



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2014/0280**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice

Dated 9th September 2014

BETWEEN

Mr Christopher Waltho

Appellant

And

The Information Commissioner

Respondent

Determined at an oral hearing at Leicester Magistrates Court on 23rd February 2015

The Appellant attended and represented himself

The Commissioner chose not to be represented.

Date of Decision 16th June 2015

BEFORE

Fiona Henderson (Judge)

Anne Chafer

And

Henry Fitzhugh

Subject matter: reg12(5)(e) EIRs prejudice to confidentiality commercial interests

*Bristol City Council v Information Commissioner and Portland and Brunswick Squares
Association EA/2010/0012*

Perry, R (on the application of) v London Borough of Hackney and Others (2014) EWCA Civ 1372

Elmbridge Borough Council v Information Commissioner and Gladedale Group Limited EA/2010/0106

Decision: The Appeal is Allowed in part and the withheld material redacted as set out in Confidential Schedule 1 should be disclosed within 35 days.

The Decision Notice is hereby substituted to reflect the reasoning in this decision and to order disclosure of the specified withheld material as per confidential schedule 1.

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice dated 13th October 2014 which held that North West Leicestershire District Council (the Council) correctly applied regulation 12(5)(e) of the EIR to withhold the information for this request.

Background

2. Cameron Homes Ltd (the Developer) applied for planning permission to develop a site in Church Lane, Ravenstone, Leicestershire to build 27 homes. The plot was made up of a paddock, disused parts of 3 residential gardens and an old school building. The site was owned by a mixture of private individuals, a charity and the local authority and included a ransom strip owned by the Charity which secured access to the highway.
3. The Developer's first planning application was submitted with a viability assessment in which they indicated that the development would not be viable if they were required to pay more than £55,000 towards the s106 costs of social infrastructure. This was only 10.7% of the amount the Council indicated would be required for the development intended. The s106 amount had been calculated in relation to the first application as £514,098 (including an affordable housing contribution of £360,000 in

lieu of on site provision)¹. The Councils Housing Strategy states that developers are required to provide affordable housing in accordance with its 2011 supplementary planning document (SPD). Instead of designating some of the housing on site as affordable, a sum was requested to enable affordable housing to be provided elsewhere off site.

4. The Council had the viability assessment independently reviewed by the District Valuer's Service (DVS) who asked for further information relating to the Conservation Area costs, detailed scheme of foundation design and took into consideration that the Conservation Officer was specifying an upgrade to plain clay roof tiles. In consequence of which the DVS was satisfied regarding the viability assessment. The Planning Committee was not provided with a copy of the viability assessment but relied upon a report by the case officer which recommended approving the application, concluding *"I believe therefore that the development would not be viable if [the Developer] had to increase the £55,000 offered in respect of Affordable Housing and s106 costs"*².
5. Planning permission was refused by the planning committee on 7th January 2014 because the application failed to make appropriate s106 contributions and therefore represented an unsustainable form of development. The Developer re-submitted its application for the identical scheme with no addendum or revised viability assessment 3 weeks later on 23rd January 2014 with an offer to pay substantially enhanced s106 developer contributions of £202,364.18³. The DVS was not asked to comment upon the revised offer. The planning application was then passed in April 2014.

Information Request

6. The Appellant wrote to the Council on 30th January 2014 asking for a copy of the viability appraisal provided to the Planning Authority by the Developer of the Ravenstone development and the District Valuer's report/assessment, commissioned by the Authority, in connection with that appraisal. In the event that the Council

¹ This was increased to £577,364 by the date of the April 2014 consideration as figures for a Parish contribution were now included and the Education contribution had been increased p 79 OB

² P54 OB

³ This covered all the contributions requested apart from the Parish Contribution and the Affordable housing contribution.

were unable to supply copies as requested, the Appellant itemised 9 specific elements that he sought.

7. The Council refused the request under s43 FOIA (commercial sensitivity) on 3rd February 2014 which they amended to reliance upon reg12(5)(e) EIRs⁴ during the internal review of their original decision. The internal review decision was upheld on appeal to the Chief Executive of the Council on 27th March 2014.

Complaint to the Commissioner

8. The Appellant complained to the Commissioner on 1st May 2014 who conducted an investigation. The Council provided a copy of the viability assessment to the Commissioner during the investigation and the Commissioner upheld the refusal of the request under reg 12(5)(e) EIRs.
9. The Commissioner did not see a copy of the DVS report during the currency of his investigation. On this basis we are satisfied that the Commissioner's investigation was flawed. Never having seen the report the Commissioner did not know how detailed it was, how many figures were provided and therefore whether (contrary to the Council's assertion) the report could in fact be disclosed in redacted format. Additionally the specific information requested was not all numeric. If the Council was unable to provide a copy of the report the request asked instead for:

*“ a summary of the District Valuer's remarks in relation to the viability assessment. Please say whether there are any aspects of it with which the District Valuer does not agree ”*⁵.

10. In the absence of the DVS report the Commissioner was not able to judge whether this information could be provided, additionally he also could not have performed his own balancing test of the public interest as required under the regulations.
11. The Commissioner requested a copy during the preparation of the Appeal and in his response to the Appeal the Commissioner informed the Tribunal that he agrees with

⁴ Prejudice to the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

⁵ Item 9 of the secondary part to the request

the Council's position that there is a substantial overlap between the materials contained within the different documents because the information in the viability appraisal is critiqued in the DVS report. He argues that the DVS report engages regulation 12(5)(e) EIR and that the public interest balance favours maintaining the exception for the same reasons given in the Decision Notice.

The Appeal

12. The Appellant appealed on 3rd November 2014 on the grounds that:

a) The exemption is not engaged as:

i) the Council had failed to demonstrate the requisite "legitimate economic interest".

ii) There is no substantiation of the assertion that disclosure would "significantly damage the Developer's interests", or would "assist its competitors".

b) The balance of the public interest favours disclosure.

13. The Tribunal heard oral submissions from the Appellant and evidence from Mr Clive Underwood (a chartered architect). During the Commissioner's investigation the Developers' views were sought from the Council. We have no direct evidence from them and we are satisfied that they have been made aware of this appeal by the Council and neither they nor the Council have applied to be joined to these proceedings.

14. The Commissioner was not represented at the oral hearing, he relied upon his decision notice and his response to the Appeal. The Tribunal was provided with an open bundle comprising some 245 pages, and a closed bundle comprising the viability assessment and the DVS report. Following the hearing the Tribunal clarified the contents of the closed bundle with the Commissioner and were provided with further pages of the DVS report electronically (as its format had made it difficult to print out in its entirety). The Tribunal is satisfied that it has seen complete copies of both reports.

15. The Tribunal has provided 2 closed annexes, the first of which details the Tribunal's reasoning for disclosing or withholding elements of the withheld material with reference to the withheld material (Closed table 1 this should remain closed) however, the same table has been redacted to detail the Tribunal's reasoning for disclosure with specific reference to the material currently withheld but which the Tribunal orders should be disclosed (Closed table 2). This table can be promulgated with the leave of the Tribunal once the itemised disclosure has been made.

Scope

16. The request was originally refused under FOIA, however at the internal review and before the Commissioner the Appellant relied upon EIRs. There is no dispute between the parties that the EIRs are applicable and we do not consider this further in this decision.
17. The DVS report was not before the Commissioner and is not separately addressed in the Decision Notice. We are satisfied that it is within the scope of the information request and therefore within the scope of the appeal.
18. The second part of the request (namely specified information relation to particular elements of the proposed development) was considered separately by the Council when the matter was before the Commissioner. They maintained that answering all or any of those questions would effectively reveal all of the confidential commercial information contained within the viability assessment⁶. The Commissioner did not address this issue separately in his Decision Notice. The Tribunal is satisfied that the terms of the second part of the request ought to have been given separate consideration as it might have been possible to answer some of them without reference to specific figures⁷. Insofar as we have withheld specific items listed in the separate part of the request they are dealt with in the body of this decision and Closed table 1.

⁶ P420B letter from Council 25.7.14

⁷ e.g. item 9.

19. The Council at one stage relied upon a statutory bar to disclosure of material from DVS (as an agency of HMRC) under s23 of the Commissioners of Revenue and Customs Act 2005. Reg 5(6) EIR disapples any statutory bars on disclosure for Environmental Information. The statutory bar is not relied upon either in the Decision Notice or the Commissioner's reply to the appeal and we are satisfied that this is not a live issue for the Tribunal to determine.
20. The Appellant relies upon the fact that as at July 2014 the case was still marked as "decision pending" on the Council website and raises concerns that the developer may be trying to renegotiate the s106 contribution. The Tribunal is obliged to consider the situation around the date of the request which in this case is around the date of the second application and is satisfied that the progress of the application once it has been granted is not material to the issues before it.

The Evidence

21. Mr Underwood provided his own evaluation of the cost of the scheme⁸ in order to explain to the Tribunal where he believed that figures were either not commercially sensitive or needed to be disclosed in order to provide transparency. Except as stated in the analysis that follows, we accept this evidence. He explained that he valued the land based upon the price of land locally (in relation to plots ready to develop) and the sum that the part of the plot which included the school had been marketed for in 2009. He explained that the schedule of specification was now in the public domain and he had based his build costs on that schedule. We accept his evidence that the fixed costs for smaller dwellings are a greater proportion of the total build cost than they are for larger dwellings (as they still require the same infrastructure e.g gas, water and electricity connection). List prices are readily available and as builders merchants compete the list price often includes quantity discounts. He explained and we accept that there were industry specific norms e.g:
- i) the approximate cost of run of road per meter (including sewers and foot paths);
 - ii) $\frac{3}{4}$ - 1 $\frac{1}{4}$ % of value of sale for Estate Agent Fees.

⁸ P137 OB

iii) Profit margins would expect between 15-28% (a smaller development built quickly has less uncertainty and a developer would expect a lower profit.)

22. Mr Underwood told the Tribunal that the specification indicated that medium quality materials were being used, which would not inflate the build price. Cost of materials can be expected to be lower in NW Leicestershire because of the proximity of materials to the site. Knowing the site he could not understand what was meant by “abnormal foundations” the ground is clay, even if there were additional pile costs there would be consequential savings in concrete. The cost of converting the schoolhouse should be less than building it new, it would be good practice to keep as much as possible as that reduces the costs but in any event it already has sewer, gas and electricity connections which reduce the costs.
23. In assessing the value of the houses he indexed his figures back to August 2013. Anyone can assess what houses go for in the locality (the examples he used were in Ibstock about 3 miles away) he did not include the premium in his estimate; the finished houses could be expected to go for more. It is easy now to make comparisons on prices in locality through sites such as Zoopla – any buyer who knew the original estimated price would be expected to know at the date of sale whether build costs and property values have gone up. A sales price is based not on build cost but on market value based on demand and comparisons within the locality. Buyers who want these houses cannot go anywhere else.
24. Mr Underwood accepted that any arrangement fee and interest on borrowings and how much of the value was borrowed would be of interest to a competitor – although it is likely they would know what kind of rates a competitor would be likely to get. Whilst his view was that the inclusion of a contingency fee and proper assessment of viability should mean that the developer should not be forced into a position of having to sell, often the houses are sold off plan which drives the timetable; the Tribunal was satisfied that as a matter of commercial reality timing, was of significance in demonstrating expected cash flow (and hence any vulnerabilities) and also in providing circumstances where a developer was under pressure to sell quickly which could be expected to impact upon the achievable price. We are also satisfied that any contingency fee is provided to cover all contingencies e.g. unexpected build costs and

could not be expected to provide a sufficient buffer so that timing pressures were entirely neutralised.

25. In assessing the costs and benefits of this scheme Mr Underwood stated that there could be another 8-9 plots from other gardens which would not require further roads. Sensible builder would keep a ransom strip with this in mind.

Whether the exemption is engaged

26. Reg 12 EIRs provides:

(5) ... 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;

It is not in dispute between the parties that the information is commercial and the information is subject to a duty of confidence provided by law. The Appellant argues that the Council had failed to demonstrate the requisite “legitimate economic interest” that needs protection because there is no substantiation of the assertion that disclosure would “significantly damage the Developer’s interests”, or would “assist its competitors”.

27. The Appellant relied upon *Elmbridge Borough Council v Information Commissioner and Gladedale Group Limited EA/2010/0106* to support his contention that there is insufficient evidence of the need to protect a legitimate economic interest for the information to be confidential and thus the exemption to be engaged. In that case the Tribunal noted that the “*information made available to the respondent amounts to assertions and speculation by the interested parties. There is a notable absence of independent or objective evidence to support the assertions or speculation put before the [Commissioner]*”. The Appellant argues that this is equivalent to the Council’s assertion that “*the developer will have an ongoing economic interest in the disposals of property at the development and the success of the development as a whole*” and

disclosure “*may detrimentally affect their negotiating position in such disposals and accordingly the viability of the development as a whole*”.⁹

28. The Appellant relies upon the use of the words “would adversely affect” to argue it is not enough that some harm “might” or “could” be caused by disclosure. In assessing whether the exemption is engaged we also take into consideration the Aarhus convention which provides that when determining harm “...*also implies that the exception may be invoked only if disclosure would significantly damage the interest in question.*”
29. This Tribunal is not bound by the decision in Elmbridge and observes that in some cases the economic interest that needs protecting may be obvious from the nature of the withheld material and the uses to which it can be expected to be put. Whilst the evidence put forward by the Council (and through them the developer) is limited, the Tribunal is entitled to draw inferences from all the material before it (including the closed material) and to subject the evidence submitted by the Appellant to critical scrutiny in assessing both this element and the public interest. We must be satisfied that the adverse effect would be caused by disclosure on a balance of probabilities, which is still less than a certainty.
30. We are satisfied that the reason that the withheld material was subject to confidentiality at law was because there were reasonable grounds for saying its release would damage the Council’s and the developers’ economic interests¹⁰. In so doing we are satisfied that as we are entitled to consider the documents as a whole the fact that some of the material might already repeat information in the public domain or reference figures that had low economic sensitivity as argued by the Appellant does not detract from our conclusion. The withheld material can be expected to contain the assumed and actual figures, percentages, methods, scheme structures including finance and timing of the developers proposal and the basis for those figures including justification/analysis. We are satisfied that there is commercial sensitivity in knowing

⁹ P39 OB letter from Council 27.3.14

¹⁰ The Commissioner relies upon Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association EA/2010/0012 in support of this point.

the whole picture, the way that the scheme is planned and structured, even the amount of detail provided will provide some insight into the robustness of the developer's proposal as well as the individual figures giving an insight into the developer's expectations, bargaining power, financial viability and the effort and expense that they are prepared to expend upon the scheme. The exemption is therefore engaged.

The Public interest test

31. Regulation 12(5)(e) is subject to the public interest test pursuant to reg 12(1)(b) EIRs.¹¹

In favour of disclosure

32. We take into consideration the general presumption of disclosure as set out in reg 12(2) EIRs¹². Additionally we accept that the development is a significant scheme within a village setting and has prompted public interest with the potential to prompt further interest and comment from the residents during the ongoing planning process. It is acknowledged to be "*considered to be of some importance locally*"¹³

33. The Appellant argues that:

i) disclosure would provide scrutiny and transparency in relation to the credibility of the planning process in issue as the Case Officer's recommendation was to approve the application (despite offering only 10.7% of the requisite s106 monies towards social infrastructure in initial application).

¹¹ 12.—(1) ... (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information

¹² A public authority shall apply a presumption in favour of disclosure

¹³ P55 OB Development Control Report 7.1.14

ii) There was no explanation for the ability to increase s106 payments, this calls into question the legitimacy of the DVS assessment (and impacts on the future course as to whether this service should be the appropriate method of evaluating developer contributions).

iii) The ability to increase the s106 contribution by such a substantial amount (rather than going to appeal which if successful would be much less expensive) is argued to demonstrate that the Developer did not believe that their viability assessment was sufficiently robust to stand up to scrutiny.

iv) No explanation has been made as to why if no more than £55,000 could be paid, the Developer is able to increase the offer so substantially.

v) No consideration was given (in the absence of reasons for the increase) whether in fact a greater increase could have been sought and obtained.

vi) In the absence of adequate s106 payments the development will be funded by the tax payer who ought to be given the opportunity to challenge fully whether this is necessary.

33. The Appellant argues that it is in the public interest that the public understand why it is not possible to provide affordable housing, when what are publicly understood to be comparable schemes in the area have been developed with full developer contributions; lack of a rigorous scrutiny of this bid has led to unfair competitor advantage for the developer in this case.

34. The Council's housing strategy 2011-15 required any new housing developments to contribute a proportion of affordable new homes. The case officer conceded in his report that: "*the housing needs of many people in the District are not being met, and not securing a contribution in this instance would not assist*¹⁴." The information currently available does not provide clear understanding of why the site could not be developed so as to meet the affordable housing needs of the community.

35. The viability assessment and the DVS report appear to contradict the Council's own Strategic Housing Land Availability Assessment (SHLAA) which references the initial

¹⁴ P81 OB Planning Committee 8th April 2014 Development Control Report.

application refusal in January 2014 and states that the Church Lane site is “considered suitable” and “available” for development, there are “no known ownership issues”¹⁵. Despite the case officer’s advice provided on 7th January 2014 (before the SHLAA was finalised) that the viability report indicated that viability issues on site arose from build complications and the number of different landowners¹⁶. The practice Guidance on SHLAA July 2007 states that:

a) in determining suitability¹⁷ regard must be had to policy restrictions (the implication being that the Council’s policy of requiring affordable housing should be taken into consideration).

b) a site is available¹⁸ where there is confidence that there are no legal or ownership problems including multiple ownerships and ransom strips.

This inconsistency needs to be explored¹⁹.

36. At the time of the planning decisions there was no Core Strategy (which was abandoned in October 2013 after criticism that it did not have an up to date housing need study and warnings of a serious and urgent housing shortfall. Mr Waltho referred the Tribunal to a briefing from the Housing Federation which suggests “where there is no up to date local plan... schemes may be promoted with limited affordable housing”. He argues that the landowners and Developers of the Church Lane site are taking advantage of these circumstances and that there is therefore a greater need for public scrutiny and transparency to mitigate the impact of the absence of a core strategy in providing consistent and coherent development.

37. We accept the above arguments as being applicable to the general public interests favouring disclosure: scrutiny, transparency, accountability, and promoting public understanding and furthering debate. Disclosure would help to increase trust in public

¹⁵ P85OB SHLAA

¹⁶ P54OB

¹⁷ Para 38 Government Practice Guidance on SHLAA July 2007

¹⁸ P99 OB Para 39 Government Practice Guidance on SHLAA July 2007

¹⁹ *Perry, R (on the application of) v London Borough of Hackney and Others (2014) EWCA Civ 1372* Lord Briggs observed when considering the sufficiency of the case officer’s report that if there had been something in the underlying document that called for special mention by the case officer, candour might have compelled the voluntary disclosure of the underlying report.

authorities and may allow greater public participation in the decision making process and promote greater public awareness and understanding of environmental matters.

38. The Appellant argued that there were conflicts of interest between the Local County Council as landowner and statutory consultee. Additionally a member of the planning Committee's wife was one of the landowners, although he recused himself the Appellant maintains that justice has to be seen to be done and in light of the perception of conflict there was a requirement to appear extra scrupulous which would be met by disclosure. The Tribunal is not satisfied that there is significant weight in these arguments, the Council has clear procedures for recusal and declaring an interest and the LCC is accountable both in auditing terms for the price achieved and also in terms of the extent to which they make representations. We are not satisfied that disclosure of this information would add transparency to either of these 2 issues.

In favour of withholding the information

39. We accept the inbuilt public interest in maintaining commercial confidences, parties who reasonably believe that they are providing information that will go no further ought to be entitled to rely upon that understanding. Additionally the Council stated to the Commissioner that "*The information requested contains confidential financial calculations and assumptions on which the developer will develop the site. If this information were to be made public in response to their request the developer states they would be at risk of action for breaching confidentiality clauses entered into as part of the process of developing the site*"²⁰.
40. Whilst the Tribunal accepts these arguments their weight is reduced by the fact that all parties ought to be aware of the EIRs and the fact that there is no absolute exemption for this type of information, indeed similar information has been disclosed in other cases²¹. The parties cannot contract themselves out of EIRs, however, the Tribunal does accept that it is not in the public interest that material used under licence or for a fee is disclosed which if freely available would remove the need for others to pay for it, thus undermining the commercial basis of the provider. The Tribunal does consider separately whether any conclusions drawn from licenced/purchased material should be

²⁰ P39 OB letter from Council 27.3.14

²¹ Eg Bristol City v Information Commissioner

disclosed (as opposed to the analysis and research that enabled those conclusions to be reached) and recognises that it may be that disclosure of the conclusions are sufficient to meet the public interest without damaging the commerciality of the source product.

41. The Council's Chief Executive argued before the Commissioner that disclosure:

“could undermine the District Council's relationship with all developers seeking to operate within the District... This may affect the ongoing development opportunities in the area which would not serve the public interest”²².

We are not satisfied that this is a strong argument. As set out above developers ought to understand the framework in which all Councils operate and the commercial reality that it is in a developer's interests to co-operate with the Councils and their planning authorities.

42. The Commissioner argues that developers should be able to conduct negotiations with the Council without fear of suffering commercially market sensitive information or potentially useful information being released, giving competitors a competitive advantage thus providing a level playing field. The Tribunal agrees, however, we take into account the Appellant's argument that a failure to examine a bid rigorously can lead to an unfair competitive advantage if a developer is permitted not to make the requisite s106 payments when others are. Additionally the strength of this argument is dependent upon the commercial sensitivity of the information contained in the withheld material. As rehearsed below, the Tribunal is satisfied that much of it is of marginal sensitivity which reduces the weight of this argument.

43. Public interests in planning applications for the local area is adequately protected by the planning application process itself. Safeguarded by the role the District Council plays through elected members on behalf of the public in reviewing and discussing the application.²³ Additionally the planning committee is in the best position to safeguard the public interest and scrutinise the application as it is argued that they are fully informed. Whilst we accept that the planning process goes some way towards

²² P39 OB letter from Council 27.3.14

²³ P39 OB letter from Council 27.3.14

satisfying the public interest, we have had regard to the facts of this case and we take into account that the planning committee neither scrutinised the original submissions, nor sought an explanation as to why the Developer was able to increase the offer so substantially. There was no comment from DVS analysing the new bid or considering whether a further increase could have been sought.

44. We accept that it is not in the public interest that a competitor or customer could gain a commercial advantage through the disclosure of this information (e.g by knowing when the developer is under pressure to sell quickly to maintain cash flow or knowing when a developer might be over extended which would impact upon their ability to maintain a bid in another project).

Application of the Public interest balance to the withheld information

45. The Tribunal has had regard to the manner in which the reports are presented and in particular whether any financial model is used under licence²⁴ and if so to what extent disclosure of the information within this framework would provide the analytical tool to others so that they could use it without having to pay. To the extent that any of the formats used to present the withheld material are publicly available we are satisfied that the exemption is not engaged with regard to the template. We are also satisfied that the public interest in withholding a format or model (due to terms of licence agreements) is reduced where the disclosure is made in pdf format because it is likely that the model can only be viewed based on the options selected and not the options offered; as such this would not constitute a complete template.
46. We are satisfied that the balance of public interest favours disclosure of any parts of the documentation that set out the approach taken by the author in constructing the document and a repetition of the purpose of the document, repeating the known background of the case including figures already in the public domain. This is due to its low commercial sensitivity when judged against the need for transparency and scrutiny.
47. We have had regard to the withheld material in its entirety and although we accept that there is some commercial sensitivity in knowing the “whole picture”, we are

²⁴ It is not argued that any of the withheld material constitutes a trade secret

satisfied that except where the commercial sensitivity and consequential detriment to another is high, the public interest favours disclosure. The withheld material can be divided up into individual elements and we are satisfied that the public interest differs depending upon the type of information involved. We have had regard to the Appellant's specific requests in the alternative and are satisfied that where the public interest favours disclosure these can best be met through disclosure of a redacted version of the document. This gives effect to the presumption in favour of disclosure and will enable further transparency and greater scrutiny whilst enabling the specific information that it is not in the public interest to disclose to remain withheld.

48. The Tribunal has gone through the categories of information which can be expected to appear in the type of documents that have been withheld in order to address the arguments raised by the Appellant. Where examples are given this does not reflect the actual content of the withheld material but is provided in this open document to illustrate the Tribunal's reasoning and is based upon the Appellant's evidence and submissions. The full reasoning with reference to the withheld material appears in closed tables 1 and 2.
49. Known constants and industry norms: Whilst some figures will be known e.g. the stamp duty rates applicable to the land, where the figure if disclosed can be reverse calculated to provide another figure e.g. the value of the sale, the Tribunal has considered the commercial sensitivity and public interest in the derived figure as well as in the actual figure. Mr Underwood pointed to several areas where he expected figures to be provided to be "industry norms" wherein a figure used is generic and expected rather than actual. Examples he gave included the likely profit that a developer would expect to make on this size of scheme, building material costs, and contingency fees. We are satisfied that if an industry norm is used either by the developer or as a comparator in evaluating the developers' figures (rather than a negotiated figure which is influenced by or reflects the status of the parties) this will have low commercial sensitivity. This is because it will not assist a competitor to undercut a quote, it will not inform a competitor of the way in which the developer's business and working practices are structured and it is not likely to impact upon their bargaining position for any actual fee or cost as it reflects the assumed starting point.

50. Actual costs: Similarly if a figure reflects a negotiated fee for a package of work we are satisfied that the rate at which a contractor agrees to do the work will be sensitive to them (as they may not wish to offer the same terms to others and it may shed light upon company incomes and cash flows). Mr Underwood's evidence was that there would be little commercial sensitivity to these specific fees as other clients would understand the impact of the size of a piece of work, and the size of the organisation the work was being done for (e.g. a loss leader to glean future work) and that in his experience developers went to the person (e.g. an Architect) with whom they already had a working relationship rather than the cheapest bidder when looking for this type of work. Whilst we accept that these are all factors we are satisfied that knowing the exact fee that a contractor was prepared to undertake a known quantity of work would be expected to affect their ability to negotiate higher fees in other circumstances whether by enabling competitors to undercut them or by providing a starting point for negotiations. However, if we are satisfied that this is a figure which has significance within the scheme and its disclosure would provide greater understanding of the rationale behind the figures²⁵ we are satisfied that this adds weight to the public interest in disclosure.
51. Global/composite figures: Where we are satisfied that there is commercial sensitivity relating to individual figures such that it is not in the public interest to disclose them we are satisfied that it is appropriate to disclose a global figure (as long as the individual figure cannot be determined) in order to inform the public and provide some transparency to enable the structure to be understood without breaching the specific commercial sensitivity.
52. Land costs: The size and location of the plot and the identity of the vendors is already in the public domain. We accept the evidence of Mr Underwood that the previous price at which part of the plot was being marketed was also already in the public domain. The eventual sale price of the plot will become public once the transaction is completed, however, Mr Underwood's evidence was that the potential to buy additional adjacent plots also existed and we have taken that into consideration in assessing to what extent the breakdown of any valuation (which would enable a price

²⁵ e.g it would shed light on suspicions of double accounting (Mr Underwood's example was that increased foundation costs ought to be reflected in decreased concrete costs.)

per square foot to be calculated reflecting the price per type of plot) is commercially sensitive.

53. Timings: The Appellant argued that the timing of the proposed development was not of commercial significance as it would be apparent what was being built and many properties would be sold off plan, in his view the role of any contingency sum would be to provide a buffer against any changes to the timetable (such as a failure to sell properties at the expected rate). We disagree, we are satisfied that timings reflect the developer's expectation of their cash flow and are relevant to the pressure to sell and suggest to competitors when they were stretched and not in a position to bid competitively. They are not directly relevant to cost and therefore add less to the public interest scrutiny than other figures.
54. Rental and Sales values: In Mr Underwood's evidence he provided his estimate of the likely values of houses once built. Mr Underwood's evidence was that this figure could be derived by anyone analysing comparable house values in the locality. We accept that values of past sales is publicly available e.g. on sites such as Zoopla. There are two elements to these figures, the conclusions and the raw data and analysis that led to those conclusions. Although the conclusions would have some commercial sensitivity in that they represent work done which is not publicly available in that format, we are satisfied that the analysis would have a greater commercial sensitivity particularly where disclosure would enable other future clients to reuse the work without paying for it.
55. Additionally we have considered to what extent it would be likely to affect the sales and negotiations of the future properties. The Appellant argued that the future sales would be demand led and that a property is worth what someone is prepared to pay for it. He did not consider it likely as a matter of common sense that purchasers would bother to look for this report in order to inform their opening bid price and even if they did he argued that the passage of time and pricing changes (inflation, building costs increases and the movement of the property market) would mean that these figures would be historical and would not be expected to have any impact on actual sales prices and negotiations. We agree with this analysis and are satisfied that this substantially reduces the commercial sensitivity of this information.

56. Funding Information which tends to illuminate the way in which the developer will structure the funding of the development we are satisfied is strongly commercially sensitive and consequently the public interest in withholding this type of information is high. From these types of information we are satisfied that competitors could determine how important this scheme is to the developer, the extent (if any) to which they are extended and these figures are likely to reflect an assessment of the developer's financial status.

Conclusion

57. For the reasons set out above we are satisfied that the withheld material should be disclosed subject to the redactions as set out in Closed Schedule 1.

58. Our decision is unanimous.

Dated this 16th day of June 2015

Fiona Henderson
Tribunal Judge