



Appeal number: EA/2019/0067P

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

ELIZABETH GAYNOR LLOYD

Appellant

- and -

INFORMATION COMMISSIONER

Respondents

BRENT LONDON BOROUGH COUNCIL

**Second
Respondents**

**Before:
JUDGE C L GOODMAN**

Determined on the papers, the Tribunal sitting in Chambers on 20 July 2020

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. This determination was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6(a) of the Senior President's Pilot Practice Direction dated 19 March 2020 and the desirability of determining cases by the most expeditious means possible during the Coronavirus pandemic.

3. The parties and 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, as amended.

4. I considered an open bundle of 304 pages from the Commissioner plus an additional 13 pages of correspondence between the parties and the Tribunal. I considered two bundles from the Council: an open bundle of 138 pages and a closed bundle.

REASONS

Background to Appeal

5. This appeal relates to a proposed new development at Northwick Park in the London Borough of Brent to include at least 1,600 new homes. The land potentially impacted includes a Grade 1 Site of Importance for Nature Conservation and Metropolitan Open Land ("MOL") which has protected status similar to Green Belt.

6. The 4 principal landowners - Brent London Borough Council ("the Council"), the London Northwest Healthcare NHS Trust, Network Homes Limited (a housing association) and the University of Westminster ("the partners") - are working together on the development and have signed a Memorandum of Understanding. The Council secured funding for feasibility work through the One Public Estate initiative of the Local Government Association and the Cabinet Office and £9.9 million for infrastructure works from the Housing Infrastructure Fund. A consultant, GVA, was appointed in April 2017 to advise on potential options for the development. In October 2017, GVA produced a Feasibility Study in conjunction with architects and traffic consultants.

7. The Appellant made a request for information on 15 December 2017. Referring to "*the One Public Estate programme at/near Northwick Park Hospital*" and a "*potential land swap*" identified in a Cabinet Office presentation (page 214 of the Commissioner's bundle), the Appellant asked:

Question 1: "*The Council/consortium appointed GVA as consultants earlier this year. Please supply a copy of all of their reports. I am content if you excise any commercially confidential information which properly and lawfully exempt-able*"

under the FOIA, and providing reasoning for such an excision (and balancing the public interest test), if applicable.”

Question 2: “The Council/consortium indicated that it would be appointing RRP architects and a highway consultant. Please supply a copy of all of their reports and plans drawn up (particularly in light of the plan on page 11 of the [Cabinet Office presentation] which indicates the position of a likely residential development on Northwick Park Metropolitan Open Land (“MOL”). I am content if you excise any commercially confidential information which properly and lawfully exempt-able under the FOIA, and providing reasoning for such an excision (and balancing the public interest test), if applicable.”

Question 3: “Please supply any correspondence with the Mayor’s Office/GLA or otherwise relating to the One Public Estate programme at/near Northwick Park Hospital and/or relating to the MOL at Northwick Park in connection with or leading to OPE at Northwick Park (including any correspondence relating to an actual or potential MOL land swap).”

Question 4: “I attach a paper from Brent CCG Primary Care Co-Commissioning Committee in August. If any part of OPE in Brent (now) involves Brent CCG, please supply any supplementary documentation whereby Brent CCG join in with the MoU, other areas which are now included in OPE bids in Brent, and/or detailing any land brought in via or by Brent CCG or NHS bodies owning/controlling land.”

8. The public authority initially refused the request in reliance on section 22(1) of the Freedom of Information Act 2000 as information intended for future publication.

9. After the Appellant requested a review, the Council identified on 23 February 2018 that the request was for “environmental information” as defined in the Environment Information Regulations 2004 (“EIR”) and therefore should be dealt with under the EIR.

10. The Council responded that the information requested in Question 4 was not held by the Council. This has not been disputed by the Appellant and is not the subject of this appeal.

11. The Council confirmed that the information requested in Questions 1 and 2 was held but refused to disclose on the basis that disclosure would adversely affect the confidentiality of commercial or industrial information under Regulation 12(5)(e) EIR and that the public interest in maintaining that exception outweighed the public interest in disclosure (page 185 of Commissioner’s bundle).

12. At the request of the Council, the Appellant clarified Question 3 on 6 March 2018 as follows:

“I should like to limit the request to any correspondence, emails, notes of telephone conversations or meetings or other items covered by the EIR duty to disclose between the Council (and any of its other partners in connection with One

Public Estate at Northwick Park (“Council’s Partners”) in the Council’s possession) and the GLA/Mayor’s Office relating to the Metropolitan Open Land (MOL) at Northwick Park, including in relation to any potential MOL swap and the areas suggested.”

13. The Appellant also made a new request for information which is not the subject of this appeal.

14. In response to the clarified Question 3, the Council provided a large amount of information to the Appellant on 12 September 2018, consisting of emails and attachments (page 269 of Commissioner’s bundle). Some were redacted or withheld under regulation 12(5)(e) EIR.

15. The Appellant complained to the Commissioner. The Commissioner issued Decision Notice FER0759236 on 21 February 2019, upholding the Council’s decision. In the Decision Notice, the Commissioner accepted that the Council was entitled to rely on the exception in Regulation 12(5)(e) because:

- (1) the withheld information was commercial as it related to the potential development of land for commercial and other options;
- (2) the withheld information was subject to an obligation of confidentiality arising from the commercial nature of the options appraisal and the agreement of the partners;
- (3) disclosure would adversely affect the legitimate economic interests of the Council and its partners who were the persons the confidentiality was designed to protect; and
- (4) disclosure would harm the confidential nature of the information.

16. The Commissioner found that the public interest in maintaining the exception outweighed the public interest in disclosure. The Commissioner noted the public interest in MOL in particular, but also that the information consisted of exploratory plans and unfinalised options and that the Council had committed to a full public consultation about its plans for the development.

17. The Commissioner found that the Council was in breach of Regulation 14(2) EIR as it failed to respond to Question 3 in time. It was regrettable that the Council had not explained that the material provided on 12 September was in response to Question 3.

Appeal to the Tribunal and Submissions

18. The Appellant’s Notice of Appeal dated 6 March 2019 disputed that all the withheld information was commercial. The Appellant objected that the Council had applied a blanket exception and that redactions could have been made to protect commercially confidential information. She submitted that disclosure “*may be difficult politically for the Council but it is not commercially sensitive*”.

19. The Appellant focussed in particular on the impact of the proposed development on an “already overloaded” highway network and potential access routes across Northwick

Park. There had been no local consultation despite the Council and its partners being aware of transport and access issues for over 2 years and the development of a new Local Plan for the area. There was a public interest in how the £9.9 million Government grant would be used.

20. A number of Case Management Directions were issued, a case management hearing was held and the parties corresponded about the content of the bundles. The Council were joined as a party on 28 August 2019. The parties agreed that the appeal related only to information existing at the date of the Council's response to the request and to the withholding or redacting of the following information ("the Disputed Information"):

- (1) The (or any) Highways Consultants Reports;
- (2) Documents other than correspondence relating to the "Roadway Options" across MOL Northwick Park;
- (3) The (or any) GVA Reports (Question 1);
- (4) The recorded information which falls into the scope of Question 3.

21. The Commissioner's Response dated 9 September 2019 maintained the analysis in her Decision Notice. The Council and its partners had not yet made any decisions about the proposed redevelopment and were exploring options. If the Disputed Information were disclosed:

- (1) the parties' ability to collaborate might be compromised, adversely affecting the quality of the proposals and their interests; and
- (2) it would adversely affect the parties' ability to secure the most economically advantageous commercial agreement for delivering the regeneration; for example, affecting the value of private land to be acquired.

22. The Commissioner recognised the public interest in the development and in particular the impact on MOL. However, this was outweighed by the public interest in protecting the legitimate economic interests of the Council and its partners. The Council agreed and endorsed the Commissioner's Response in its Response dated 25 September 2019.

The Law

23. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"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.

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

24. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

25. The information sought by the Appellant is “environmental information” as defined in the EIR: it relates to land and to measures and activities affecting and designed to protect land. This was not disputed by any party.

26. Regulation 5(1) EIR provides that a public body that holds environmental information shall make it available on request.

27. Regulation 12(1) EIR provides as follows:

“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.”*

28. Regulation 12(2) provides that: “A public authority shall apply a presumption in favour of disclosure.”

29. Regulation 12(5) provides that:

“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;”.*

30. Grounds for refusing to disclose environmental information under the EIR should be interpreted in a restrictive way (*Vesco v Information Commissioner and GLD* [2019] UKUT 247 (AAC)).

Evidence

31. The Council’s closed bundle of Disputed Information contained 20 emails (or email chains) plus attachments. The open bundle contained the same 20 items in the form in which they had been disclosed to the Appellant, identifying where information had been

redacted or withheld. The index identified which category (or categories) of Disputed Information applied to each item.

32. The Disputed Information in the closed bundle included a Feasibility Study for the Northwick Park development prepared by GVA in October 2017. Although redacted from the open bundle, the first 29 pages of this Study have been disclosed to the Appellant – and indeed are available to the public on the Council’s website (with the exception of two sentences of paragraph 5.2). The Appendices to the Study including a Technical Note on vehicle access options have not been disclosed other than a 2 page Planning History.

33. The Disputed Information also included:

- Correspondence and reports about developing options for the redevelopment;
- Correspondence about the appointment of consultants to work on options, including contracts and fee proposals;
- Draft reports from those consultants;
- Notes of, plans and presentations for meetings between the partners, proposals for funding bids and extracts from the MoU;
- A Phase 4 Delivery Plan, most of which was disclosed to the Appellant, with the exception of Appendices about funding expenditure and support letters.

34. I have commented further on the closed bundle in a closed annexe to this Decision.

Conclusion

35. As noted above, there is a presumption in favour of disclosure under the EIR. The presumption applies both to the question of whether an exception applies and to the assessment of conflicting public interests. If there is any doubt, it should be resolved in favour of disclosure. The threshold to justify non-disclosure is a high one.

36. I accept that the Council carried out an “email by email” review of the inboxes of senior Council officers to identify relevant information (page 289 of the Commissioner’s bundle) and took a considered approach to redacting and withholding information based on its understanding of the exception in Regulation 12(5)(e) and the public interest test. Unhelpfully, large black boxes appeared on information where in fact no redactions had been made.

37. I have considered afresh all the items of Disputed Information and the application of Regulation 12(5)(e) and the balance of public interest in relation to each.

38. I have adopted the approach to Regulation 12(5)(e) suggested by the Information Rights Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012). The Tribunal identified the following elements:

- “(1) The information in question is “commercial or industrial”;*
- (2) The information is subject to confidentiality provided by law;*
- (3) Such confidentiality is provided to protect “a legitimate economic interest”;* and
- (4) The disclosure of the information would adversely affect such confidentiality.”*

39. I am satisfied that each of these elements is satisfied in respect of the Disputed Information.

40. The Disputed Information is commercial information. It relates to options for the redevelopment of Northwick Park, a project which will require significant expenditure by the partners and the raising of substantial funding and/or financing. It will impact on land owned by the partners and third parties, require the appointment of multiple contractors and consultants and potentially third party land purchase. There are important commercial considerations for all the partners in appraising development options and deciding how to work together. “Commercial information” is not limited to financial information such as costings and land values (as suggested by the Appellant at page 195).

41. The Disputed Information is subject to confidentiality provided by law. The Commissioner and Council do not assert that the MoU between the partners includes express obligations of confidentiality. Some, but by no means all, of the Disputed Information is expressly identified as confidential. However, I accept that a mutual obligation of confidence has been assumed between the partners in respect of all of the Disputed Information, arising from the commercial nature of the options appraisal for the development, their partnership and the potential impact on their commercial interests. The Disputed Information has the necessary quality of confidence and was imparted in circumstances importing an obligation of confidence.

42. The confidentiality is protecting a legitimate economic interest; namely, the commercial interests of the partners in the development.

43. Disclosure would adversely affect the confidentiality of the Disputed Information, harming those legitimate interests. It would damage the partners’ ability to secure the most economically advantageous commercial agreements for the development and their commercial bargaining position with, for example, contractors and third party land owners. It would damage their ability to work with each other on the project. At the time of the Council’s response to the request, plans were still at a very early stage with the cost and viability of a number of options being explored.

44. I find that the exception in Regulation 12(5)(e) applies to the Disputed Information.

45. Turning then to the question of the conflicting public interest in disclosure of the Disputed Information and the public interest in maintaining the exception.

46. There is understandably a substantial public interest in the development at Northwick Park and in particular, the impact on MOL and public open space. This was

eloquently put by the Appellant in her response to the Council's internal review at page 195 of the Commissioner's bundle: *"there can be little of more concern, in these environmentally conscious days than the possibility of taking a major new access road through MOL/public open space, and generating more traffic and increased infrastructure load on an area including the major hospital London North West University Healthcare Trust, constructing a further 3700 dwellings and commercial developments, imposing loads on an already busy Tube line, leaving aside the environmental effects of many years of construction, where the residents of our area have for many years had good access to public open space, and well used playing fields with changing facilities and a club house over many years"*.

47. The Appellant's arguments resonate strongly with the underlying rationale for disclosure of environmental information set out in Recital (1) of the EU Directive (2003/4/EC), the Directive implemented by the EIR:

"Increased public access to environmental Information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

48. There is a clear public interest in transparency, openness and accountability in the development of options for a project which impacts so substantially on local residents and the environment, and in the use of public money to explore options for the project. It is important that information about the options and the potential impact on green spaces and highway infrastructure is published at a stage when the public can still influence or, where appropriate, prevent environmental damage.

49. On the other hand, there is also a public interest in protecting the commercial interests of the Council and its public body partners in undertaking such a large and expensive publicly funded project and their ability to work together and to obtain best value for money from contractors and private landowners. Disclosure of information about their commercial interests and the options under consideration at this early stage will undoubtedly harm the commercial interests of the Council and its public body partners and affect the financial viability of those options.

50. Information in the closed bundle confirms the Council's commitment to public consultation about the development at Northwick Park. While this does not in itself weaken the public interest in disclosure of the Disputed Information, it underlines the fact that disclosure would have been premature at the date when the Council responded to the request. It is in the public interest that the partners are allowed to explore options at this stage without the disclosure of information which would damage their commercial interests and the viability of the project as a whole.

51. As a matter of legal precedent, I am not bound by decisions of differently constituted First-tier Tribunals. However, I have considered the *Bristol* case which the Appellant referred in her request for internal review (see paragraph 38 above) and which also concerned information about a new development. In that case the Tribunal ordered disclosure of a viability report and cost estimate in relation to the retention of

a protected building. The Tribunal found that the information fell within Regulation 12(5)(e) but that the public interest in disclosure substantially outweighed the public interest in maintaining the exception. However, the Tribunal observed that it was “*very significant that the information requested in this case was directly relevant to (and, as it turned out, a “major factor” in) a specific environmental decision about the demolition of a protected building which was imminent and controversial*” (at paragraph 16).

52. By contrast, no decision has been taken about the Northwick Park development and no decision was “imminent” when the Council responded to the Appellant’s request for information. The Council and its partners were still at a very early stage in considering the viability of options for the development and intending to take those plans to public consultation after further feasibility work.

53. In conclusion, I am satisfied that in all the circumstances of this case, the public interest in maintaining the exception in Regulation 12(5)(e) EIR outweighs the public interest in disclosing the Disputed Information. I find that the Commissioner’s Decision Notice FER0759236 is in accordance with the law and dismiss the appeal.

Judge CL Goodman
(First Tier Tribunal Judge)

DATE: 01/09/2020

DATE PROMULGATED: 07/09/2020