assertion which appears to be based on the Appellant's assumption of the position and there is no evidence to support this contention.

85. Moreover, the Appellant's arguments also overlook the fact that some of the withheld information is personal data of the Council's employees. Obviously, the Appellant's arguments relating to expectations for privacy in the context of members of the public challenging tree preservation orders, or making or objecting to planning applications, cannot apply to the personal data of staff whose personal data is processed merely in the function of their duties as employees. Again, there was no evidence before us in support of the view that the relevant employees would have a reasonable expectation that their personal data would be disclosed to the world at large.

86. There is another point that we should make in respect of the Appellant's arguments about the expectations of privacy by the data subjects. Even if we were to accept that individuals challenging tree preservation orders, or making or objecting to planning applications, would expect to have their personal data made publicly available within the context of the regime for planning applications and tree preservation orders, that expectation may not necessarily exist in the context of disclosure under the EIR (or FOIA), which is a different regime and has different implications. However, this was not a material point in our considerations; our concerns lie in the fact that there is no supporting evidence to corroborate the Appellant's assertions that the relevant data subjects would actually have had an expectation, at the time when their personal data was processed, that their personal data would be disclosed to the public.

87. In that regard, we also remind ourselves that when a third party's personal data is included in any information requested under the EIR, the starting point (in accordance with the legislation and case law we have referred to) is the principle of the protection of privacy with respect to the processing of personal data. Ultimately, we agree with the Commissioner's conclusion that, in this case (in the absence of any evidence to the contrary), the data subjects – that is, both the members of the public and the Council's employees - would have a reasonable expectation of privacy and that they would not expect their personal data to be disclosed to the world at large.

88. We therefore find that the Commissioner was correct to conclude, on the application of the Balancing Test, that the Appellant's legitimate interests in making the Request do not outweigh the data subjects' fundamental rights and freedoms. Accordingly, the Commissioner was also correct to conclude that processing (by way of disclosure) of the relevant personal data would be unlawful. Therefore, pursuant to regulation

13(1)(a) of the EIR, the Council must refuse to disclose the personal data comprised in the Requested Information. It follows that we consider that the Decision Notice was correct in drawing conclusions to the effect that the relevant personal data comprised in the Requested Information should remain redacted.

Information not held

89. The Appellant has complained about the Council's assertion that no further information within the scope of the Request is held by it, beyond the information which it has already disclosed to the Appellant (subject to the personal data redactions).

90. As we have noted:

    a. regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information which is requested to the extent that it does not hold that information when an applicant's request is received; and

    b. in accordance with the test in the case of *Bromley*, where the Commissioner or the Tribunal is faced with a dispute regarding whether information is held by a public authority, the test to be applied is the balance of probabilities.

91. In determining whether or not information is held on the balance of probabilities, a decision will be reached based on an assessment of the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held.

92. The Council explained to the Commissioner that the Council had applied its document retention schedule, which meant that information more than seven years old was routinely deleted (with certain exceptions). The Council stated that the only information which has been retained (again, in accordance with its document retention schedule) is the sealed TPO itself, which has been disclosed to the Appellant. The Council has also explained to the Commissioner that it has no business purpose or statutory requirement for retaining any information other than the sealed TPO. For these reasons, the Council informed the Commissioner that it does not hold any other information within the scope of the Request and the Commissioner reached this conclusion in the Decision Notice.

93. We find the above explanations to be entirely credible. For completeness, we should say that we were not provided with a copy of the Council's document retention schedule but only an extract of the relevant section; however, we are satisfied with the Council's explanation of the existence and implementation of that policy and have no reason to doubt it. Retention schedules/policies reflect good practice regarding records management and such policies are commonplace amongst many public authorities and businesses. The rationale for the existence and operation of the Council's document retention schedule is therefore understandable and, in our view, it is normal to dispose of old documents in the manner which the Council has explained. We therefore accept, especially given the age of the documents in question (namely, more than 16 years old), that those documents have been deleted as the Council has outlined.

94. In turn, we have seen no evidence to suggest that any documents might be remaining in existence within the scope of the Request. We have taken account of the Appellant's

views that further information is in the Council's possession but has been withheld, or has been destroyed, but we find no evidence to support those views (except for the deletion of documents in accordance with the Council's document retention schedule, as we have referred to).

95. Likewise, we have seen no evidence of inadequate searches for any potentially pertinent information. On the contrary, the Council has given explanations regarding the searches which were conducted (as referred to in paragraphs 54 and 55 of the Decision Notice) and, in the circumstances of this case and with no evidence to indicate otherwise, we accept those explanations and do not consider that there were other searches which should have been undertaken. We have also taken account of the fact that the Council has located and provided to the Appellant a number of documents which relate to the consultation on, and making of, the TPO (albeit redacted in relation to personal data).

96. We therefore consider that the Commissioner was correct to conclude in the Decision Notice that, on the balance of probabilities, the Council does not hold any further information within the scope of the Request, beyond the information which it has already disclosed to the Appellant (subject to the personal data redactions).

Final conclusions

97. For all of the reasons we have given, we conclude that the Decision Notice was in accordance with the law. We also do not consider that any exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently.

98. We therefore dismiss the appeal.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 06 March 2023