



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2015/0243

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0579004

Dated: 20th, September 2015

Appellant: Warwick District Council ("the Council")

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Jean Nelson

and

Steve Shaw

Tribunal Members

This appeal was determined on written submissions.

Date of Decision: 10 June 2016

Date of Promulgation:

Subject matter: The Environmental Information Regulations 2004, (“The EIR”)

Reg. 12(5)(e)

Whether disclosure of the disputed information would adversely affect the confidentiality of commercial information where such confidentiality was provided by law to protect the legitimate economic interests of the Council and of other parties and, if it would, whether the public interest in withholding such information outweighs the public interest in disclosure, having regard to the presumption in favour of disclosure enacted in Reg. 12(2).

The Tribunal’s decision

The appeal is allowed. All the disputed information is confidential information. That confidentiality was provided by law to protect the legitimate interests of the Council and the public interest in withholding it from disclosure outweighs the public interest in disclosure. The Tribunal does not require the Council to take any further steps.

Abbreviations additional to those indicated above.

The DN Decision Notice.

FOIA The Freedom of Information Act, 2000.

The Relevant Statutory Provisions

The EIR

- 12(1) Subject to paragraphs 2, 3 and 9, a public authority may refuse to disclose environmental information requested if-
- (a) An exception to disclosure applies under paragraphs (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (5) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

Relevant authorities

Burgess v ICO and Stafford B.C. EA/2006/0091.

The Reasons for the Tribunal's Decision

The Requests

1. On 28th. January, 2015 the Council held a meeting. Item 17 on the agenda was "Strategic Opportunity Proposal" ("the SOP"). The content of the proposal was treated as confidential and discussion took place in the absence of the public, a practice sanctioned by local government legislation in appropriate cases.
2. On 11th. March, 2015, a further Council meeting took place; item 4 on the agenda was a further report from the Chief Executive on the SOP.
3. On 14th. February, 2015 the Chairman of the Leamington Society made a "Freedom of Information request" to the Council. He referred to item 17 of the agenda for 28th. January, 2015 and asked "what category of exempt information was it that weighed more heavily than the public interest?" He requested release of this information, excluding, if essential, confidential details. The Council responded promptly on 24th. February, 2015, refusing disclosure in purported reliance on FOIA s. 43, which protects confidential commercial interests.
4. On 4th. March, 2015, the same requester made a further request, observing that item 4 on the agenda of the forthcoming Council meeting referred to a further report from the Chief Executive on the SOP and that it was again listed as "not for publication". He requested publication of that further report for the same reasons as led to his earlier request.
5. This request was also refused on the same ground and an internal review of the handling of both requests did not alter the position, save that the Council rightly amended the statutory basis for its refusals to EIR 12(5)(e) ("the exception").
6. The requester complained to the ICO in accordance with FOIA s.50, setting out his concerns as to the Council's claims to confidentiality and attaching a number of explanatory documents.

The DN

7. The ICO reviewed a substantial volume of information within the scope of these requests, which were rightly treated as covering the same ground. In very broad terms the SOP related to Council plans for a major development for the purposes of providing housing and some necessary infrastructure, moving Leamington Football Club to a better stadium, part of a sports hub with improved accessibility and transforming its current facilities into a gypsy and traveller site. Such plans required the purchase of a number of properties.

8. The ICO found that the exception was not engaged in relation to most of the withheld information but that the public interest favoured withholding a very limited amount of information to which it applied. The confidential annexe to the DN identified in precise detail the information which might be redacted.
9. The Council duly communicated redacted versions of the SOP and the March report which omitted the information with which the Tribunal is now concerned.
10. We put the matter thus because the present appeal raises issues which were not canvassed with the ICO during his investigation and the preparation of the DN and its confidential annex. The result is that very little of the DN is material to the Tribunal's determination and the submissions of both parties on this appeal cover quite fresh ground. The Council frankly acknowledges that it failed to raise material arguments as to the asserted prejudice to its own and others' economic interests until after the publication of the DN, by which time its only way forward was by way of appeal. The ICO takes no point as to the stage at which these arguments were introduced; indeed, it seems that he pointed the Council in the direction of an appeal to the Tribunal. We consider that his approach was correct; if the Council is right in the case that it now presents, then the DN was "not in accordance with the law" (s.58(1)(a)) and the fact that it was wrong only because the right arguments were never addressed to him is immaterial.

The Appeal

11. It is regrettable that this open decision can say very little about the arguments advanced on both sides and the Tribunal's reasoning which leads to the result stated above. To identify in this decision the specific features of the SOP to which the Council's appeal relates would probably result in the disclosure of the information which it seeks to protect. The Registrar has issued directions under Rule 14(6), which reflect that position.
12. As might be expected where the disputed information is contained in a development plan, that information concerns the acquisition of land. It is therefore information falling within class (c) of EIR regulation 2(1), namely a plan or activity likely to affect land and landscape. That much was common ground between the parties. Accordingly, the exception enacted in EIR 12(5)(e) is the provision governing the Council's case.
13. The starting point for an analysis of the issues and arguments is the presumption in favour of disclosure required by EIR 12(2). That presumption applies both to the question whether an exception is engaged and, if it is, to the assessment of the conflicting public interests – see *Burgess v ICO and Stafford B.C. EA/2006/0091*. That means that the Council must show that the evidence on both issues is sufficiently strong to displace that presumption so that, taking account of the

presumption, it is more likely than not that the exception is engaged and that the public interest in withholding the disputed information outweighs the interest in disclosure. That is the approach adopted by the Tribunal.

14. The tests for the engagement of this exception are clearly spelt out in the text of EIR 12(5)(e);

(a) Is the information commercial or industrial in nature?

(b) Is it confidential?

(c) Is that confidentiality provided by law?

(d) Is it provided in order to protect a legitimate economic interest?

(e) Would disclosure adversely affect that interest?

15. We have no doubt that the information is commercial in nature and that the Council has an economic interest which would, on a balance of probabilities, be prejudiced by disclosure. If the disputed information is confidential, the confidentiality is provided by the common law. That proposition was not contested in this appeal. The further elements of these tests require closer analysis, which we have set out in the closed annex. We conclude, following such analysis, that the exception is engaged.

16. As to the balancing of public interests, there are powerful interests in favour either of disclosing or withholding the disputed information.

17. The conduct of major development projects by local authorities is a matter of major importance to the local community and, in many cases, a broader public. It is fundamental that reasonable objections should be heard whilst they can influence or, where appropriate, prevent the environmental changes involved. The planning system is designed to embody that principle.

18. On the other hand, it is of critical importance that a local authority obtain for its taxpayers the best deal that can properly be achieved. Getting value for money is an unchanging demand of the active electorate. A District or County Council is, in many respects, a commercial concern. Large authorities engage in many big commercial transactions. In a non – forensic sense a council's electors are its shareholders. Its legal duties to them are not those of a company's directors to its shareholders but failures properly to manage public funds are matters for the District Auditor and invite future rejection by the electorate, a political rather than a legal sanction.

19. We find that, applying the presumption (EIR12(2)), the balance of public interests requires the withholding of this information.

20. We cannot go beyond these general findings in the open decision but set out our approach and assessments in the Closed Annex.

21. Accordingly, we allow this appeal.

22. This decision is unanimous.

David Farrer Q.C.

Tribunal Judge.

10th. June, 2016