



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

Appeal No: EA/2014/0010

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50511070
Dated: 8 January 2014**

Appellant: Richard Naylor

Respondent: The Information Commissioner

Heard at: Fox Court, London

Date of Hearing: 22 May 2014

Before

Chris Hughes

Judge

and

Mike Jones and Narendra Makanji

Tribunal Members

Date of Decision: 30 June 2014

Attendances:

For the Appellant: in person

For the Respondent: did not attend

Subject matter:

Freedom of Information Act 2000

Environmental Information Regulations 2004

REASONS FOR DECISION

Introduction

1. This request for information arises out of a proposed development by Tesco Stores Ltd in the area of Tendring District Council on a site close to other potential developments. In October 2012 the Council granted planning permission subject to conditions. On 14 June 2013 the Council Cabinet considered the disposal of land to Tesco in order to facilitate the broader development of that area including facilitating Tesco's part of the overall development. The Cabinet was informed that existing site access was unsuitable and that revision of the access arrangements to the site would be necessary for the proposed retail development and future development of the later phases of the broader development of the area. The Cabinet resolved to dispose of the land subject to:-

“Terms for the disposal of the land to the developer, including provisions to safeguard future access, have been negotiated and further details on the nature of the terms are included in the report in part B of this agenda.”

2. While the first part of the Cabinet report was made publicly available the part B report was not relying on provisions of the Local Government Act 1972 with respect to maintaining the confidentiality of the proceedings of local authorities.
3. The Appellant in these proceedings (Mr Naylor) sought disclosure of information:-
please could you, as a request under the Freedom of Information Act 2000, disclose headline details of the proposed transfer of land off Kirby Road, Walton on the Naze to Tesco and/or others?
4. The Council resisted the application on the basis that the issue remained subject to contract, that there were a number of different interests involved, the details of the contract had to be fully worked through and disclosure would lead to adverse consequences.
5. Mr Naylor complained to the Respondent in these proceedings (the Commissioner). The Commissioner concluded that the Council was wrong to handle the application under FOIA and that it should have been resolved under EIR. The Council confirmed

that it would rely on regulation 12(5)(d) and (e) - material in the course of completion and the confidentiality of commercial information.

6. The Commissioner considered the case under 12(5)(e). He found that the information was commercial in nature - confidentiality was provided by law. The confidentiality was protecting a legitimate economic interest and that confidentiality would be adversely affected by the disclosure. He then weighed the public interest and noted that there was a public interest in the transparency of the sale of public assets. Against this he weighed the public interest of maintaining the exception and found that there was a strong interest in maintaining the confidentiality of information which reveals a party's bargaining position during negotiations. The disclosure of information before negotiations concluded and the parties are bound would damage trust in the negotiations. Details of the sale would be disclosed by registration of the sale at the Land Registry. He concluded that disclosure at this stage in the negotiations, in addition to having a negative impact on the Council's bargaining position, would only serve to reveal terms and conditions at an intermediate stage while they were still subject to negotiation. Accordingly the information "would not provide a complete or accurate picture of the transaction".
7. The Commissioner made his decision on the basis of circumstances at the time the request was received. While recognising the value of providing the public with information so that it can have a better understanding of decisions which affect the area and the environment he concluded that the requested information was not necessary in order to understand the central aspect of this sale, the impact on the environment and the benefits of the proposed sale. He therefore concluded that there was not sufficient interest in disclosing the information which would justify the damage which disclosure would do to the process of the negotiation which it illuminates. He therefore concluded that the balance of public interest lay in maintaining the exception.

The appeal to the Tribunal

8. Mr Naylor appealed against this decision and the Commissioner maintained his position as set out in the decision notice.
9. Mr Naylor argued that:-

- the information was not of a commercial nature,
 - the confidentiality was not protecting a legitimate economic interest,
 - disclosure of the information would not adversely affect the confidentiality.
10. He therefore considered there was no need to bring into account the question of public interest because the exception was not engaged. He argued that there was no evidence to indicate that disclosure would damage the legitimate economic interests that disclosure was intended to protect. He stated that “*absence of evidence ... therefore means that this conclusion does not hold.*” He submitted that the Commissioners arguments were “*conjectural and not factually based.*”

The questions for the Tribunal

11. The over-arching question for the Tribunal is whether the Commissioner’s decision is correct in law in the light of the relevant facts. This in turn divides into two questions – is the exception under 12(5)(e) engaged; if so, where does the balance of public interest lie?

The applicability of regulation 12(5)(e)

12. Mr Naylor has argued that this information is not commercial in nature. The term commercial is undefined in the Regulations and has its normal meaning. The Commissioner in his published guidance has suggested:-

The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

13. Mr Naylor adopted this approach and on that basis argued that the information was not commercial. However the Commissioner’s “definition” is (the Tribunal trusts) meant to be illustrative –he cannot restrict the meaning beyond the normal range of meanings of the word within the context in which it occurs. The Oxford English Dictionary provides a large number of partial definitions from the observed use of the word including “viewed as a mere matter of business” and “with a view to profit”. The Council in its submission to the Commissioner (bundle pages 96-97) stated “*the council is intending to dispose of land, which involves commercial negotiation with the parties to ensure the best price consideration is obtained*”. The Council further drew attention to S123 of the Local Government Act which prevents Councils from

disposing of land for a consideration less than that which can be reasonably obtained. It is a misunderstanding of the English language to understand the approach which the Council adopted, and was required by law to adopt – of getting the best price for the land, as anything other than “commercial”. Information about the proposed transaction is commercial information.

14. This information is protected by the law of confidence (as was accepted by Mr Naylor in his notice of appeal).
15. In considering whether the confidentiality protected a legitimate interest which would be prejudiced by disclosure Mr Naylor took issue with the Commissioner’s observation that the Council was in a strong position with respect to the transaction. Mr Naylor disputed this. The position at the time of the request was that neither party was committed to this land sale. It was still in the process of negotiation. The Council could therefore, if it wished, not proceed with the disposal. It is clear that until disposal the Council had significant strengths in its negotiating position. At all times between the request for the information and the Commissioner’s decision notice the Council and the proposed purchaser were not irrevocably committed to the transaction. The Council informed the Commissioner on 13 December:-

“therefore the remaining heads of terms [price; rights reserved; covenants; options] are being withheld as the negotiation has at times been intense and until the sale is completed, there is a high risk that the sale of the land could fall through. If the information was disclosed, it is highly likely that the purchaser despite negotiating subject to contract with the Council and requesting the information to be kept confidential could walk away from the sale ...

... Whilst the negotiations remain Subject to Contract the parties are acting in confidence that the terms will remain confidential until the purchase is completed. This is standard business practice ...

... If the term is currently being negotiated were disclosed the interests of the Council would be prejudiced in that:

(i) the third party would withdraw from the transaction

...or

(ii) Seek to reduce the price being sought...”

16. While Mr Naylor has argued that this does not amount to hard evidence, the reality of the position is that hard evidence is unlikely to exist in a case such as this. The Council undoubtedly has a legitimate economic interest in securing the best price. The law of confidentiality protect the interests of both parties in a negotiation such as this. If material is disclosed out with the normal commercial practices it is entirely foreseeable that it will cause difficulty in the negotiations and conceivably could cause them to break down or place the Council at some disadvantage in continuing them. The Tribunal is entirely satisfied that the exception to the duty to disclose provided by regulation 12(5)(e) is engaged.

17. The Tribunal noted that at paragraph 39 the Commissioner stated:-

“the Council confirmed that it consulted with the third party about the request to disclose the information and, whilst it did not provide consent to disclosure, it did not provide any evidence of any harm of its own interests.”

18. This is a significant error. The communication from the Council in which it set out its reasoning explicitly stated:-

“the third party has also requested that the information is kept confidential but has not supplied reasons.”

19. There is a substantial difference in meaning between requesting that information is kept confidential and not providing consent to disclose. It is clear that, while the other party to the negotiations did not put forward evidence, it valued the confidentiality and did not consider that there should be disclosure. It is likely that, since it was in a commercial negotiation with the Council, it recognised the Council would ensure (as it had by placing the material on the part B agenda) that confidentiality would continue to be protected and the Council would take steps to ensure that this was so.

Weighing the Public Interest

20. The Tribunal also considered the extent to which the public interest could favour disclosure in this case. The Tribunal noted the clear and, in its view, probable description of the consequences of disclosure of the information on the negotiations and the stance of the other party. The public benefits of disclosure of this information

before the disclosure which would arise from registration of the sale with the Land Registry seemed to the Tribunal of little weight when compared with the harm.

Conclusion and remedy

21. The Tribunal has therefore concluded that the Commissioner had correctly applied the exception to disclosure and appropriately weighed the public interest. The appeal is dismissed.

22. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 30 June 2014