



Neutral citation number: [2024] UKFTT 521 (GRC)

Case Reference: EA/2023/0476

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

**Decided without a hearing
On: 6 June 2024
Decision given on: 20 June 2024**

Before

**JUDGE HAZEL OLIVER
MEMBER SUZANNE COSGRAVE
MEMBER ROSALIND TATAM**

Between

PAUL ELSTONE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is allowed in part.

Substituted Decision Notice:

1. Mid Devon District Council was entitled to rely on regulation 12(5)(e) of the Environmental Information Regulations 2004 to withhold some of the information requested by the Appellant, but the exception does not apply to all of the withheld information.
2. Within 42 days of the date when this decision is sent to them, Mid Devon District Council is to disclose to the Appellant the following information from the Development Viability Review dated 13 January 2021:
 - a. From the table in paragraph 4.2, all of the column headings, the content in the first two columns, and the total value shown in the bottom right of the table.
 - b. From the table in paragraph 4.7, all of the column headings and the content in the first two columns.

The remainder of the withheld information is covered by the regulation 12(5)(e) exception.

3. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules and may be dealt with as a contempt of court.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 12 October 2023 (IC-247469-J0L6, the “Decision Notice”). The appeal relates to the application of the Environmental Information Regulations 2004 (“EIR”). It concerns information about a viability assessment requested from Mid Devon District Council (the “Council”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can 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).

3. On 4 April 2023, the Appellant wrote to the Council and requested the following information (the “Request”):

“Could I please make a Freedom of information Request to receive a FULL COPY and not the Executive Copy of the 3 Rivers Development Haddon Heights VIABILITY ASSESSMENT.”

4. 3 Rivers Developments Limited (“3 Rivers”) was a property development company wholly owned by the Council. Local planning authorities can set a developer contribution for affordable housing. The contribution for this site was set at 30%. 3 Rivers produced a viability assessment which showed that the development would not be sufficiently profitable if the 30% contribution was required. An executive summary of this viability assessment was published. The Council instructed a third party (S106 Affordable Housing) to review this viability assessment. They produced a report in a “Development Viability Review” dated 13 January 2021. The report reached the same conclusion.

5. It is this Development Viability Review, which reviews the original viability assessment, that is the subject of this appeal. This is clear from the Appellant’s complaint to the Commissioner (which is about the “*independent Viability assessment...obtained by the Council for comparison with the developers submission*”), and from his appeal document.

6. The Council responded on 10 May 2023. They initially confirmed that they held the requested information but withheld it under regulations 12(5)(e) EIR (commercial confidentiality) and 13(1) EIR (personal data). Following an internal review, on 7 July 2023 the Council disclosed a redacted version of the document and withheld certain information under the same two exceptions.

7. The Appellant complained to the Commissioner on 25 July 2023. The Commissioner contacted the Council to inform it that the withheld name was already in the public domain. The Council agreed to release the requested information with only the sales value information redacted under regulation 12(5)(e). The Appellant did not accept this redaction.

8. The Commissioner decided:

- a. The information is commercial in nature and was not in the public domain.
- b. The Council had demonstrated a causal link between disclosure and specific adverse effects to economic interests. These are the bargaining position of the company developing the site and the company's capacity to maximise profit, based on prejudice to their ability to achieve currently advertised sales values.
- c. The public interest in maintaining the exception outweighs the public interest in disclosure.

The Appeal and Responses

9. The Appellant appealed on 6 November 2023. His grounds of appeal are:

- a. He accepts that the sales value of a property is commercial in nature, but the report was published in January 2021 and there have been considerable variations in property values since then.
- b. Confidentiality is not provided by law – the document was not marked confidential, the National Planning Framework says that Viability Assessments should be prepared on the basis that they will be made public, and he submitted various documents which make clear that all information used in the assessment of planning applications should be released.
- c. The Commissioner's decision says that release "may" prejudice commercial objectives, rather than showing that release of the information would cause harm. The information already released is more likely to cause the relevant harm.
- d. If the exception applies, the public interest in disclosure outweighs the public interest in withholding the information.

10. The Commissioner's response maintains that the Decision Notice was correct. He says that the relevant limbs of the test have been met, and that there is a strong public interest in maintaining the exception. The detailed arguments are addressed in the discussion below.

11. The Appellant submitted a reply and written submissions which we address to the extent relevant to our decision in the discussion below.

Applicable law

13. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

- 2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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 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;*

.....

5(1) *...a public authority that holds environmental information shall make it available on request.*

.....

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.*

12(2) *A public authority shall apply a presumption in favour of disclosure.*

.....

12(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;*

14. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

15. Regulation 12(5)(e) is not limited to information provided by a third party. The information in question must be commercial or industrial. The information must be subject to confidentiality provided by law. An obligation of confidence can be implied, and the three-stage test in **Coco v A N Clark (Engineers) Ltd** [1969] RPC 41 applies: (1) the information must have the “necessary quality of confidence”, in that it is not publicly accessible and is more than trivial; (2) the information must have been imparted in circumstances that implied an obligation of confidence, whether this is explicitly or implicitly; and (3) disclosure of the information must be unauthorised. The confidentiality must protect a legitimate economic interest, which would, on the balance of probabilities, be harmed by disclosure. Finally, it must be shown that the disclosure of the information would adversely affect the confidentiality.

16. The test under Regulation 12(5) is that disclosure “would” have an adverse effect. This means that it needs to be more likely than not. The Commissioner’s detailed guidance on the EIR explains this as follows – “For you to apply an EIR exception, you must show that disclosure

is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect... The fact that EIR uses only “would” and not “would be likely” means that the test for engaging these exceptions is more stringent than FOIA prejudice-based exemptions. A public authority cannot engage an exception if they cannot show that the adverse effect is more likely to happen than not (ie if there is a less than 50% chance).”

Issues and evidence

17. The issues are:

- a. Is Regulation 12(5)(e) engaged by the withheld information – would disclosure adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest?
- b. If so, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

18. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld information and a submission from the Council to the Commissioner.
- c. A witness statement from the Council. As this is not provided by a named individual as a witness, we have taken this into account on the basis that it is a written submission from the Council.
- d. Final written submissions from the Appellant.

19. It was not clear to the Tribunal why one of the submissions from the Council to the Commissioner was contained in the closed rather than the open bundle. We considered whether this document should potentially be disclosed to the Appellant before we finalised our decision. The document contains quotes from the Council and 3 Rivers explaining why disclosure “may” cause prejudice, an explanation that the withheld information is an independent report rather than the viability assessment itself, and concessions in relation to personal data and land values (which were then disclosed). We have not based our decision on this document, and so find that it was not necessary to delay our decision in order to clarify with the parties whether this document should be in the open bundle.

20. Various previous Decision Notices of the Commissioner in other cases were included in the bundle. These are not binding on the Tribunal, and we have assessed this case based on its own facts and the specific information that has been disclosed and withheld.

Discussion and Conclusions

21. The withheld information is contained in the Development Viability Review conducted by S106 Affordable Housing on behalf of the Council, dated 13 January 2021. The withheld information includes sales valuations provided by 3 Rivers for the nine plots in the development, and sales values proposed by the Council. These are shown in two tables. The entire tables

that contain the sales information along with other information have been redacted. There is also a discussion of sales values in two additional paragraphs which have been redacted.

22. The first issue is **whether regulation 12(5)(e) is engaged by the withheld information** – would disclosure adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest? We have considered the various elements of the test as follows.

23. **Is the information commercial or industrial in nature?** This is not disputed by the Appellant. The projected sales valuations for the development clearly relate to a commercial activity of selling housing for profit, and so this is commercial information.

24. **Is the information subject to confidentiality provided by law?** The information must have the "necessary quality of confidence", in that it is not publicly accessible and is more than trivial. Having seen the withheld information, we find that the majority of it meets this test. It is more than trivial information. Our understanding is that the majority of the information has not been made available to the public. However, the total valuation reached in the 3 Rivers viability assessment is shown in the published executive summary of this assessment (page A37 in the open bundle), which is dated 20 November 2020. This was published before the Development Viability Review. This specific information was already publicly available and so cannot have been subject to confidentiality provided by law.

25. The information must also have been imparted in circumstances that implied an obligation of confidence. The Appellant says that the document is not marked confidential, and both the National Planning Framework and caselaw he refers to indicates it is expected to be published. The Commissioner says that this document was only shared with those involved in the planning application, and its restricted circulation supports an expectation of confidentiality. The Commissioner also says that the actual Viability Assessment was made public in accordance with the relevant policies and framework, and so the case cited by the Appellant is not relevant.

26. We have taken account of relevant planning framework and the caselaw provided by the Appellant. This is clearly relevant in relation to publication of a Viability Assessment – there are clear principles that such assessments should be published. However, the withheld information is in a different document for a different purpose. A Viability Assessment is prepared in support of a planning application, which was made in this case by 3 Rivers. The Development Viability Review was commissioned by the Council, as part of the process of assessing the 3 Rivers statements and making a recommendation to the Planning Committee, and shared with the Committee tasked with the planning decision. This means that it is not subject to the same principles of publication as the Viability Assessment itself. It is a document that the parties could expect to be confidential. We agree with the Commissioner that its limited circulation in the context of making a planning decision supports an expectation of confidentiality. We therefore find that the information was imparted in circumstances that implied an obligation of confidence. Disclosure of the information must also be unauthorised. We understand that 3 Rivers as well as the Council object to disclosure of the information.

27. **Does the confidentiality protect a legitimate economic interest which would, on the balance of probabilities, be harmed by disclosure?** Information about proposed sales values clearly relates to the ability of 3 Rivers to maximise profit from the development. This is

a legitimate economic interest. The key issue is whether this “would” be harmed by disclosure of the withheld information.

28. The Appellant says that the Commissioner’s decision is based on an argument that disclosure “may” cause harm rather than “would” cause harm. The Appellant is right that this is not the correct test. The Commissioner says that it is plain from content of sales information that disclosure would negatively impact on bargaining position and capacity to maximise profit. We have made our own assessment of whether disclosure would cause harm, based on the information in the open bundle and the written submissions from the Council.

29. The main part of the withheld information is sales valuations provided by 3 Rivers for the nine plots in the development, different sales values proposed in the independent report, and discussion of these sales values. We find that disclosure of this information at the time of the Request would, on the balance of probabilities, harm the bargaining position of 3 Rivers and so harm their ability to maximise profit. The information shows specific valuations by 3 Rivers and valuations from the independent report. Before the plots had been sold, this information would be compared and used by prospective buyers to negotiate a reduction in price. The Appellant argues that there have been considerable variations in property values since the Development Viability Review was published. It was more than two years between the date of this document and the Request. However, because property values have fluctuated during this time rather than simply increasing, the withheld information could still be used by buyers to improve their bargaining position. As acknowledged by the Council in their witness statement, this would no longer apply to the same extent once all the plots in the development had been sold, as these actual sales prices would then be public knowledge. At the time of the Request, however, the properties had not all been sold.

30. There are some items of withheld information that do not have the potential to cause this harm. The Council has redacted the entirety of the tables which contain the valuations. Some of this information should not have been redacted as it would not affect the Council’s bargaining position and/or was already in the public domain at the time of the Request. This applies to the column headings in each table, and the content in the first two columns (which give the plot number and the number of bedrooms). The remaining information would cause the harm.

31. ***Would the disclosure of the information adversely affect the confidentiality?*** We find that it would. The confidentiality protects 3 Rivers’ bargaining position, and disclosure of the sales valuations in the Development Viability Review would adversely affect this confidentiality.

32. **If so, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?** Having considered this carefully, we find that the public interest in maintaining the exception does outweigh the public interest in disclosure.

33. The Appellant makes various points about why disclosure is in the public interest, which we have taken into account. He explains that there were originally due to be 10 affordable homes as part of the development, and now there are none. He says that it negates the purpose of the assessment (to check on avoidance of the affordable housing contribution) if crucial information is removed. This information was used by the planning committee in determining the planning application, and the Council must be seen as ensuring the developer doesn’t try to avoid their obligations. It was important to have the information at the time so that the public can still influence the planning process. We accept that there is considerable public interest in

the issue of affordable housing and ensuring that developers comply with their obligations. This is reflected by the requirements for publication of Viability Assessments that are provided in support of planning applications. As noted above, the Development Viability Review is a different document for a different purpose. Nevertheless, there is public interest in the content of this document as it helps to understand how the planning application was dealt with and the final position in relation to affordable housing.

34. The Commissioner says that public interest in upholding the exception is strong due to the impact on the public purse (as 3 Rivers is owned by the Council), and the harm caused by disclosure would damage their future ability to provide housing. We accept that there is a strong public interest in avoiding harm to the public purse and to provision of future housing.

35. The key issue for the Tribunal is how far the information that has already been disclosed goes towards meeting the public interests in disclosure. The Council's position in written submissions is that they have disclosed most of the information already, the sales information will provide no tangible extra benefit, and the information will be released once the properties are sold. The Council says, "*This assessment can be fully understood without the specific proposed property prices. Which to disclose would provide no tangible benefit to the appellant while being detrimental to Three Rivers Development's finances*". We have considered the information that has already been disclosed, along with the additional information that we have found should be disclosed (the total valuation from the 3 Rivers viability assessment and some information from the redacted tables). We note that the disclosed information makes clear the conclusions of the Development Viability Review, including the summary assessment that the proposed sales values are significantly higher than the available market evidence (see paragraph 3.4 of the document). This goes a considerable way towards satisfying the public interest. There is some further public interest in seeing the specific valuations themselves, so that they can be compared. However, this is outweighed by the strong public interest in avoiding the harm that would be caused by disclosure.

36. We therefore find that the Council was entitled to rely on regulation 12(5)(e) EIR to withhold some of the information requested by the Appellant, but the exception does not apply to all of the withheld information. The information that is not covered by the exception is:

- a. From the table in paragraph 4.2, all of the column headings, the content in the first two columns, and the total value shown in the bottom right of the table.
- b. From the table in paragraph 4.7, all of the column headings and the content in the first two columns.

37. We uphold the appeal in part and issue the Substituted Decision Notice set out at the start of this decision.

Signed: Judge Hazel Oliver

Date: 16 June 2024