IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2016/0229**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50621525
Dated: 7 September 2016

Appellant: **Tony Burton**

Respondent: **The Information Commissioner**

Heard on the papers: Alfred Place, London

Date of Hearing: **22 March 2017**

Before

Chris Hughes

Judge

and

Steve Shaw and **Dave Sivers**

Tribunal Members

Date of Decision: **14 April 2017**

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7 September 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Since 2013 the London Borough of Merton (the "Council") has been pursuing a large scale procurement process for the maintenance of its parks in conjunction with a neighbouring borough and through a joint procurement arrangement with several neighbouring boroughs. It carried out studies, options analyses and consultations during 2014, published a notice in the Official Journal of the European Union in January 2015 prepared detailed proposals in autumn 2015, then conducted a dialogue with potential tenderers until February 2016. As part of the consultation a number of community groups (including ones with which the Appellant is associated) commented on appropriated standards of maintenance which they considered should be incorporated in the tender. Minutes of a Council scrutiny panel of 24 February 2016 explain that this dialogue with potential tenderers:- *"allows both the Authorities and bidders to enhance and adapt the scope of the requirements and therefore the final specification."*

2. The Appellant attended a Council meeting on 6 November 2015 and asked when the draft specification for future maintenance of the Borough's green spaces would be published. He was informed that while it had been the Council's intention to share it with stakeholders, legal advice had indicated that doing so could pose a risk to the procurement process. The Appellant then asked for a copy of the proposals document on 6 December 2015:-

   "This is to ask for a copy of the high level 'output based specification' for procurement of the parks and open space maintenance for the Borough as a freedom of information request. This information was promised by the Cabinet Member for Environmental Sustainability and Regeneration and the Director of Environment & Regeneration at a meeting with Friends of parks and green spaces groups on 2 March 2015. Despite numerous requests and a question to Full Council it has not been forthcoming. We are not requesting any information which is commercially sensitive."

3. The Council responded confirming that the information was properly considered to be environmental information whose disclosure was governed by the Environmental Information Regulations (EIR). It resisted disclosure relying on regulation 12(4)(d)

which protected enabled it to refuse to disclose when:- *"the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data"* and regulation 12(1)(b) applied:- *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*. The Council maintained this position on review.

4. The Appellant complained to the Respondent Information Commissioner (the "ICO") who investigated. During the investigation the Council explained that the process meant that the bidders had a role in shaping the final specification and that the production of the final output based specification was an iterative process, at the date of the request the specification was still fluid and subject to change (decision notice ("dn") paragraphs 15-17). The Appellant disputed this with the ICO (dn paragraph 18) arguing that the specification was one step in a process and the discussions would produce a new document. The ICO did not accept this argument, accepting the Council's explanations.

5. The ICO then considered the balance of public interest and noted that the Appellant had argued powerfully in favour of disclosure asserting that the "safe space for consideration" argument could not extend when the key decision to go to tender had been taken and a document prepared for the tender especially given the scale of the contract £50 million and the significance for the public. She discounted some arguments advanced by the Council and considered the question of the balance between the Council's decision-making space and ensuring that there is sufficient transparency to ensure that the arising decisions are accountable. She noted the steps taken by the Council to support transparency including briefings, letters to stakeholders and partial release of information during the process and full release after the process.

6. The ICO recognised that the late disclosure would "not necessarily placate individuals who have an interest in the direction of policy. This is because at that stage it may be much more difficult to influence the process. However the stakeholders had already had early input, and while stakeholders will be interested in how their views have influenced the tender process "it may not be beneficial to open up the decision-making process entirely with… the resultant risk of fruitless debate and interrogation of officials as to unadopted positions." There was no reason to think that the Council would not incorporate stakeholders views and private dialogue between the Council

and the bidders "may be a valuable way to develop a procurement strategy that was realistic and manageable". She concluded that the balance of public interest was in favour of non-disclosure.

7. In his appeal three substantive issues are raised:-

    - He challenges the quality and timeliness of the Council's engagement with the various community groups interested in the Council's parks; doubting that their concerns have been taken into account;
    - He argues that the "safe space" is allowed to continue too long;
    - He argues that the "outputs" were defined at the start of the process, dialogue with bidders was to discuss inputs and the bidders "have no role in changing what the Council, as representatives of the public, wanted to achieve at the time of the specification, as this would be undemocratic" – the original specification could not be changed and accordingly the document was a final document.

8. In responding to the appeal the ICO maintained the stance adopted by the decision notice.

9. In responding to the inputs/outputs distinction the ICO noted that this did not reflect the understanding the Council had of the process. The Council minutes from 2014 and subsequent communications had demonstrated its view that contact with the bidders would allow it to "explore various options and service developments (bundle page 31). The document was therefore unfinished.

10. In considering the quality and effectiveness of the Council's public engagement on the issue and the EIR presumption in favour of disclosure the ICO noted that the Council had sought public engagement and had taken that into account in balancing the public interest, however the public interest was balance between competing factors which had weighed in favour of non-disclosure.

11. In considering the duration of the time a safe space was needed, the ICO confirmed here view that at the time of the request the safe space was needed.

Consideration

12. There are two matters for the tribunal to consider. The first is whether the document does fall within regulation 12(4)(d) "the request relates to material which is still in the

course of completion, to unfinished documents or to incomplete data". The tribunal is entirely satisfied that the evidence, including consideration of the document itself which is over 1300 pages long) is material in the course of completion. The document represents a key step in securing the effective maintenance of the Council's parks and green spaces for a substantial period of time, it is the Council's first draft of what is to be contracted for, however it was always clearly envisaged that the document would evolve until such time as it was formally incorporated in the contract. The ICO was correct to conclude that it fell within 12(4)(d).

13. The second substantial issue is, given that it is incomplete, where the public interest lies between disclosure and non-disclosure. The tribunal recognised that the Council was carrying out a large, complex operation extending over a significant period of time with relatively limited resources. It had started the process by seeking the input of stakeholders, however in addition to its obligations of transparency under EIR it had obligations to conduct the tender in accordance with other regulations of equal standing – the procurement regulations, designed (inter alia) to ensure fair competition. The Council had a proper concern that public debate and apparent intervention during the negotiation process could lead to a challenge as to the fairness of the tender process resulting in delay and expense for the Council. Furthermore there was little public interest in disclosure of the working document when the key document, setting out the actual obligations of the contractor would be published within a foreseeable and short time period.

14. The issue of accountability during the process of tendering is difficult, given the risks of litigation from contractors. However the function of the Councillors of a local authority is to provide the framework for review, challenge and control of the work of the Council as the elected representatives of the people. The primary accountability for ensuring a good outcome to the tender process lies with Councillors ensuring effective systems are in place, overseeing their operation and giving a proper account of the outcome. The added "accountability and transparency" provided by the premature disclosure of a working draft would be of little practical advantage in explaining what was going on and would be likely to obstruct the effective delivery of good environmental services. In a case such as this the presumption of disclosure is not brought into play given that the public interest very clearly lay in not disclosuing the information.

15. The ICO correctly applied the law and this appeal is dismissed.

16. Our decision is unanimous

Judge Hughes

Date of Decision: 14 April 2017
Date Promulgated: 19 April 2017