



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

EA/2013/0191

B E T W E E N:-

ALUN HUGHES

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Tribunal

**Brian Kennedy QC
Paul Taylor
Henry Fitzhugh**

Hearing: Civil Courts, Vernon Street, Liverpool on Tuesday the 21st January 2014.

Subject matter: Appeal under Section 57 of the Freedom of Information Act 2000 and Regulation 12 (5) of the Environmental Information Regulations 2004 generally and specifically whether exemption engaged and Public Interest test balance properly applied.

DECISION OF THE FIRST-TIER TRIBUNAL:

The Tribunal grants the appeal in part directing disclosure of the disputed information with appropriate redaction.

REASONS

Introduction

1. The Appellant appeals under section 57 of the Freedom of Information Act 2000 (“the Act”), as incorporated by regulation 18 of the Environmental Information Regulations 2004 (“the Regulations”), against the Commissioner’s decision notice dated 5 August 2013 with the reference number FER0488228.

Background

2. Playing fields exist at Ingleborough Road in Birkenhead, Merseyside (“the playing fields”). The pavilion on the site was built in memory of 88 Old Boys of the Birkenhead Institute School who fell in the First World War.
3. Tranmere Rovers Football Club (“TRFC”) has owned the playing fields since 1994. However, in recent years, TRFC was of the view that the playing fields were no longer meeting its needs. TRFC therefore sought planning permission to build on the playing fields.
4. At the same time, TRFC also submitted an additional planning application to redevelop Woodchurch Leisure Centre on Carr Bridge Road.
5. On 25 October 2012, Wirral Metropolitan Borough Council (“the Council”) granted outline approval for the two applications. Full approval is subject to planning conditions and the requirement for a s106 legal agreement.

The Request

6. On 5 November 2012, the Appellant requested the following information from the Council:

“I would like to have your responses please to the following 2 questions relating to [name redacted] – Principal Planning

*Officer within the Authority's Department of Regeneration,
Housing & Planning*

- 1. What hospitality has the above Officer (and his line manager) declared as having been received by them within the last 5 years and from whom?*
- 2. In his report to the Planning Committee on 25 October 2012 in respect of Planning Application reference OUT/12/00824, [name redacted] wrote the following on page 11, 6th paragraph,*

“a viability assessment has been submitted by the applicant, which has been independently assessed on behalf of the Council”.

My request is, to know who the independent party that is referred to was and to see a copy of that advice”.

- 7. On 6 December 2012, the Council advised that it did not hold any information in response to the first limb of the request because neither individual had declared any hospitality in the last five years.*
- 8. In response to the second limb of the request, the Council confirmed that Kinneer Miller Associates had carried out the independent assessment (“the Report”) of the viability assessment. The Council provided the conclusions and significant findings of the Report. The Council also reproduced the full paragraph from which the reference to the independent assessment of the viability assessment was referenced and which prompted part two of the Appellant’s request. This says:*

“...In this instance, a viability assessment has been submitted by the applicant which has been independently assessed on behalf of the Council. The independent review of the assessment has confirmed that, based on a land acquisition value identified by the applicant for the Ingleborough site of £5m, the residual appraisals preclude the inclusion of any affordable housing units.

The applicant has outlined that it is proposed to use a proportion of the funds realised from the sale of Ingleborough to reduce Tranmere Rover’s debts (in addition to the delivery of replacement facilities at Carr Bridge Road)...

...In summary, the viability assessment undertaken is considered to demonstrate that the development would not be viable should a requirement be imposed for affordable housing. That said, Members will be mindful that land acquisition values vary over time and as such it will be necessary to include a mechanism within a s106 Legal Agreement to secure a contribution to affordable housing, should the value rise significantly above that currently indicated and having regard to an up-to-date assessment of the viability of the site”

9. However, the Council advised that the remaining information in the Report was exempt from disclosure by virtue of section 43 of FOIA.
10. On 10 December 2012, the Appellant sought an internal review of the Council’s decision. The Appellant argued that the withheld information could not be commercially sensitive as Kinnear Miller was commenting on information in the planning application which was already in the public domain.
11. The Appellant contacted the Commissioner to complain that he had not received a response to his request for an internal review. The

Commissioner asked the Council to provide the Appellant with an internal review of its initial refusal.

12. On 20 February 2013, the Council provided the Appellant with the outcome of its internal review. Firstly, it advised that it should have considered the requests under the Regulations. Secondly, it advised that it was citing regulation 12(4)(a) in relation to the first request and regulation 12(5)(e) in relation to the second request.
13. On 1 March 2013, the Appellant complained to the Commissioner.

The Legal Framework

14. Under regulation 5(1) of the Regulations, a public authority is required to make environmental information available on request.
15. However, a public authority may refuse to disclose environmental information under regulation 12(1) if (a) an exception to disclosure as set out at regulations 12(4) and/or 12(5) applies and (b) if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
16. The relevant exception in this case is regulation 12(5)(e) which provides:

“...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(a) – (d) ...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.

The Decision Notice

17. The Commissioner issued a decision notice on 5 August 2013, the subject of this appeal.
18. The Commissioner found that regulation 12(5)(e) was engaged. Further, the Commissioner went onto find that the public interest test favoured maintaining the exception.
19. This appeal addresses the balance of the public interest test as applied.

Summary of the Appellant's Grounds of Appeal & the Commissioner's Response

20. The Tribunal accept that the Commissioner has to consider the circumstances as they existed at the time of the request or by the time for statutory compliance with that request at the latest. Thus, the Commissioner has to consider the circumstances as they existed in this case in November 2012. Accordingly, any disputed information which can be said to be in the public domain by virtue of the Asset Management Report of 14 March 2013 cannot be taken into account for the purposes of reaching a decision on the appropriateness of the application of regulation 12(5)(e) at the time of the request.
21. In relation to the Planning Committee meeting of 25 October 2012; the Commissioner has correctly noted that the Appellant is in possession of and has provided a copy of the relevant report submitted to the Committee as Annex A to his Ground of Appeal. The Tribunal agree that the relevant minutes of that meeting are also publically available and that these were available at the time of the Appellant's request. The Tribunal further accepts that the information contained in the Report is not reproduced in these publically available documents and thus maintains its confidentiality for regulation 12(5)(e) purposes.

22. The Commissioner properly acknowledged that the Appellant has been provided with a copy of the Report's Conclusions and Significant Findings as well as a copy of the email from Kevin Adderley (Interim Director of Corporate Services at the Council) to Mr M Paddock (of the Paddock Johnson Partnership) dated 28 September 2011 referred to therein and that the Report also contained a copy of the Valuation Report undertaken by Mr Michael Honeybourne dated 1 July 2011. It has been accepted by the Commissioner that this was then currently available on the Council's website and it appears from the document title that it was added on 1st June 2012 at 15:59. The Appellant was also in possession of the same as he included a copy at Annex D to his Notice of Appeal.
23. As such, the Commissioner accepted that this information could not be said to have the necessary quality of confidence and thus the exception was not engaged in respect of these documents. However, the Commissioner maintained that the remainder of the Report is not in the public domain and as such it retains the necessary quality of confidence. Thus, the Commissioner says that it was open and reasonable for him to find that regulation 12(5)(e) was engaged in respect of the remainder of the Report. This was not a significant dispute at the hearing before this Tribunal.
24. The Appellant says:
- “...The only other possible explanation for reluctance of Wirral to release the information could be that Kinnear Associates were subsequently told to downgrade the estimate of the works at Woodchurch from £5m to approx. £2.5m thus allowing for TRFC to make multi-million pound profit from the sale to reduce its debts. ...If the profit that it is planned TRFC should make is the only financial figure which might thus be considered commercially sensitive, it does not justify the non-disclosure of the vast majority of the report...”*

25. The Commissioner disputes that the only information which may be considered to be commercially sensitive is any reference to TRFC's potential profit. Instead, the Commissioner maintains his position as set out at §19DN. However in the course of this appeal hearing, the Appellant has persuaded the Tribunal that what has been described as "*TRFC's own viability assessment*" was either in the public domain as part of the planning application or was an additional document. We further accept his detailed argument that in either event the public interest in disclosure is greater.

26. The Commissioner argues;

"...The report relates to on-going contractual negotiations between the public authority and TRFC. It is a detailed appraisal of the value of the site at Ingleborough Road and therefore linked to negotiations regarding the proposed section 106 agreement. The report is based on TRFC's own viability assessment (which as far as the Commissioner understands had not been made public) of the site. The information relates to a potential agreement likely to affect the commercial interests of both parties and therefore possesses the necessary quality of confidence...."

27. The appellant argues that this is incorrect. He maintains there are no planning conditions attached to the resultant planning permission granted in respect of Ingleborough Road by Wirral Council, which link to land values at Ingleborough Road. He also points out that the only reference to a section 106 agreement contained in condition 19 makes it clear that such negotiations as this may throw up, are limited only to the provision of replacement playing fields at Carr Bridge Road and the timescales/delivery of same, not whether any subsequent increase in value of the land would justify an element of affordable housing being required at the Ingleborough Road site. On hearing the appellant on the detail of the background the

Tribunal accept that in this case the public interest in disclosure outweighs the withholding of the disputed information.

28. The Appellant argues that the Commissioner has operated under the erroneous working assumption that the Appellant is confusing information contained in the Planning Report of 25 October 2012 with information in the Asset Management Report of 14 March 2013. This, the Appellant argues, meant the Commissioner erroneously limited his consideration of any public interest in disclosure of the Report to the public interest in disclosure of information concerning the linked development at Carr Bridge Road.

29. Instead, the Appellant says:

“...In fact at the time of my original request and on the basis of the information publically provided at the planning committee meeting, Councillors and the public were being assured by the Planning Officer of the following:

- *Sale of Ingleborough would raise £5m*
- *Replacement facilities at Woodchurch would cost £5m*
- *It was therefore the case that there was no profit to require any element of affordable housing to be provided by the developer, Tranmere Rovers Football Club (TRFC)*
- *An (unspecified) sum for the sale proceeds would however be released to TRFC to reduce its debts.*

It was entirely because this could not be made sense of that I sought to have the document in which the affordable housing situation was considered made public...”

30. The Commissioner says that as the Appellant had put forward particular arguments in respect of the Carr Bridge Road site; it was appropriate for the Commissioner to consider these points in his decision notice.
31. However, the Commissioner says that he has accepted that there is a broad public interest in disclosure of the requested information because it would shed light on the basis on which the Council granted outline planning permission for the two developments in light of the position outlined by the Appellant at §36DN. Disclosure, he suggests would therefore enhance transparency and accountability in relation to a transaction involving public funds and with the potential to have an impact on a significant number of local people.
32. The Commissioner also accepts that there is a public interest in the disclosure of information which would go to explain why it was agreed that affordable housing was not viable at the time of the request when a Council planning officer had suggested that there was a need for such housing provision.
33. However, the Commissioner considers that there is also a strong public interest in protecting commercially sensitive information, particularly, when high-value negotiations are on-going between the parties as they were at the time of the request in relation to the planning conditions and the section 106 agreement.
34. The Appellant has provided evidence which appears to show that the costs estimate for the works at Carr Bridge Road was around £5 million in July 2011 (see RMT estimate provided at Annex E to his Grounds of Appeal).
35. The Appellant has also provided evidence (Annex F to his Grounds of Appeal) which appears to suggest that the costs of the work at Carr Bridge Road were estimated, in October 2012, to be £2.5 million. However, he asks;

“...The questions remains why therefore Kinnear Miller was sent a RMT feasibility cost breakdown for Woodchurch showing an anticipated spend of £5m there, if this was not the case and were asked [sic] to take this into account in

considering the viability of providing affordable housing element at Ingleborough Road?

In this context the comments of the Commissioner at Para 35 “The independent assessment was only with regards to the viability of affordable housing in the Ingleborough site” and the related comment at Para 41 “The independent report did not consider the viability of the proposed works at Woodchurch” are true only as far as they go. The cost of Woodchurch was a significant factor in determining whether affordable housing should be allowed to be avoided...”

36. The Appellant goes on to comment:

“...There is substantial circumstantial evidence to suggest that the supposed justification for [the] non provision [of affordable housing] contained in the Kinnear Miller Associates report was not appropriate or accurate evidence to support the non-provision of affordable housing on Ingleborough site in the following 2012 resubmissions by TRFC.

If this is correct it would be expected to lead to the conclusion that the planning decision taken by Councillors in October 2012 in respect of Ingleborough Road was based on an inaccurate (and some might think dishonest) recommendation for approval by the Planning Officer. As Councillors may have been potentially misled, this could have led to a flawed decision and one that deserves further investigation by the Local Government Ombudsman ...”

37. The Commissioner has acknowledged that there is likely to be a public interest in the disclosure of any information which would go to explain the

apparent discrepancy between the figures for the Carr Bridge Road development.

38. However, the Commissioner stands by the points set out at §35 and 41DN, namely, that the independent assessment of the viability assessment (the withheld information in this case) concluded that affordable housing was not viable at the Ingleborough site based on the amount of monies estimated to be raised by the sale of the land. It did not specifically consider the costs of or make recommendations on the feasibility of the development.

39. This the Commissioner argues is important because he has to consider whether or not the disclosure of the withheld information will go to meet any of the identified public interest factors in favour of disclosure.

40. The Commissioner will say that as the disclosure of the requested information would not go to explain the apparent discrepancy between the figures for the Carr Bridge Road development; then this argument does not add any further weight to the public interest factors in favour of disclosure.

41. The Appellant, at the hearing gave evidence in support of his contention that the Commissioner was wrong in his application of the Public Interest test being in favour of non disclosure of the withheld or disputed information. The arguments he developed are set out in page 160 – 163 of the hearing Bundle. Suffice to say on hearing these arguments, the tribunal were unanimously persuaded that the Appellant is correct that the Public Interest in the particular circumstances of this case lie in disclosure.

42. The following points made in submissions and expanded on presentation by the Appellant at hearing, in particular, have persuaded the Tribunal unanimously to allow this appeal:

Reasons:

43. The Appellant argues with some merit that the Commissioner has made incorrect assumptions about the basis of his interest in securing sight of the Kinner Miller Associates report leading to an incorrect conclusion. He argues

he was interested in an explanation why no affordable housing element was required when it appeared that TRFC would make sufficient profit to enable it to apparently reduce its debts. This we accept is a matter of significant public interest beyond the Appellant's own curiosity.

44. Information recently to hand indicated that the Commissioning of the report from Kinnear Miller Associates from Matthew Rushton was based solely on two documents already referred to and already in the public domain, namely a valuation report associated with planning application 11/00897 and a cost estimate associated with 11/00896 (this reference may be seen at Page 55 of the bundle).

45. The proposition placed before Kinnear Miller Associates by Matthew Rushton states quite clearly TRFC's argument that, "*...affordable housing cannot be provided within the Ingleborough Road site because **all** of the capital released would be required to be invested in the replacement sports facilities*". Again, the Tribunal accept that this is a matter of significant weight in the argument of public interest being in favour of disclosure.

46. The Commissioner states that the Kinnear Miller Report is only a detailed evaluation of the value of Ingleborough Road and not of the feasibility of Carr Bridge Road yet, it is clear that the actual cost of the work at Carr Bridge Road in its entirety must be an element in considering the feasibility of affordable housing at Ingleborough Road. It is clear also that publically available information submitted in support of the Carr Bridge Road planning application indicated a works cost of £5m whilst it is now clear that the Council knew that the scope & cost of the work at Carr Bridge Road had been reduced to £2.5m (email 4.10.12) and although this was known by Officers prior to the Planning Committee on 25 October, Councillors were misled into believing the cost was £5m without this change being made known to them. This is a matter we accept should be fully and properly considered in the balancing exercise of the public interest test and which we find on hearing the oral submissions of the Appellant to be in favour of disclosure.

47. The Appellant argues that the Commissioner was appearing to suggest that Kinnear Miller Associates received “TRFC’s own viability assessment” which was different to that referred to the Planning Committee. He argues that this considered alongside the failure to report altered costings in respect of the Carr Bridge Road proposals might amount to potential maladministration which they indicated was important and that they should have considered. The Appellant also pointed out reasons why there is no linkage between the Kinnear Miller report and Section 106 negotiations which undermines their non-disclosure argument further. In response to a further FOI request by the Appellant, he asserts the Council confirmed that the two publically available documents referred to in the commissioning letter to Kinnear Miller Associates (namely the Honeybourne Kenny & Partners valuation report and the cost estimate of £5m supplied by RMT) are the **only** documents supplied directly by the Council to the firm for consideration.

48. The Appellant argues that if further viability studies have been provided it must therefore be concluded that direct discussions must have taken place between the Club, its representatives and Kinnear Miller Associates with new information being supplied missing out Council Officers. This, he argues appears irregular if not unprofessional and, he argues, throws into question the competence of the Council Officers at the very least. The Appellant argues that it is now apparent that much manipulation of the figures has been going on such that the information and recommendation to Members of the Planning Committee cannot be relied upon. This is explained further and articulated in the summary of the Appellant’s reply to the response by the Commissioner.

49. The Appellant attests that his interest in this matter is not gratuitous. His concern is that it appears that important and relevant matters of detail are being hidden from elected Councillors who will have been impaired in their judgement as a result. The Appellant asks the Tribunal to make the report and associated documents available to scrutiny by the public so that any apparent decision to disadvantage the inhabitants of the Borough through the loss of important affordable housing provision whilst allowing a private company to

make a potentially multi million pound profit, may be properly discussed in the open and if necessary allow the full facts to be reported back to elected officials.

50. **Conclusion:** The Tribunal accepts that the Commissioner did not have the benefit of hearing the Appellant at this appeal and direct a substituted decision that the withheld information be disclosed subject to any request for redaction of names where appropriate.

Brian Kennedy QC

10th March 2014.