



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. 2014/0299

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FER0543013
Dated: 10 November 2014

Appellant: PAUL WINDMILL

First Respondent: THE INFORMATION COMMISSIONER

Second Respondent: STAFFORDSHIRE COUNTY COUNCIL

Heard at: Stafford Magistrates Court

Date of hearing: 10 September 2015

Date of decision: 16th September 2015

**Before
CHRIS RYAN
(Judge)
and
MICHAEL HAKE
PIETER de WAAL**

Attendances:

The Appellant appeared in person

The First Respondent did not appear and was not represented.

For the Second Respondent: Mark Bradshaw of counsel

**Subject matter: Environmental Information Regulations 2004
Request for information, Reg 5
Exceptions, Regs 12(4) and (5)
- Interests of an individual (5)(f)**

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. Two issues arise on this Appeal. First, whether the Staffordshire County Council (“the Council”) held information at the time of the Appellant’s information request, in addition to that which it told the Appellant it held at the time. And second, whether it was entitled to refuse to disclose that information under regulation 12(5)(f) of the Environmental Information Regulations 2000 (“EIR”).

Information held by the Council

2. Following an earlier hearing, which was attended only by the Appellant and during which we considered only the first issue, we promulgated a Case Management Note in which we directed that the Council should be joined as a Respondent to the appeal. We also directed the Council to file and serve a witness statement, signed by an officer having direct knowledge of the facts of the case and providing additional information on the searches made for documents containing the information which the Appellant had sought. Our reasons for issuing those directions, in the context of the facts of this case, are set out in the Case Management Note.
3. The Council responded to the Appeal by filing a written Response and a witness statement signed by Paul Hurdus. At the relevant time Mr Hurdus had been a Senior Engineer responsible for the Council’s contribution to the planning application processes undertaken by Stafford Borough Council (“the Borough Council”) in respect of the particular project which concerned the Appellant. The Council was also represented at the resumed hearing by Mr Bradshaw of counsel, who was accompanied by Philip Jones, the Council’s Head of Information Governance and Gemma Allen, an information officer employed by it.
4. Mr Hurdus explained in his witness statement that he had inherited responsibility for the project from a colleague in February 2013. In March 2014 the Council’s Information Governance Unit had sent him the Appellant’s information request and he had taken responsibility for searching for information relevant to it. He explained the search

facilities that were available to him and how, by using them, he had brought to light the emails referred to in paragraph 2(i) of the Case Management Note (as well as the documents attached to them), but no other relevant information. Mr Hurdus added the comment that the documents that he found were consistent with his recollection of what had been provided to him at the time of the transfer of responsibility and were typical of documents that would be held in relation to pre-planning discussions for a project of the scale of that under consideration at the time.

5. Mr Hurdus did not attend the hearing for cross examination but Mr Jones and Ms Allen agreed to answer questions posed by the Appellant and by the Tribunal panel. We are very grateful for their willingness to do this, which they did without prior warning and with an evident willingness to help the Tribunal reach its decision.
6. The Appellant explained that he had submitted his information request because he wanted to know how the Council had reached a decision on its pre-planning recommendation to the Borough Council on highways matters, which preferred a particular road layout close to the proposed development, which did not include traffic signals or provision for cyclists. He would have expected that the Council's contribution on this important contribution on such a major project would have been fully documented, particularly as the Council had also contributed data modelling materials to the developer.
7. We were satisfied, on the basis of all the evidence provided to us, both in documentary form and in the answers to questions provided by Mr Jones and Ms Allen, that on the balance of probabilities no additional information was held at the relevant time beyond the emails referred to. We were also able to satisfy ourselves that the Council had not concentrated on the pre-planning stage, to the exclusion of later stages, as the Appellant suspected. We continue to have some concern that the Council appears to have retained, and published on its planning portal, so much information covering the period after the relevant planning application had been filed but retained what appears to be a disproportionately small amount of information (just a few emails with their attachments) in respect of the pre-planning stage. However, this Tribunal has made it clear in a number of cases that it does not have jurisdiction to consider what information a public authority should have retained in recorded form, only whether or not that which it did retain at the time of an information request should be disclosed.

Council's right to refuse disclosure of the withheld information

8. The emails referred to above were contained in a closed bundle which was provided to us but, for obvious reasons, not made available to the Appellant. He had been shown the index, which disclosed that the withheld information consisted of emails passing between the company

proposing the development for which permission was sought, its consultants and the Council. There were attached to the emails a number of drawings and supporting data in respect of certain highways layout options. These had not been included in the bundles made available to us before the hearing but we were able to inspect them during a closed part of the hearing. We were also able, at that stage, to put further questions to Mr Jones and Ms Allen, which assisted greatly in our understanding of the materials and the circumstances in which they came into existence.

9. EIR regulation 5(1) imposes on a public authority holding environmental information an obligation to make it available on request. There is no dispute that the information requested in this case falls within the scope of EIR.
10. The obligation to disclose information is made subject to a number of exceptions. Regulation 12(5)(f) reads:

“A public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person –
i. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
ii did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
iii has not consented to its disclosure...”

11. The Council's case, which found favour with the Information Commissioner in the Decision Notice from which this appeal arises, was that the pre-planning discussions in question had taken place on a confidential basis, during which the developer had voluntarily put forward a number of road access proposals. The proposals, the data to support them and the Council's reaction to them could be of use to competitors. The Council maintained that position during the hearing before us and we were able to explore with Mr Jones and Ms Allen, during the closed session, the detail of the email exchanges and the documents attached to some of them. We also received confirmation that the developer's consent to disclosure had been sought and was refused. We were satisfied that, viewed overall, all the material in the closed bundle reflected the developer's initial proposals for a projected development and that its disclosure at the relevant time might well have benefited its competitors and caused it damage.
12. We conclude, therefore that the exception is engaged.
13. EIR regulation 12(1)(b) provides that it is not enough for a public authority to establish that an exception is engaged. It is necessary to show also that:

“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

14. It was accepted by the Council that there is a general public interest in the transparency of the planning process, but it relied on the public availability of all documents relevant to the planning application itself to satisfy that interest. On the other side the Appellant accepted that a developer would be entitled to expect a degree of confidentiality in respect of preliminary discussions with the relevant authorities before a decision was made to proceed with a planning application. However, he argued that the importance of knowing how recommendations were made to the Council and how the Council reached the decision it did in this particular case should be regarded as equalling or exceeding that expectation. The Council, on the other hand, argued that the effective operation of the planning processes would be undermined, and developers would be discouraged from participating in the pre-planning discussions (to the detriment of competition in the public interest), if it was not possible to float plans with an assurance that publicity would only be given to those that went forward to the next stage (which many might not).
15. On balance we were satisfied, on the basis of the submissions made and our examination of the materials in the closed bundle, that the public interest in maintaining the exception in this particular case outweighed the public interest in disclosing the withheld information.

Conclusion

16. In light of the findings set out above we have concluded that, although we understand why the Appellant should have pursued his information request and appreciate the clear and measured terms in which he presented his arguments in support of it, the Information Commissioner reached the correct decision in his Decision Notice. The Appeal should therefore be dismissed.

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Judge
2015