



Neutral Citation Number:

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

**Appeal No: EA/2015/0029**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50560611**  
**Dated: 12 January 2015**

**Appellant: Janet Giggins**  
**Respondent: The Information Commissioner**  
**2nd Respondent: Hungerford Town Council**

**Heard at: Field House, Breams Buildings, Chancery Lane, London**  
**Date of Hearing: 19 May 2015**

**Before**  
**Chris Hughes**

**Judge**

**and**

**Melanie Howard and Marion Saunders**

**Tribunal Members**

**Date of Decision: 18 June 2015**

**Attendances:**

For the Appellant: in person  
For the Respondent: did not attend  
For the 2<sup>nd</sup> Respondent: Mr Megson (Ashburn Planning)

**Subject matter:**

Environmental Information Regulations 2004 12(5)(d)

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 12 January 2015 and dismisses the appeal.

## **REASONS FOR DECISION**

### Introduction

1. Hungerford lies within the area of West Berkshire Council (“WBC”). For some time WBC has been developing its strategy for the number of dwellings to be built in its area over the coming years in response to broader Government policies requiring local authorities to plan for new housing in their areas sufficient to meet demand. As a consultee of WBC the Second Respondent in these proceedings Hungerford Town Council (the “Council”) commissioned work to be done for it by a consultancy, Ashburn Planning to assist it in formulating its stance in response to proposals from WBC.

### The request for information

2. On 13 August the Appellant in these proceedings, Mrs Giggins, made a number of requests for information of the Council about its consideration of the issue, including:-  
“4, Any reports provided by Ashburn Planning”.
3. The Council is a small organisation and was not as well versed as Mrs Giggins in the law relating to environmental information. It resisted supplying the report. On 4 November 2014 Mrs Giggins contacted the First Respondent, the Information Commissioner (“the Commissioner”) to complain about the handling of her request.
4. The Commissioner considered that the requested information “Hungerford Town Council-Housing Growth Review” was environmental information and the request fell to be considered under EIR. He concluded that the report was confidential information protected by a common law duty of confidence, and had been commissioned by the Council in preparation of submissions it would make to the process being carried out by WBC which would determine the sites in the area of WBC (including sites within the Council’s area), which were suitable for housing development.
5. He noted that the final position of the Council would be made public, but that changes in planning law and requirements between the production of the report and the public presentation of the Council’s case caused him to conclude “*the information*

*was imparted by Ashburn Planning in circumstances where confidentiality is generally acknowledged to be important, particularly where it is necessary for the Council to give detailed consideration to the report frankly and freely.”*

6. In considering prejudice he concluded (dn paragraph 38): *“The report identifies the Council’s preferred options for development as they stand at the time of its writing. These options are subject to potential change. If these sites were made public at this time, the Council’s assertions that the public and developers could be misled and the Council could receive unwarranted planning applications based on incorrect information are likely to occur. The Commissioner accepts there is a real likelihood that the land price of those sites identified in the report could be artificially inflated and therefore would jeopardise the Council’s economic interest and therefore those of its residents.”* In the light of this, taking into account the public interest in transparency, he concluded that the balance of public interest lay in withholding the report.
7. In her appeal Mrs Giggins disputed the precise purpose for which the report had been obtained. She argued that the report had already been widely circulated and therefore was in the public domain. She found the possible detrimental impacts “far-fetched and absurd”, she did not feel that the Commissioner had given her a proper opportunity to comment on the Council’s position. She felt that the Local Development Plan process of WBC could not be harmed by disclosure of the report and that the disclosure of a report,(paid for by the people of Hungerford) would enable them to make their own submissions to the planning process. Withholding the report might suggest that there was “something to hide”.
8. In resisting the appeal the Commissioner confirmed that confidential information held by a public authority could be protected by regulation 12(5)(d) which covers “the confidentiality of the proceedings of that or any other authority” and that therefore, even if there were no “proceedings” of the Council, WBC’s planning process also met the definition of “proceedings”. He reaffirmed his reasoning justifying the conclusion that the information was confidential with respect to the balance of interest.
9. The Council (bundle page 48) confirmed that the report would ultimately be used as the base for evidence at the Examination in Progress which would be conducted as

part of the process for the WBC planning process. The Council wished to maintain the confidentiality of its case until then. It argued that the document was draft and could change, it would therefore be misleading to release it. The premature release would create prejudice by giving an advantage to developers who obtained it, it had the quality of confidence and premature disclosure could adversely affect planning decisions in the area.

10. In the hearing Mrs Giggins reinforced the points she had made in writing and criticised the handling of her request by the Council and the guidance which the Commissioner had given the Council in responding to the request which she felt was unfair. She disputed that the information was confidential and argued that it had been circulated more widely than councillors and argued that the confidentiality of the report was not provided by law.
11. While in her grounds of appeal she stated: - “I am in the process of gathering evidence to prove that the report has been circulated more widely than Council members and Officers, contrary to the assurances given to the Commissioner in paragraph 33. As such it is in the public domain already, although only certain members of the public have seen it.” She was unable to demonstrate that the report had gone beyond a small group linked to the Council and assisting it in formulating its strategy.

#### Question for the tribunal

12. The legal test the tribunal had to consider was whether regulation 12(5)(d) applied in this case and the disclosure would adversely affect the proceedings of Hungerford Town Council or any other public authority where the confidentiality of the material was protected by law; and if so, where the balance of public interest lay.
13. Although Mrs Giggins was critical of the Commissioner and the assistance which the Commissioner gave to the Council in understanding the issues raised by the request, these are not grounds for appeal. The issue for the tribunal is whether or not the decision of the Commissioner was correct in law. Since the Commissioner has responsibility for ensuring that the FOIA and EIR regimes are effectively administered by public bodies it is an inevitable part of his responsibilities to ensure that public authorities (especially small and poorly resourced bodies such as town and parish councils) are guided through the process to enable them to understand their

rights and responsibilities. It does not seem to this tribunal that there is any substance in Mrs Giggins criticisms of his conduct in this case.

### Analysis

14. The first issue for the tribunal to consider is whether there are confidential proceedings of the Council. It is clear from the evidence that the Council was considering the report as part of its preparation to participate in the wider West Berkshire planning process. It did so as part of its statutory functions and responsibilities and the evidence clearly demonstrated that this was a “proceeding” of Hungerford Town council as well as of West Berkshire.
15. The second issue is whether the confidentiality of the proceedings was provided by law. It may be noted that the report is not stamped “confidential” or any other protective marking. Nor is there a specific statutory provision granting it confidentiality. The argument is whether at common law there was a duty of confidentiality. In assessing this it is important to look at the contents of the material, the circumstances under which it was communicated and the evidence as to how the parties understood and handled it.
16. The material itself clearly has the quality of confidence, it relates to the formulation of a Council’s policy which may have some impact on the future use and therefore the value of land. It is not trivial, it relates to issues of substance and, for some people (for example owners of the land in question), financial significance.
17. The organisation which prepared it, Ashburn consulting, are a professional consultancy dealing with planning issues and this is, in essence a combination of professional advice and a draft of evidence for future planning proceedings. The normal course of the work of such people is that they and their clients treat the material they produce as confidential until such time as it is released.
18. The council clearly kept its circulation to a narrow group of individuals and have not circulated it widely. A member of the public does not have access to it. It is not in the public domain. While Mrs Giggins argued that it was wrong that in a small community such as Hungerford there should be this secrecy since (she felt) individuals making the decisions could be affected by them, there is no evidence of any impropriety and this level of privacy of consideration is necessary for the maintenance of confidentiality.

19. The tribunal is satisfied that the exception is engaged.
20. With respect to the balance of public interest; the tribunal noted the complexity of the position that the Council was in, needing to be able to respond effectively to promote the interests of its area when faced with a changing set of requirements with respect to West Berkshire's need to provide more houses, the possibility of changing planning guidance and law and other guidance emerging over the next months. The examination in public was still about a year away and the evidence for that hearing would be submitted at the appropriate time. The tribunal considered that the report was in essence the case and evidence for that hearing and was therefore, a draft to be finalised as near to the time as possible to ensure it was a relevant and accurate as possible and therefore had the greatest impact in advancing the final form of the case which the Council wished to advance on behalf of Hungerford. Until then the report was not a reliable guide to the position, creating uncertainty and the possibility of movements in land prices. There was a significant chance that its premature disclosure would lead to speculative planning applications which would be likely to involve the Council in further effort to consider the specific applications in advance of the clarification of the planning needs and strategy for the area which would be produced by West Berkshire Council.
21. The planning processes of West Berkshire Council seemed to both parties to be excessively drawn out. This has not doubt contributed to some of Mrs Giggins' concerns and she feels that much of the document is already in the public domain.
22. Although Mrs Giggins emphasised that the report had been funded by the electors of Hungerford and they might wish to use it to craft their own submissions to the Examination In Public; the tribunal felt that members of the public would be fully able to participate in the process without this information, and that while the publication of the information would help give some understanding of what the Council might put into the planning process, these considerations were outweighed by the provisional nature of the report which would be finalised for publication at the appropriate time, and the detriment which could flow from acting upon it.
23. The tribunal was therefore satisfied that the Commissioners decision was correct in law and dismissed the appeal.
24. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 18 June 2015