



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS STEVEN SHAW AND DAVID WILKINSON

Between

HEMSWORTH TOWN COUNCIL

EA/2017/0120

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

IAN WOMERSLEY

2nd Respondent

EA/2017/0125

HEMSWORTH TOWN COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

JAMES KENYON

2nd Respondent

DECISION AND REASONS

NB Numbers in [square brackets] refer to the open bundle

1. The Tribunal's decision is to confirm that of the Information Commissioner (the Commissioner). The requested information (i.e. the closed material) should be disclosed within the later of 28 days from the date of the decision or the determination of any application for permission to appeal by Hemsworth Town Council (the Council) (and any subsequent appeal).
2. The Tribunal considered these conjoined appeals together. The requests for information by Ian Womersley and James Kenyon of the Council were made separately but are materially identical.
3. The Commissioner gave separate decision notices, each on 17 May 2017.¹ The Council appeals against those decision notices. Mr Womersley and Mr Kenyon were added as Respondents on 5 July 2017.
4. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).²
5. The requested information was sent to the Tribunal to be held as closed material. The Council has not made a closed submission and there is no need for a closed decision.

The requests

6. On 30 August 2016, Mr Womersley made his request. It is not in the bundle. However, the Council's response, written by Ms Tina Pattison (the town clerk), is at [27]. She described the request as being for 'the signed contracts and documents between Saul Construction (the developer) and [the Council] in respect of the sale of the Hemsworth Sports Complex'. The solicitors Mr Womersley later instructed, Richard Buxton Solicitors (Richard Buxton), clarified that he wanted only 'the completed contract of sale between [the Council] and [the developer]' [136]. 'Completed contract' is a misnomer: the contract has not been completed. However, it is clear that the request was referring to the uncompleted contract.
7. Mr Kenyon made his request on 13 December 2016, also via Richard Buxton [92]. He asked for the sale contract between the Council and the developer. One of the oddities of the case is why, since Mr Kenyon has himself been a councillor during the relevant period, he could not see it in that capacity. The answer may be that he was but would not be able to discuss its contents publicly.

¹ FS50660538 and FER0681064

² SI 2009 No 1976

8. The Tribunal construes the requests as relating to all the contractual documents relating to the agreed transaction. It is in the public domain that there are two parts to the contract (see the note of the electors' meeting on 8 October 2016 [73]).

The background

9. The essential – and undisputed – facts, derived from the open bundle, are as follows:

- In early 2011, the Council entered into a contract for the sale of the sports complex (the site)
- The development would consist of over 150 homes
- The parties also agreed that Council would take over a new community centre at Bullenshaw Road and new football facilities at Sandygate. That has happened
- The sale was not conditional on planning permission being granted (by Wakefield Metropolitan District Council (Wakefield))
- Planning permission was in fact granted but was quashed by the High Court in a judicial review brought by Mr Kenyon, following an error by Wakefield with regard to a section 106 Town & Country Planning Act 1990 agreement
- Planning permission has since been re-granted but is the subject of another judicial review, challenging the failure by the Secretary of State to require an environmental impact assessment (EIA) (the EIA judicial review)
- Because of the hiatus caused by the judicial reviews (there has been a third case, albeit only tangentially relating to the site), the developer has refused to complete the contract. Title therefore remains with the Council. The developer has, however, paid £350,000 pursuant to a section 106 agreement and has paid part of the contract price. £1.4 million remains outstanding from the purchase price
- The Council and the developer have been seeking to renegotiate the contract
- By a letter to Mr Kenyon dated 27 April 2011 [51], Ms Pattison told him that, after councillors were provided with relevant information at the annual Council meeting on 17 May 2011, she would release the contract to the public. Clearly, that has not happened

- Mr Womersley and Mr Kenyon are local residents. They have expressed concern about various environmental issues resulting from the sale and loss of open space
- Mr Kenyon has been a councillor since early 2011. At least in 2013, he was one of five independent members. The other 10 members were Labour.

The initial responses and reviews

10. In her reply to Mr Womersley, Ms Pattison said that the 'documents' were exempt from disclosure under section 43(2) Freedom of Information Act 2000 (FOIA) (commercial interests). She did not refer to the fact that section 43(2) is a conditional exemption or to the public interest balancing exercise therefore required by section 2(2)(b).
11. Mr Womersley asked for a review on 13 October 2016 [88]. He pointed out that the clerk had promised that the documents would be made public once all the councillors had seen them.
12. In her letter of 24 November 2016 to Mr Womersley, Ms Pattison explained that two days earlier the Council had decided to maintain its decision.
13. In relation to Mr Kenyon's request, the Council applied the Environmental Information Regulations 2004 (EIR), which had been cited by his solicitors. Although Ms Pattison did not say so, the Council must therefore have regarded the contract as 'environmental information'. It relied on the exemption in regulation 12(5)(e) (legitimate economic interests), but without explaining why. It decided that the public interest favoured withholding the information. Its reasons were generic:

'In carrying out a Public Interest Test we consider the greater good or benefit to the community as a whole if the information is released or not. The "right to know" must be balanced against the need to enable effective government, deliver efficient policing and to serve the best interests of the public. After assessing all the considerations pertinent to the circumstances of this request, we consider the balance of the public interest favours the disclosure-exception provision under regulation 12(5)(e).'

It is not clear what policing had to do with release of the contract.

14. Richard Buxton requested a review on 17 January 2017, a request repeated and expanded upon in their letter of 19 January. In that letter, they argued (*inter alia*) that legitimate economic interests could not be adversely affected by disclosure of a contract then more than five years old. In any event, the public interest favoured disclosure, in part because the development was controversial and a matter for public debate.

15. The Council maintained its decision in Ms Pattison's letter of 14 March 2017 [103]. The review did not refer to regulation 12(5)(e) but argued that the public interest favoured withholding the requested information, for similar generic reasons to those given in Mr Womersley's case.

Proceedings before the Commissioner

16. Mr Womersley made his complaint to the Commissioner under section 50 FOIA on 6 December 2016 [105]. He reiterated the points he had made to the Council.
17. Richard Buxton wrote to the Commissioner on 6 April 2017 [108] on behalf of Mr Womersley. They listed a number of factors pointing to disclosure under the public interest test. They argued that the contract was disclosable under the EIR as 'environmental information' as well as FOIA (in fact, information cannot be disclosable under both FOIA and the EIR: see section 39 FOIA) and that three of the four criteria for engaging regulation 12(5)(e) of the EIR set out in *Bristol City Council v Information Commissioner and Portland & Brunswick Squares Association (Portland & Brunswick)* ³ did not apply (see below). The solicitors added that Mr Kenyon was bringing the EIA judicial review.
18. In her letter to the Commissioner of 10 May 2017 [123], sent in the context of Mr Kenyon's complaint, Ms Pattison said that the Council had relied on regulation 12(5)(e) because the contract had been provided to it by a third party on a confidential basis. The contract was still not concluded and the site was subject to a judicial review application. As a result, it was in the public interest to withhold the contract because some of its details could be used to try to influence the legal process (she did not explain how). However, the Council had agreed to release that part of the contract dealing with environmental issues. She disclosed an extract headed *Environmental Provisions*, in which the developer acknowledged that the property might have been contaminated. The developer was to be exclusively responsible for any remedial works and agreed to indemnify the Council in respect of claims arising out of the environmental condition. The clause was said to constitute a liability agreement for the purpose of paragraph D.38 of the DETR Guidance 02/2000 Part IIA Environmental Protection Act 1990 (Contaminated Land).
19. In an email to the Commissioner on 15 May 2017 [133], Ms Pattison suggested that the requests were part of a continuing vendetta against the Council and the developer. She referred to the Commissioner's decision in FS50510064. ⁴ As with most Commissioner decisions, the requester is not identified but the decision says that he had been a councillor of the Council since 2011. There were, in fact, two requests, in a total of 21 parts. The Commissioner upheld the Council's decision

³ EA/2010/0012 (24 May 2010)

⁴ 11 March 2014

that the requests were vexatious within section 14(1) FOIA. She noted that the complainant had sent voluminous correspondence to the Council, usually made up of several pages of questions, statements, requests for information and requests for meetings and explanations. As a result, the clerk had amassed 50 hours of time off in lieu between April and November 2011. The Commissioner concluded that, whilst the complainant may have had reasons for making the requests at issue, the impact on the Council had become disproportionate and unjustified.

20. Ms Pattison also said that the developer was seeking to renegotiate the contract prior to make the outstanding payment. That would result in (unspecified) legal obligations. She maintained the contract was not disclosable, whether under section 43(2) FOIA or regulation 12(5)(e) of the EIR.

The Commissioner's decisions

21. In **Mr Womersley's case**, the Commissioner decided that the EIR, rather than FOIA, applied. The information could be considered a measure affecting or likely to affect the environment or a measure designed to protect it within the definition of 'environmental information' in regulation 2(1)(c) of the EIR. The information related to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the Council. She referred to the Tribunal's decision in *Kirkaldie v Information Commissioner and Thanet District Council*.⁵
22. The Commissioner explained the four *Portland & Brunswick* tests had to be applied when determining whether the exception in regulation 12(5)(e) of the EIR was engaged: (a) is the information commercial or industrial in nature?; (b) is the information subject to confidentiality provided by law?; (c) is the confidentiality provided to protect a legitimate economic interest?; and (d) would the confidentiality be adversely affected by disclosure? (Each test has to be met but the third and fourth really collapse into one and the Commissioner did not consider them separately).
23. She held that the first test was met because the disputed information related to the sale of land and was commercial in nature. As far as the second test was concerned, the information had the necessary quality of confidence because it was not trivial and was not in the public domain. There was at the very least a clear obligation of confidence relating to the information.
24. With regard to legitimate economic interests, under Tribunal caselaw it had to be shown that, on the balance of probabilities, adverse effects would accrue. The

⁵ EA/2006/001

interpretive guide to the Aarhus Convention, ⁶ the genesis of Directive 4/2003/EC (the directive) which the EIR then transpose into domestic law, suggests that '[l]egitimate economic interest ... implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist ... competitors' (emphasis added). The Commissioner concluded that the Council had not identified any specific adverse effects arising from disclosure of the disputed information (or parts of it).

25. Since the Council had failed to discharge the burden on it of establishing that regulation 12(5)(e) was engaged, the Commissioner did not need to apply the public interest test.
26. Her decision in **Mr Kenyon's case** was to similar effect. She noted that some of the Council's arguments were not relevant to regulation 12(5)(e).

The Grounds of Appeal and the Commissioner's Response

27. The Council's **Grounds of Appeal** are identical in each case. The Council said that both it and the developer objected to disclosure because sensitive and commercial negotiations were still taking place between the parties before the contract could be completed. If the contract (i.e. the majority of it still withheld) was made public now, the ongoing negotiations could be prejudiced to the detriment of both parties. The contract related broadly to financial agreements. Once the contract was completed, the terms of the transfer would be in the public domain via the Land Registry. The Council would not object to disclosure at that point.
28. In response [29] to Case Management Directions (CMD) issued by the Tribunal on 27 June 2017, the Council said it was satisfied that confidentiality was imposed under a contractual obligation. It referred to the EIA judicial review.
29. The Council included a **short submission by the developer**: the contract was of an obvious commercial nature; it was of economic interest since the cost of land was fundamental to the viability of any development; and confidentiality would be adversely affected by disclosure. Certain aspects of the contract were also affected by the current judicial review. In the developer's opinion, the motives behind both the requests and the judicial review were 'vexatious and not innocent'.
30. In her **Response**, the Commissioner said she understood that the development had given rise to concern within the local community because of historic contamination from the site's past use as a landfill, unauthorised use as a building yard, increased flood risk to the site and surrounding land and adverse effects on open space and wildlife. Planning permission granted to the developer had twice

⁶ The [United Nations Economic Commission for Europe](http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998): <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

been quashed after legal challenges and there was currently pending the EIA judicial review.

31. The Commissioner noted that, although the Council's Grounds of Appeal and response to the CMD largely focused on the second *Portland & Brunswick* test (was the information confidential?), it was the third test (harm to legitimate economic interests) which was in issue.
32. With regard to that harm test, the burden lay on the Council to show (a) the nature of the harm which would arise from disclosure; (b) that it would, not merely might, arise (see *Elmbridge Borough Council v Information Commissioner & Gladedale Group Ltd*⁷); and (c) that it would arise from disclosure. It was not clear how disclosure of a contract (including the consideration (price)) entered into six years ago could prejudice the commercial interests of either the Council or the developer. The motives behind the requests were irrelevant.
33. In conclusion, the Commissioner's primary position was that no part of the contract engaged regulation 12(5)(e). If that was wrong, not all of it would do so.
34. **The requesters** submitted their Response on 11 September 2017 [43]. In addition to the environmental concerns listed by the Commissioner in her response, there were concerns relating to current management of the site including clearing of vegetation, unauthorised use as a builder's yard and fly-tipping. They submitted that, without the contract, it would impossible properly to understand the nature and extent of the ownership of the land and, in particular, whether and to what extent liability might rest with the Council for (for example) contamination and what conditions of sale remained to be fulfilled.
35. The requesters asserted that the whole of the contract (not simply those parts specifically addressing environmental matters) constituted 'environmental information'. The legitimate economic interests criterion was not met because the Council merely referred to possible prejudice. Disclosure could have no impact on ongoing negotiations between the Council and the developer because both parties had the contract. Similarly, there was no explanation as to how the EIA judicial review was relevant.
36. The requesters attached the letter from Ms Pattison to Mr Kenyon on 27 April 2011 [51] in which she said:

'The Town Council signed the Contract of the Sale of land at Kirkby Road, Hemsworth in February 2011 and contracts have now been exchanged and monies paid into the Town Council's bank account. In addition to this the Town Council have taken over the new Community Centre, Bullenshaw Road and new Football facilities at Sandygate, Hemsworth. I will be providing Councillors at the Annual Town Council meeting on 17th May 2011 details on contractual and capital receipts relating to the

⁷ EA/2010/0106

Strategic Projects and following all Town Councillors having this information then I will be in a position to release the document to the public' (emphasis added).

37. In its **Reply** to the Commissioner's Response [55], the Council clarified that, in its view, harm would, on the balance of probabilities, be caused by disclosure and disclosure would adversely affect a legitimate economic interest. It explained that the delay in completing the contract had been caused by the judicial reviews. It disagreed with the Second Respondent's analysis with regard to 'environmental information'. It was common knowledge, the Council said, that £1.4 million was outstanding from the sale price.
38. The requesters served a **Note on the Council's Reply** on 16 October 2017 [58]. They cited the numerous statements by the Council explaining that completion was not conditional on planning permission.
39. There was a round of final submissions. The Council asserted that the EIR was concerned with the disclosure of information to the public and the relevant part of the contract dealing with environmental information had been disclosed. Statements in the 27 April 2011 letter and at a later meeting were correct when made. The developer was refusing to complete because of the EIA judicial review. It had used delays caused by the various judicial reviews to renegotiate the section 106 payments, had succeeded in 'achieving a decrease of £350,000 on affordable housing' and had attempted to renegotiate the contract. Releasing the contract would 'therefore' adversely affect a legitimate economic interest. The Council added that it could not justify paying additional legal fees to fight the appeal having spent so much on legal fees on the judicial reviews.
40. The **Commissioner** referred to the Court of Appeal decision in *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney (Henney)*⁸ on the 'environmental information' question. It was apparent from the minutes of a Council meeting on 2 October 2012 [72] that the contract was not conditional on planning permission. Planning matters remained outstanding, but the sale was 'finalised' by the entry into the contract.

The statutory framework

41. Under regulation 5 of the EIR, public authorities have a duty to make environmental information available on request.
42. Regulation 2(1) of the EIR provides:

"environmental information" has the same meaning as in Article 2(1) of the Directive [Council Directive 2003/4/EC], namely any information in written, visual, aural, electronic or any other material form on –

⁸ [2017] EWCA Civ 844, see especially paragraphs 13-17

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

43. Regulation 12 contains exceptions to the duty to disclose:

- (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
 - ...'

Discussion

Does the contract constitute 'environmental information'?

- 44. There has been some dispute as to whether the contract, or all of it, constitutes 'environmental information' within regulation 2(1) of the EIR. To the extent that it does not, FOIA would govern the requests.
- 45. The definition of 'environmental information' is extraordinarily wide. However, it is not limitless. In *Henney*, where the precise issue was whether it could be said that a project assessment review of a particular subset of the Government's Smart Meter Programme (SMP) was information 'on' a measure affecting the

environment (the SMP), the Court of Appeal looked for a sufficient connection between the information requested and the environment

46. The Tribunal accepts the analysis of the Commissioner and the requesters that the whole of the contract constitutes 'environmental information'. It constitutes a 'measure' within paragraph (c) on both the state of 'elements' within paragraph (a) (such as wildlife on the site, soil, water and air on and around the site) and 'factors' within paragraph (b) (such as noise, waste, emissions, discharges and other releases into the environment). The fact that some of the site is, or may be, contaminated underscores that. It is not simply that part of the contract, disclosed by the Council, which expressly addresses the environment which falls within the definition. In *Henney* terms, there is sufficient connection between the whole of the contract and the environment.
47. Even if this were wrong, such that section 43(2) FOIA could in principle apply to some or all of the contract, the Tribunal would have held that disclosure would not prejudice commercial interests for similar reasons as that regulation 12(5)(e) is not engaged (see below). Similarly, even if section 43(2) was engaged, the public interest would favour disclosure, again for similar reasons as with regulation 12(5)(e).

Is regulation 12(5)(e) engaged?

48. The Tribunal considers that it is not. The first two *Portland & Brunswick* tests are met but not the third. The Council eventually alighted on the correct legal test – that disclosure would, not merely might, adversely affect legitimate interests (its own and those of the developer, it said) but has failed to show how. It has either talked airily about commercial sensitivity or engaged in *non sequiturs*, for example by arguing that disclosure would prejudice the EIA judicial review or renegotiation of the contract. It has not explained how disclosure would prejudice either of these. Whether the contract is in the public domain can have no obvious impact on whether the Secretary of State should have required an EIA. Similarly, as things stand, each party is entitled to insist on performance of the current contract. Whether the public at large knows the terms of the contract would appear to make no difference to renegotiation.
49. No doubt the problems the developer has experienced in retaining planning permission have complicated matters and could well have affected the financial viability of the project. The fact is, however, that the contract was not made subject to such permission. It appears that the developer did not anticipate any problems in that regard. Nevertheless, given that there was no relevant condition, there seems to be no reason why the Council could not have insisted on completion (with payment of the balance of the purchase price) by bringing an action for specific performance of the contract. For whatever reason it has decided to renegotiate rather than rather than bring such an action. However, this cannot without more mean that disclosure would adversely affect its legitimate economic interests or those of the developer.

50. The developer's submission, via the Council, to the Tribunal can only be described as wholly inadequate, particularly given that it claims to be concerned about harm to its valuable commercial interests. It makes no attempt to particularise how disclosure would have this effect.
51. As the Commissioner and the requesters have pointed out, the contract was over five years old at the date of the request. It might be argued that some of its provisions, including the sale price, were sensitive when it was entered into. In fact, the Council, at least, saw no problem with disclosing the contract soon after it was made: Ms Pattison promised Mr Kenyon in her letter of 27 April 2011 (shortly after exchange) that it would be made public after councillors had been briefed at a meeting on 17 May 2011. If disclosure then would not affect legitimate economic interests, the supervening events cannot make any difference; at any rate, neither the Council nor the developer has explained how they could. The burden lies on the Council to establish that regulation 12(5)(e) is engaged.
52. Even if some elements of the contract, such as the price, were sensitive when it was made (despite Ms Pattison's promise), in the Tribunal's judgment sensitivity would have been lost by the time of the requests. Knowing the consideration the developer agreed to pay in 2011 would have little interest to competitors five years later. In any event, at least some information relating to price is already in the public domain – the section 106 payment and the fact that £1.4 million remains outstanding.

Public interest

53. Because the Tribunal has concluded that regulation 12(5)(e) is not engaged, the public interest test does not have to be applied. However, if the Tribunal is wrong on engagement, it considers that the public interest supports disclosure, bearing in mind the presumption in favour of disclosure in regulation 12(2). The proposed development has clearly excited considerable local controversy. A number of environmental concerns have been raised. There is also concern about loss of open space. Those issues will have been addressed in the planning process. However, the contract could, in principle, reveal how responsibility for dealing with the environmental concerns has been addressed (beyond the section dealing with contamination which has been disclosed). In addition, local residents are entitled to assess, from detailed information in the contract, whether the Council has obtained best value. Particularly after the passage of time, residents are entitled to scrutinise a controversial contract to assess whether the Council has made a good deal on its behalf.
54. In addition, residents are entitled to seek to influence any renegotiation of the contract and to do that they need to know where things lie at present.

55. There is also a strong public interest in public authorities fulfilling their promises (here, Ms Pattison's that the contract would be made public after a meeting in May 2011), absent a material change of circumstances, There has been none here.

Conclusion

56. For these reasons, the appeal is dismissed. The decision is unanimous. Subject to a possible appeal, the Council is to disclose the disputed information.

57. The Tribunal has some sympathy with the Council. It appears to have been subjected to a sustained and prolonged barrage of requests for information and explanations from Mr Kenyon and others. It is a small authority working within a tight, modest budget and these demands could easily have stretched its limited resources. As well as these requests, it has had to contend with three judicial reviews arising out of or touching upon the contract (it is, of course, perfectly legitimate for those affected by decisions of public authority to challenge them if there are grounds to do so). That said, the Council has not helped itself by failing - despite numerous prompts by the Commissioner and the requesters - to address the legal issues raised by the two requests and, in particular, to show how disclosure would affect either its or the developer's legitimate economic interests.

Signed

Judge David Thomas of the First-tier Tribunal
Date: 24 May 2018