



Neutral citation number: N/A

Appeal Number: EA/2021/0293

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights Tribunal.**

Heard: On the papers by consent.

Online remotely.

On 4 May 2022.

Decision: 13 May 2022.

Tribunal Panel

Brian Kennedy QC, Paul Taylor, and Dave Sivers

Between:

Roger Davey

Appellant:

And

The Information Commissioner

Respondent:

Representation:

For the Appellant: Roger Davey as a Litigant in person through written submissions.

For the Respondent: Sonia Ben Mitchell of Counsel. through written submissions.

Decision: The appeal is dismissed.

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”), as modified by regulation 18 of the Environmental Information Regulations 2004 (“EIR”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 01 October 2021 (reference IC-52156-T1T9), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information relating to a copy of a document commissioned by Mid Devon District Council (“The Council”), which sets out details of the estimated costs of a planned housing development.
- [3] The Commissioner found that the Council erred in their reliance on section 43(2) FOIA when they withheld the requested information. However, the Council is entitled to rely on regulation 12(5)(e) EIR. The Commissioner held that the Council has breached regulation 14(3) as they failed to deal with the request under the EIR. Further, that the Council breached regulation 11(4) by failing to provide an internal review response within 40 days. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology

- [4] On the 15 July 2020 the Appellant wrote to the Council and made the following request:

“I would like to request under the Freedom of Information Act, a copy or a view of the report compiled for MDDC by Randell Symonds LLP on the cost analysis for the housing development behind the Tiverton town hall currently under

construction by the council's development company 3rivers Ltd. As the contracts have been awarded there can be no reasons of confidentiality or any other to stop the council from granting my request."

- [5] The Council responded on 12 August 2020 and refused to provide the information under section 43(2) FOIA, stating that disclosure would prejudice the commercial interests of itself and its subsidiary company, 3 Rivers Development Ltd ("3 Rivers"). The Appellant requested an internal review on 12 August 2020 and the Council upheld its original decision.
- [6] The Appellant complained to the Commissioner on 23 August, and again on 22 October 2020. On 6 May 2021, after an extended period of correspondence between the parties, the Commissioner invited the Council to revisit the request and asked a number of questions.
- [7] The Council maintained its position that the request ought to be considered under FOIA as opposed to EIR. However, it stated that if the Commissioner held that the EIR applied then its arguments in favour of withholding the information would be based on regulation 12(5)(e) of the EIR.

[8] **Legal Framework**

Public authorities are under a general duty under the EIR to disclose environmental information (as defined in regulation 2(1) EIR) where it is requested:

Duty to make available environmental information on request

5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

.....

However, a public authority may refuse to disclose information (under reg.12(1)(a)) to the extent that it does not hold that information when an applicant's request is received (reg. 12(4)(a)):

Exceptions to the duty to disclose environmental information

12. - (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -

*(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(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;
(emphasis added)*

.....

Commissioner's Decision Notice

[9] The Commissioner investigated the matter and issued her DN on 1 October 2021. The Commissioner found that the Council erred in their reliance on section 43(2) FOIA when they withheld the requested information. However, the Council is entitled to rely on regulation 12(5)(e) EIR. The Commissioner reached her decision on the following grounds:

- a. *"The requested information constitutes "environmental information" under regulation 2(1) EIR because it contains information integral to the development and its construction, which will or is likely to affect the environment [DN 20-21].*
- b. *The exception in regulation 12(5)(e) (confidentiality of commercial or industrial information) is engaged in relation to the withheld information as:;*
 - 1 *Its commercial in nature as it relates to the financial arrangement between the council and 3 Rivers, and also the arraignment between 3 Rivers and the third-party company contracted to carry out the development [DN 30-32];*
 - 2 *It is subject to the confidentiality provided by law because the detailed estimated costings for the development are unique to the Council's plans for the development and are not in the public domain [DN 33-34];*
 - 3 *The confidentiality is provided to protect a legitimate economic interest: disclosure of it would undermine the position of 3 Rivers in a competitive market place, because it would have a detrimental impact on its ability to get best value for the works to be carried out, as its commercial bargaining position would no longer be protected. As 3 Rivers is a wholly owned subsidiary of the Council, its finances would be affected by disclosure in the same way [DN 37-43];*
 - 4 *The disclosure of its confidential information would necessarily harm its confidentiality.*

c. *The public interest test is finely balanced but favours withholding the information under regulation 12(5)(e).*

- 1 *In favour of disclosure is the inherent interest is transparency, the controversy around the development which makes it reasonable for the public to seek a greater degree of transparency, and the need for the Council to be accountable in relation to public money [DN 53-55].*
- 2 *In favour of withholding the information is the inherent public interest in ensuring fair competition, which would be undermined by disclosure, the harm disclosure would do to commercial position of the Council and 3 Rivers as further contracts and variations were a real possibility at the time of the Request, and the extent of information about the development already in the public domain [DN 56-63]”.*

Grounds of Appeal

[10] The Appellant’s Grounds of Appeal detailed that the Commissioner erred in her conclusion that disclosure would cause commercial disadvantage to 3 Rivers or the Council as the information is approximately 5 years old and the development is now being built by a team of sub-contractors for whom the disputed information is of little interest. Further, the Appellant contended that the prices exhibited in the study have no bearing on the costs of today. The Appellant refuted that the exception in regulation 12(5)(e) is engaged. The Appellant stated that the argument in relation to the public interest favouring disclosure is twofold. Firstly, that the information is necessary to see whether the Council appropriately considered the project or if it was a *vanity project*. The Appellant suggested that the latter is the case as two national developers withdrew from the project. Secondly, as the information is approximately 5 years old it will have no commercial impact. The Appellant argued that the Commissioner lacks the understanding required of the industry involved.

The Commissioner's Response

- [11] The Commissioner upheld her position as outlined in the DN and resisted the appeal. The Commissioner highlighted that EIR does not define 'commercial information'. The Commissioner referred to her own guidance on the application of regulation 12(5)(e). Further, the Commissioner cited the First-tier Tribunal in *Student Loans Company v IC (EA/2008/0092)* and *Sally Ballan v IC (EA/2015/0021)*, whereby the First-tier Tribunal defined "commercial" as *competitive participation in buying and selling goods or services*.
- [12] The Commissioner indicated that the Tribunal must be satisfied that the reason the information is confidential is to protect a legitimate economic interest and that "*disclosure 'would' have that adverse effect [on that interest], not that it 'could' or 'might'*" per *London Borough of Sutton v Information Commissioner EA/2017/0064* §17. The Commissioner submitted that neither of the Appellant's reasons for disputing the application of this exception should succeed.
- [13] The Commissioner stated that at the time of the request, the development was being conducted by the single contractor and the disputed information contains detailed costings that would be relevant whether the project was completed by a single contractor or several. Furthermore, the request was made less than three years after the costings and the costings would be used in future contractual variations which could harm 3 River's bargaining position if released into the public domain.
- [14] The Commissioner argued that the strong public interest in transparency is outweighed by the factors in favour of withholding the information such as: the importance of fair competition in a competitive market place, the negative impact on the Council and 3 Rivers from disclosure, which would be detriment to public funds, and the extent of information about the development already in the public domain. The Commissioner invited the Tribunal to dismiss the appeal.

The Appellant's Reply

[15] The Appellant argued that the Commissioner erred in her ruling. The Appellant stated that the requested information concerns a feasibility study. The Appellant attempted to clarify the position in relation to the documents referenced by the Commissioner in her response. The Appellant contended that the public interest is not best served focusing on remote possibilities. The Appellant refuted the argument that the passage of time reduces the public interest. The Appellant alleged that the Council breached the public procurement regulations and stated that if the Council exercised appropriate care and due diligence, disclosure will not adversely affect them.

The Issues:

- [16]** The Access Regime: We agree with the Commissioner for the reasons set out under paras.20 & 21 of the DN (see page A4) and the matter is one to be considered under 12(5)(e) EIR where the onus lies in Disclosure.
- [17]** Is the requested information Commercial or Industrial? We accept, and agree with, the Commissioner's reasoning at paras.30 to 32 (p.A5) and find that it obviously is.
- [18]** Is the information subject to confidentiality provided by law? We agree with the Commissioner's reasoning at paras.33 to 34 (p.A5) that it is for the reasons set out therein.
- [19]** Is the confidentiality provided to protect a legitimate economic interest? We find clearly it is, and we accept and adopt the Commissioner's reasoning at paras.35 to 42 (p.A6) and find so on the face of the closed withheld information; also given that housing is a function of the local authority.
- [20]** Would the confidentiality be adversely affected by disclosure? Again, we accept and adopt the reasoning in the DN para.43 and the fact that disclosure under EIR is to the world at large.

- [21]** Public Interest - The Commissioner has set out fully the arguments put forward by both sides, together with her conclusion, at paras.44 to 67 (p.A7). We accept and adopt the Commissioner's analysis, with particular emphasis on the contents of paras.57 to 59 vis, the fact that construction was ongoing at the time of the request; variations to contract were a possibility and the extent of information which the Council had already placed in the public domain.
- [22]** We find the age of the withheld information in this case takes the Appellant no further forward given that the construction work In question was, (and still is), ongoing at the time of the request. Further we consider that the withheld information describes materials which would still need to be purchased at the time of the request (irrespective of the likely outdated cost estimate); disclosure thereof would, in our considered view have compromised the Council through suppliers inflating costs, for example.
- [23]** The Appellant argues in his Reply on page A29 that he doesn't believe the public interest is served by focusing on a 'narrow time slot' i.e. the time of the request - but that is precisely what the Commissioner, and this Tribunal are required to do.
- [24]** The Appellant argued in the original request that since the contract had already been awarded there could be no confidentiality issues. In fact, commercial confidentiality surrounding e.g., costings, methodology etc often goes beyond a single contract; knowing what lies behind on negotiation can compromise future negotiations - for example the 'squad of subcontractors' they subsequently engaged on the development.

[25] The Appellant's argument that if the Council has exercised due care and diligence, it has nothing to fear, could be applied to every exemption in every case. The application of exemptions introduced by Parliament would then become futile. The level of detail in the withheld material in our view is clearly precisely the sort of information that should be withheld on commercial confidentiality grounds as set out above.

Conclusion:

[26] In all the circumstances and for the above reasons the Tribunal find no error of Law in the Commissioner's DN nor in the exercise of her discretion in arriving at her decision therein. Accordingly, we must refuse this appeal.

Brian Kennedy QC

13th May 2022.

Promulgated on : 16 May 2022