Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0019
Information Commissioner's Ref: FS50204499

Heard at Manor View House, Newcastle on 4 and 5 November 2009

Decision Promulgated On 23 November 2009

BEFORE

CHAIRMAN

ANNABEL PILLING

AND

LAY MEMBERS

HENRY FITZHUGH
ANDREW WHETNALL

BETWEEN

CHRISTOPHER McGLADE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

REDCAR AND CLEVELAND BOROUGH COUNCIL

Additional Party

Subject matter:
EIR Definitions, Reg 2, environmental information
EIR Exceptions, Reg 12(4) – Information not held (4)(a)

Representation:
For the Appellant: Christopher McGlade
For the Respondent: Robin Hopkins
For the Additional Party: Anthony Senior

Decision

The Tribunal dismisses the Appeal and upholds the Decision Notice of 17 February 2009.

Reasons for Decision

Introduction

1. This is an Appeal by Mr Christopher McGlade against a Decision Notice issued under the Environmental Information Regulations 2004 (the 'EIR') by the Information Commissioner (the 'Commissioner') dated 17 February 2009.

2. The Decision Notice relates to a request for information made to Redcar and Cleveland Borough Council (the 'Council') by Mr McGlade under the Freedom of Information Act 2000 (the 'FOIA') for information relating to a development scheme known as the Coatham Enclosure or Links Scheme (the 'Coatham Scheme').

3. The Commissioner concluded that the Council should have dealt with the request under the EIR and not FOIA. He also concluded that the public authority did not hold the information requested and therefore the exception in Regulation 12(4)(a) of the EIR applied.

4. The central question in this Appeal is whether the Commissioner was correct in reaching that decision.

Background

5. The Coatham Scheme is a major 14 hectare coastal development project located on the seafront to the west of Redcar town centre. The total capital cost of the Scheme is between £85 - £90 million, with approximately £54 million of this figure relating to private sector

investment in the housing and commercial elements, the remainder to be funded through a combination of capital receipts from Persimmon Homes Ltd ('Persimmon'), grant funding from Homes and Community Agency, ONEnortheast Single programme and Sport England, and gap funding by the Council from its capital programme. The development is a mixed leisure and housing scheme.

6. Mr McGlade, with other members of the Friends of Coatham Common group, objects to the inclusion of housing as part of the Coatham Scheme.

The request for information

7. By e-mail dated 20 September 2007, a request for information under the FOIA was made to the Council by Mr McGlade:

> *"I would like to know if Redcar and Cleveland Borough Council are liable in any way, be it financially or otherwise, in full or in part, for the construction of the sea defence that has to be built in order for the Coatham Enclosure/Link scheme to go ahead."*

8. The Council responded on 9 October 2007 as follows:

> *"1. Redcar and Cleveland Borough Council and Persimmon have joint responsibility for ensuring flood defence measures for the Coatham scheme are adequate.*
>
> *2. Provision has been built into the Capital cost model for the Coatham scheme based on the outcome of studies undertaken.*
>
> *3. It will be necessary for all planning conditions to be fulfilled including those relating to flood defence measures that*

demonstrates that no further flood defence measures will be required. A further study has been commissioned for this purpose."

9. Mr McGlade did not consider that these responses adequately addressed his request for information and he resubmitted his request on the same day, emphasising that the question related to the "CONSTRUCTION" of the sea defence.

10. The Council responded on 12 November 2007 by the single word answer, "Yes".

11. Mr McGlade contacted the Council that day to say that the response was insufficient. He stated;

"I would like to know how the council are liable for the construction of the sea defence? Is it a financial liability or are the council liable in some other way, or both? I would also like to know to what extent are they liable if they are liable financially to providing it? What percentage of the total cost are they liable for?"

12. The Council responded on 3 December 2007 informing Mr McGlade that:

"The Council will contribute towards the cost of any additional flood defences at Coatham. Until details of the defence works are known it is not possible to determine with any accuracy what the costs will be. Therefore, a provisional sum has been included within the cost model for the scheme to ensure that the issue is not overlooked. This will need to be reviewed once a more accurate cost can be determined."

13. The Council also indicated that it was withholding some information under section 43(2) of FOIA as it was commercially sensitive and the public interest in maintaining the exemption outweighed the public interest in disclosure.

14. On 5 December 2007 Mr McGlade submitted another request for information to the Council:

> *"Under the Freedom of Information Act, I would like to know, exactly who made the decision to commit the council to spending money on the sea defence in Coatham?"*

15. The Council responded on 3 January 2008 as follows:

> *"The decision to commit the council to expenditure on additional flood defences at Coatham is not yet taken. A cabinet decision will be required to approve such costs if they are necessary, as part of the final costs for the scheme when these are determined."*

16. On 9 January 2008 Mr McGlade complained to the Council that the responses given were contradictory and, although no formal request was made by Mr McGlade, an internal review was carried out. The result of that internal review was communicated to Mr McGlade by e-mail on 21 January 2008. Within that e-mail, the Council accepted why Mr McGlade felt that the responses had appeared contradictory but stated that this had not been the intention and could be resolved with the following further explanation:

> *"The planning condition that applied to the Coatham Scheme meant the Council and Persimmon would be jointly liable for any construction work relating to sea defence measures, if any were deemed necessary. The confusion has arisen because it was*

not made sufficiently clear to you that a study is currently being undertaken to determine if any further sea defence measures are necessary. Therefore, we do not know if any measures are necessary and have no information held in respect of this. I can confirm that if the results of the study indicate additional measures are necessary, any committed expenditure will require Cabinet approval."

The complaint to the Information Commissioner

17. Mr McGlade initially complained to the Commissioner by e-mail on 3 January 2008. This was not in a form acceptable to the Commissioner as it consisted of a number of separate e-mails that had been cut and pasted together to make one document. On 18 April 2008 Mr McGlade resubmitted his complaint to the Commissioner about the way the Council had handled his request for information, specifically relating to whether the information provided to him had directly answered his information requests.

18. The Commissioner contacted the Council on 14 July 2008 and indicated that, in his opinion, the request should have been considered under the EIR. The Council reviewed the decision and accepted that the EIR was the correct regime under which to consider the request and cited Regulation 12(4)(a) as the exception relied upon. The Commissioner investigated the complaint and there followed a series of correspondence between the Commissioner and both the Council and Mr McGlade. There was other correspondence between the Council and Mr McGlade concerning the Coatham Scheme which did not form part of the information request. The complexity of the background is summarised in paragraphs 3 and 4 of the Commissioner's Decision Notice.

19. A Decision Notice was issued on 17 February 2009.

20. The Commissioner concluded that the Council does not hold the information and therefore regulation 12(4)(a) EIR applies.

21. He found that a number of procedural breaches of the EIR; these are not relevant in this Appeal.

The Appeal to the Tribunal

22. By Notice of Appeal dated 5 March 2009 Mr McGlade appealed against the Commissioner's decision. The ground of appeal is the assertion that the evidence submitted by the Council to the Commissioner was "quite simply untrue" and, in effect, the Council misled the Commissioner in his findings.

23. The Tribunal joined the Council as an Additional Party to this Appeal.

24. The Appeal was determined at an oral hearing on 4 and 5 November 2009.

FOIA OR EIR

25. Initially Mr McGlade did not accept that the EIR was the correct statutory regime that applied in this case and submitted that his request should have been dealt with under FOIA. After hearing submissions on the point from the other parties at the start of the hearing, he did not pursue the argument.

26. For completeness, we record that if the information requested is environmental information for the purposes of the EIR, it is exempt information under section 39 of FOIA and the public authority is obliged to deal with the request under the EIR.

27. The EIR implements Council Directive 2003/4/EC on public access to environmental information.

28. "Environmental information" is defined in Regulation 2(1) as having the same meaning as in the Directive, namely any information 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 those elements;*
>
> *(b) …..*
>
> *(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;*

29. We accept that the information requested falls within the definition in this Regulation and therefore agree that this matter should be dealt with under the EIR.

30. By Regulation 18(1) EIR, the enforcement and appeals provisions of FOIA apply for the purposes of the EIR, (subject to the amendments of such provisions as set out in the EIR).

The Powers of the Tribunal

31. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, 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.

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

32. The statutory jurisdiction is considerably wider than carrying out a judicial review of the Commissioner's decision on the principles that would be followed by the Administrative Court in carrying out a judicial review of a decision made by a public authority. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

33. The question of whether the Commissioner was correct to conclude that the Council was entitled to refuse to disclose the information on the basis of the exception to the duty to disclose environmental information contained in Regulation 12(4)(a) is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The Legal Framework

34. Regulation 5(1) EIR creates a duty on public authorities to make environmental information available upon request.

35. Regulation 12(1) (2) and (4) EIR provides:

> *"(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if:*
>
> *i) an exception to disclosure applies under paragraphs (4) or (5); and*
>
> *ii) 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.*
>
> *……*
>
> *(4) For the purposes of paragraph (1) (a), 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;*

The issues for the Tribunal

36. The ground of appeal was identified as being an assertion that the Council had not been truthful to the Commissioner and that the information that had been supplied to the Commissioner caused him erroneously to conclude that the Council did not hold the information requested.

37. Throughout the correspondence submitted in support of the appeal, Mr McGlade made reference to his request for the identity of the person who made the decision to "commit" the Council to spending public money on a sea defence. This was the request for information made on 5 December 2007, the "third request". The Commissioner and the Council submitted that this request is outside the scope of this appeal and therefore the exact scope of the appeal fell to be determined as a preliminary issue.

38. Mr McGlade submitted that his complaint to the Commissioner was never about one aspect of the first request made on 20 September 2007 but about the whole way the Council had behaved by providing him with conflicting statements and refusing to supply the information. He submitted that the scope of the appeal was not confined to the request contained in his e-mail of 20 September 2007 but extended to the later requests which were made as the Council had failed to answer his questions properly.

39. The Commissioner and the Council submitted that the scope of the appeal was restricted to the first request. The Commissioner had not taken the stance that he was refusing to consider some of the requests made by Mr McGlade but rather that this was a conditional or hypothetical decision that had been entered into by the Council and if the Commissioner, and, on appeal, the Tribunal, accepted that there

was not yet an actual commitment, the subsequent questions posed by Mr McGlade did not arise.

40. We concluded that the scope of the appeal was limited to the narrow issue of whether the Council held the information sought in the request made on 20 September 2007. We agree with the Commissioner and the Council that if there is no actual commitment to the building of a sea defence, either in principle or specifically as to the cost or contribution to the cost, then the subsequent questions posed by Mr McGlade cannot arise. We indicated that in order to clarify whether there had been an actual commitment or not we needed to consider all the evidence.

41. It appeared to us that Mr McGlade had many complaints about the way the Council acted generally or had made decisions, particularly concerning the Coatham Scheme. Our remit as the Information Tribunal is necessarily limited to a consideration of the validity of the Decision Notice issued by the Commissioner, not to check on the efficacy or probity of any decision made by the Council. We have no power to carry out a judicial review of a decision or to order a judicial review to take place. The only jurisdiction we have in this case, as explained above, is to consider whether the information requested was held or not, and that question requires a consideration of the evidence.

Agreed Bundle of Material

42. The Tribunal was provided with an agreed bundle of material. This had been prepared in accordance with usual Directions issued by the Tribunal.

43. At the commencement of the hearing Mr McGlade made an application to place some additional material before the Tribunal. This was a repeated application that had been refused by the Tribunal on 21

October 2009. A previous application to add further material to the bundle had been allowed in July 2009. Mr McGlade submitted that this additional material had not been in his possession before 14 October 2009 as he was preparing for the hearing on his own and this material had been located from within the volumes of paperwork amassed by the Friends of Coatham Common. He relied on his submissions as to relevance made by e-mail to the Tribunal sent on 19 October 2009. It is not necessary for us to repeat those submissions here but we did consider them when deciding whether to allow this application.

44. Both the Commissioner and the Council objected to this further application, principally on the basis that there was no reasonable explanation as to why the application had not been made earlier and that the documents themselves were either duplicates or bore little, if any, relevance to the matters the Tribunal had to decide.

45. The Tribunal recognised throughout the Appeal process that Mr McGlade is not legally represented, is not legally trained and prepared this Appeal by himself.

46. We were not persuaded that there was any reasonable explanation for why this material had only just been advanced as relevant to this Appeal. The Notice of Appeal in this case is dated 5 March 2009, directions were issued in April and May 2009 before the type of hearing was varied and the Further Directions dated 16 July 2009 were issued. Mr McGlade can have been in no doubt as to his responsibilities to ensure that all relevant material was placed before the Tribunal within the timeframe directed.

47. The parties and the Tribunal need to be in possession of all the relevant material in good time to prepare properly for a hearing. The Directions are designed to ensure that there is ample opportunity to submit documents that any party considers important. The Tribunal has

an obligation to deal with all cases fairly and justly; we were not satisfied that the additional material had such significance to the issues before the Tribunal that we should admit it at such a late stage and in the face of strong objections from the other parties. We did not consider that Mr McGlade would be unreasonably disadvantaged by this decision.

Evidence and analysis

48. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

49. We also received written and oral evidence from eight witnesses that was not available to the Commissioner. As is usual practice, the written statements of each witness stood as their evidence in chief.

50. The four witnesses relied upon by Mr McGlade attended court and were called in order to be cross-examined before us. No questions were asked of them by the Commissioner or the Council, despite an indication having been given within the agreed timetable that each party would spend an average of 15 minutes cross-examining each witness. The explanation given to the Tribunal was that Mr McGlade had intimated an intention to ask additional questions in examination-in-chief and the other parties had allowed for time to cross-examine on any matters that arose therein. By not asking any questions in cross-examination to challenge the evidence contained in the witness statement, the other parties therefore accepted that evidence. In our opinion, the Commissioner and the Council should have given that indication to Mr McGlade at a much earlier stage to avoid witnesses being required to attend the hearing.

51. The nature of Mr McGlade's complaint to the Commissioner and repeated in his appeal before the Tribunal is that the information given by the Council was contradictory and false. The central issue for the Tribunal to decide is whether the evidence shows, on the balance of probabilities, that the Council had not yet entered into an agreement as to how sea defences would be funded and what their liability would be, if any.

52. There is no dispute between the parties that the Coatham Scheme is to be built on an area where there is a high likelihood of flooding and that the construction of a sea defence wall of some sort is anticipated and that the Council's overall contribution to the Scheme will include an element of contribution to such a wall if the entire Scheme proceeds to development.

53. Mr McGlade objects to the use of the word "anticipated" and submitted that there is no doubt that a sea defence has to be built. He drew our attention to a number of documents to support this, including a letter from the EA to the Planning Services department of the Council dated 15 December 2006 indicating that the EA would be prepared to lift its flood risk objection to the principle of the development on the basis of a statement of intent from the developers that they intend to provide tidal flood defences to the standard proposed.

54. It appears to us that Mr McGlade has assumed that the EA has the responsibility for deciding whether a development in a flood risk area can go ahead, rather than the local planning authority which makes the decision within the national framework of development control guidance and law. The EA must be consulted but it does not follow that its recommendations or suggestions have to be adopted verbatim if the requirements of the planning framework can be satisfied in other ways.

55. Mr McGlade also does not accept the Council's assertion that the relevant surveys regarding sea defences have yet to be completed. He submits that in order for work to commence on the expected date, these surveys must have been completed and that the Council must be in possession of the results.

56. The Council's witnesses explained that the delay was due to the EA changing the required scope of the survey and that no agreement had yet been reached between the EA and Persimmon as to the requirements of any sea defence. There is no evidence before us to cast doubt upon this and therefore we accept the Council's assertion.

57. Mr McGlade submitted that the responsibility for providing the sea defence is the sole responsibility of Persimmon Homes. He drew our attention to a number of documents within the bundle which he submitted were evidence to support this.

58. The first document he drew our attention to was an article in The Independent newspaper from February 2001 reporting the new Government controls on developments built on flood plains contained in the Planning Policy Guidance note 25 (PPG25). Mr McGlade relied on the contents of this article, in particular the line that, "In addition, developers themselves will have to foot the bill for flood defences in risk areas" as evidence to support his submission that it is the sole responsibility of Persimmon.

59. He submitted that this was further evidenced by the Council's own Development Brief document which contained extracts from relevant Planning Policy Guidance documents. Mr McGlade interpreted this as the Council giving a clear indication that Persimmon was responsible for the sea defence, with no suggestion that the Council would be jointly liable or contributing in any way. Mr McGlade assumed that the words "should fund" in PPG25 could only be interpreted as "must fund".

60. We were reminded by the Commissioner and the Council that PPG25 is a Guidance document. Steps may be underway to give it statutory weight, but it had not been implemented at the time in question. The point of the guidance is to ensure that suitable measures are put in place to protect against flooding rather than to prescribe where financial liability should rest in the case of a mixed development with public and private sector components. The Council submitted that the Coatham Scheme is a *joint* development between the Council and Persimmon and therefore the word "developer" encompasses both; it is not a reference to Persimmon alone.

61. Mr McGlade also relied upon the Shoreline Management Plan prepared by Royal Haskoning on behalf of the Environment Agency (the 'EA'). This shows that for Coatham the recommended standpoint of the EA was "hold the line"; that is, no particular action was recommended at that time.

62. Mr McGlade relied upon a witness statement provided by Malcolm Baxtrem, who attended a presentation of the Shoreline Management Plan (the 'SMP') for the coastline from the River Tyne to Flamborough Head by Royal Haskoning, on behalf of the EA, on 18 July 2006. In relation to Coatham, the position was "Hold the line", that is, at the present time there was no need for the EA to do anything with regard to sea defences.

63. Mr Baxtrem's evidence was that the person presenting the SMP was asked a hypothetical question about what the requirement would be if a development including the building of houses were to take place on the car park and Coatham Common area. His response was that a suitable sea defence would need to be built to protect the housing; in his opinion the EA would not need to build this defence and he presumed that the developer would have the responsibility. He explained that decision was not part of his remit.

64. This evidence was not challenged. The Commissioner and Council submitted that whoever had made that comment was not speaking with the authority of the Council or Persimmon and, on the face of it, the language used makes it clear that this is a statement of opinion, not an unqualified statement of fact.

65. Mr McGlade also drew our attention to the contents of an e-mail dated 15 December 2006 from Gary Cutter at the EA to Malcolm Baxtrem, another Friend of Coatham Common:

> *"The developers have stated that they intend to provide tidal flood defences to protect the development area…"*

66. Mr McGlade submits that this is further evidence that Persimmon had sole responsibility for the sea defences. With respect to Mr McGlade, we consider that he has misinterpreted this e-mail and attributed to it more significance than it in fact bears. While "the developers" may have stated to a third party that "they" intend to "provide tidal flood defences to protect the development area", there is nothing to suggest where this statement originated, who is being referred to as "the developers", that is, Persimmon alone or jointly with the Council, nor does it explain what is meant by "provide"; for example, whether this refers to, for example, ensuring arrangements have been made, to the construction and the financing of sea defences or the construction alone. A further e-mail from Gary Cutter on 7 May 2007 confirms that in his opinion the funding would come from Persimmon but he properly acknowledges that from the EA's flood risk management viewpoint it did not particularly matter where the funding came from. We do not regard these e-mails as evidence to support the submission that the responsibility for funding any additional sea wall or other sea defences was that of Persimmon alone.

67. Alan Logan, a Project Manager involved in the Coatham Scheme, was responsible for the provision of the response to Mr McGlade's Request for information. He explained that the hypothetical nature of his response had been an attempt to show that the position was unclear but that provision had been made within the cost model for the Coatham Scheme to cover the eventuality that additional sea defences would have to be constructed as there had not yet been any formal confirmation of that. He conceded that his response could have caused confusion but denied that was intentional.

68. He was able to provide background information about the genesis of the Coatham Scheme and the issue of sea or flood defences, although he stressed that he was not an expert with regard to the technical aspects and that a "sea defence" might encompass measures other than or in addition to a "sea wall".

69. He explained that the Coatham Scheme is a regeneration scheme with a number of targets to deliver. The Council entered into an agreement with Persimmon which is to be employed by the Council to construct the public elements of the Coatham Scheme and to act as agent for the construction of the leisure facility. The Council will sell the land for the housing element of the development to Persimmon. There was an issue raised as to the value of that land but we do not consider that to be relevant to this Appeal.

70. Mr Logan outlined that there is a Development Agreement between the Council and Persimmon, signed on or about 1 May 2007, which is a contractual document setting out the terms and conditions under which the contract will be delivered. Under the terms of that Agreement the commitment by the Council to expenditure on a sea defence would only become formalised when the Council's Cabinet (the 'Cabinet') gives approval to proceed with the Coatham Scheme; that had not been given at the time of the Request and had not been given at the

time of the hearing of this Appeal. While there is a provisional sum in respect of sea defence work included within the cost model for the development scheme, this is not a definitive document and the sum was included to ensure that the issue was not overlooked. We did not see the Development Agreement and accept the evidence we were given by Mr Logan and Mr Hopley (see below) that it does not contain specific references to flood or sea defences.

71. As to the necessity of any sea defence, Mr Logan stressed that there is a difference between a sea wall being required and a sea wall being anticipated; until there is an agreement between the EA and Persimmon it is not possible to be sure as to what is required. That agreement has not yet been reached.

72. Having been involved in the Coatham Scheme for a number of years, Mr Logan "categorically" confirmed that the cost model part of the agreement contains a provision for the Council (subject to a number of factors, including Cabinet approval for the entire scheme to proceed to development) to contribute to the costs of any additional sea defences that may be required, as part of the overall funding package. He rejected Mr McGlade's assertion that the construction and financing of any sea defence is the sole responsibility of Persimmon.

73. We heard evidence from Ian Hopley, previously Project Manager for the Coatham Scheme and now Regeneration Manager for Area Regeneration with responsibility for a number of projects. A statement had been obtained from him by the Council to respond to the contents of a witness statement provided by Mr McGlade from Russ Libbey. Mr Libbey had attended a Council sea defence presentation on 4 July 2009 and had spoken to Mr Hopley. Although that particular presentation had not concerned Coatham, Mr Libbey spoke to him about the sea defences required for the Coatham Scheme and recalled that Mr Hopley had said that these would be jointly financed by the

Council and Persimmon. Mr Hopley could not recall this conversation but accepted that the answer attributed to him is the answer that he would have given.

74. He amplified this by explaining that as with all well-managed regeneration projects, the Council and its development partner have developed a capital cost model through which financial control is exercised. Within that cost model estimated sea defence costs have been identified, although the apportionment between the public purse and Persimmon cannot be finalised until, amongst other issues, the detailed design currently being undertaken is completed.

75. In dealing with Mr McGlade's principle assertions, Mr Hopley confirmed what had been said by Mr Logan, that the Council is not currently "committed" to any expenditure on sea defences at Coatham and will not be so committed until the Cabinet authorises the entire development scheme to proceed; this cannot take place yet as the legal agreement between the Council and Persimmon is a conditional agreement requiring a number of pre-conditions to be satisfied and these pre-conditions will not be satisfied until, amongst other things, sea defence costs have been fully established. It would only be at that stage that Cabinet approval could be sought.

76. Initial planning approval for the Coatham Scheme had been granted by the Local Planning Authority (the 'LPA') on 3 April 2007, which also specified a number of pre-conditions. Planning permission was granted on 24 May 2007.

77. Mr McGlade submitted that originally, planning permission had been granted with the condition that no development shall take place until the design and extent of the proposed sea wall has been agreed in writing with the LPA, but that this condition had been changed without further consultation. The new condition permitted the development to

begin but stipulated that the agreed scheme shall be implemented to the satisfaction of the LPA prior to the occupation of any buildings.

78. Mr McGlade submitted that this amounted to a relaxing of the planning conditions and was contrary to Defra (Department for Environment Food and Rural Affairs) guidance as the EA had not been consulted on the final wording of the condition. He subsequently made a complaint to Defra and we were shown a copy of the response from Defra. This confirms that Defra does not consider that any "rules" have been broken. This letter also shows that although the EA had not been consulted as to the final wording of the condition, it was satisfied after further discussions with the Council that the original intent of the condition had been kept and that the re-wording does not constitute a relaxation of flood protection to the site or elsewhere, and agree with the Council that the defences can be built in phases and that no works can begin on site until the design and extent of the sea wall has been agreed.

79. Mr Logan addressed this issue in his witness statement. He clarified that the planning conditions exist to ensure that the matter is adequately addressed to reduce the risk from flooding but is not evidence that any particular structure is required.

80. Mr Scott, a Councillor explained that the change in the wording of the condition was an entirely proper course of action for the relevant Council officer who had come to the conclusion that a variation was more suitable in his professional opinion. We do not consider that the alteration of the planning condition advances Mr McGlade's submission that the Council has provided false information to the Commissioner and the Tribunal. We do, however, consider that it is a further example of Mr McGlade making incorrect assumptions about the procedure surrounding planning applications.

81. Mr Scott was cross-examined on behalf of Mr McGlade on a range of matters, although his written statement had been confined to his recollection of a conversation with one of Mr McGlade's witnesses, Charles Davis. Mr Davis recalled that Mr Scott had said in June 2007 that "never-ever-ever" would the Council subsidise the building of a private housing estate. While Mr Scott does not recall using those particular words, he agreed that this would have been his view. He also stated that he did not and could not commit the Council as a body to opposing any proposal but he did not agree that the Council's contribution to any sea defence would amount to a subsidy of a private developer.

82. In response to questions from one of the Tribunal Panel, Mr Scott agreed that there were two separate and distinct processes that come to the Council for a decision, that is, the planning decision and a decision as to the financial package. He explained that the nature of the financial package is likely to include a public contribution in respect of flood risk and a private contribution in respect of flood risk but that the Council can withdraw from the conditional agreement with Persimmon if the costs are not acceptable.

83. It appears to us that Mr McGlade has assumed that because the Coatham Scheme includes a housing element, it is a private housing scheme and that any contribution by the Council would be solely for the benefit of Persimmon. This is a mixed use development with leisure and other socially beneficial facilities, which includes a proportion of residential development. Additionally, the regeneration of the area is a priority for the Council and could be regarded as being beneficial to the wider community. The provision of appropriate sea and flood defences can therefore be regarded as beneficial to the wider development and not simply the residential element.

84. Mr McGlade has asserted throughout the Appeal process that the finance for the sea defence at Coatham is the sole responsibility of Persimmon. Although we can understand how he came to that conclusion based on his interpretation of the various sources, having analysed the evidence before us, some of which we have referred to above and we repeat that we have had regard to all the material before us, we do not consider that the evidence supports that assertion.

85. We found that all the witnesses called were truthful and nothing we heard would undermine their credibility. We accept the evidence given by the witnesses called by the Council that the Council has not yet entered into an irreversible commitment to the development. We also accept that there has not yet been any final decision as to the extent and nature of any sea defence or as to cost liability. There is a difference between the Council being liable for something if the Coatham Scheme proceeds to development and being "committed" to something at a particular point in time.

86. We are satisfied that the Council does not hold the information requested and that the question posed by Mr McGlade in his Request for information of 20 September 2007 cannot be answered properly until the decision has been taken by the Cabinet.

Conclusion and remedy

87. We conclude that the Commissioner was right in his decision that the Council did not hold the information requested and that therefore the exception in Regulation 12 (4)(a) of the EIR applied.

88. We agree with the Commissioner that the confusion that has arisen could have been avoided if the Council had not given hypothetical

answers to Mr McGlade's request of 20 September 2007 and that the correct response should have been that the information requested was not held. We accept that the Council regarded the Request itself as hypothetical, because Mr McGlade assumed then, and indeed continues to assume, that a sea defence *has* to be built. In order to be accurate, the Council could have indicated that although there were estimated figures in the cost model, nothing had been finalised in terms of either commitment to the Coatham Scheme or the Council's financial contribution.

89. Our decision is unanimous.

Other matters

90. It is apparent from both the history of this matter and conduct during the hearing that the Coatham Scheme generates controversial opinions. Allegations of bad behaviour were made by both Mr McGlade towards those working for the Council and by those working for the Council towards Mr McGlade. Mr McGlade submitted that the responses to his Requests for information were dealt with in a contemptuous manner and differently from the way requests from others not associated with the Friends of Coatham Common would have been dealt with. The evidence given by Susan Bridges, the Constitution Manager for the Council with overall responsibility for dealing with Requests for information, was that all requests were treated the same.

91. We have already commented that the hypothetical nature of the response to Mr McGlade caused confusion and that the single word, "yes" response, it is accepted by the Council, was not helpful. Mr Logan conceded that his frustration might have influenced his decision to respond in that way. We do not consider that it is appropriate or part

of our remit to make any further comments on the conduct of any party, either before or during the hearing of this Appeal.

Signed

Annabel Pilling
Deputy Chairman Date 23 November 2009