



Neutral Citation Number:

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

Appeal No: EA/2015/0078

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0562199
Dated: 24 February 2015

Appellant: Peter Higham
Respondent: The Information Commissioner
2nd Respondent: Cornwall Council

Heard on paper: Edinburgh Employment Tribunal
Date of Hearing: 11 August 2015

Before
Chris Hughes
Judge
and
Jean Nelson and John Randall
Tribunal Members

Date of Decision: 20 August 2015

Subject matter:
Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 24 February 2015.

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0078**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: 20 August 2015

Public authority: Cornwall Council

Address of Public authority: County Hall, Treyew Road, Truro, Cornwall TR1 3AY

Name of Complainant:

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 24 February 2015.

Action Required

The Council release the redacted information within 35 days.

Dated this 20th day of August 2015

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. On 14 August 2014 the Appellant in these proceedings (“Mr Higham”) requested information from the Second Respondent (“the Council”) under the heading “16M turbine investment programme” he sought information about the decision-making process and specifically asked in the following terms:-

“I attach a Freedom of Information request from myself and [name redacted] representing Cornwall Protect for the most complete available financial statement of the business case for the above Council turbine investment programme. As you see a suitable format if available is that used for the earlier B 15M Solar Energy programme spread over 25 years...”

2. The Council focussed on the financial information request and resisted the request citing the protection of commercial interests. On review it concluded that the request should have been considered under the Environmental Information Regulations (EIR) but came to essentially the same conclusion, that the information should be withheld relying on Regulation 12(5)(e) that the disclosure would adversely affect:-

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

3. Mr Higham complained to the First Respondent (“the Commissioner”). The Commissioner focussed his inquiry on the request for the business case and in his decision notice concluded that the information relating to proposals to develop wind turbines to provide electricity for sale was information of a commercial or industrial nature (DN paragraph 8).
4. He concluded that the information was the costs estimates and forecasted financial details relating to a number of proposed developments which would be used as the basis for a tendering process. The council staff would be aware of the need to keep the information secret as the disclosure of the information would have a significant effect on the tendering. It would enable those tendering to have a commercial advantage in dealing with the council by structuring their tenders in a way to win the contract while maximising their profits at the expense of the Council. He considered

that this was a weighty argument and that the information was confidential and confidentiality protected the Council's legitimate interests of safeguarding the taxpayer. He was satisfied that the Council would be disadvantaged in the tendering exercise if the information was revealed (DN 9-25).

5. In weighing the public interest he noted the presumption in favour of disclosure and the value of enabling better scrutiny of the Council's decision. He acknowledged Mr Higham's argument for the need for transparency for a substantial project with contracts lasting 25 years. Disclosure would enable the public to better understand the Council's decisions if they were armed with the anticipated costs and benefits of the project. He further noted that while the public would be able to participate in the planning process for each turbine site they would not be able to address the overall economics, merely the siting of the turbines. He also noted that the planning and policy arguments about siting of the turbines or the need for renewable energy would not be assisted by the disclosure.
6. He concluded that the prejudice to the Council in terms of the costs arising from the disclosure outweighed the public interest in transparency (DN paragraph 47).
"Ultimately, providing proof that the financial proposals are appropriate before submitting the development for tender would be likely to lead to the same project costing taxpayers more" He upheld the decision of the Council to withhold the information.

The appeal to the Tribunal

7. In his appeal Mr Higham disputed the commercial sensitivity of the information he has requested. He argued that *"The central point is that no commercial body or competitive developer could conceivably use a broad, out-of-date financial aggregation of 7 different site projects as a negotiating lever in one of them."* He noted that his request for information about the decision-making process, had not been addressed by the Council or the Commissioner. He argued that the tendering process would not be affected by the disclosure of the business case.
8. The Commissioner resisted the appeal relying on his decision notice and explaining that the Council did not hold the summary information which Mr Higham sought; but rather held information whose disclosure would cause prejudice.

9. In its reply the Council explained that it did not hold summary information in the form requested by Mr Higham. He had been provided with such information for a previous project relating to solar power after it had been completed when the commercial sensitivities were considerably less. The information which the Council held concerning the wind turbine project covered a small number of sites and that disclosure, even if aggregated would give such information as to the overall financial viability as would assist potential tenderers and prejudice the Council.
10. In his reply to this Mr Higham again affirmed his view of the importance of disclosing the financial information and the need for wider scrutiny beyond the Council. He argued that the aggregated information of the costs across all the sites identified should be made available.

Consideration

11. The withheld information is a report entitled “Green Cornwall Wind Energy Programme Stage 2A Cost Report of various sites throughout Cornwall for Cornwall Council”. The bulk of the report is detailed schedules of costings for each site, the introductory part of the report sets the scene and various assumptions underpinning the process of developing the costs.
12. Mr Higham’s request was for “the most complete available business case” for the project and the Council has correctly identified this document as a complete business case. The document clearly matches the request. Although Mr Higham has claimed that what he had in mind when he made his request was a briefer document similar to what he had already been provided for the solar energy project; what he asked for was a complete business case. The withheld information is clearly within the scope of the request. Furthermore there is no obligation on the Council to carry out processing to produce some derivative form of the information that it holds into one which would no longer risk causing commercial harm. What has to be considered is the information actually held by the Council.
13. The tribunal was in no doubt that the Council’s concerns were entirely legitimate and that disclosure of the information requested would cause serious prejudice to the Council. The tribunal is further satisfied that the Commissioner in carrying out his investigation correctly identified the issues, weighed them and correctly concluded that disclosure of this information at the time it was requested was not in the public

interest. However while that analysis is true of the report as a whole and in particular the schedules relating to specific costs the argument has considerably less force when applied to the introductory pages of the report. The cost commentary and the various broad assumptions and descriptions of processes are of use to the public in understanding the project and are not the details which would assist potential tenderers in structuring their tenders to the Council's disadvantage. The tribunal is therefore satisfied that, subject to certain redactions, the first 7 numbered pages should be disclosed.

Redactions

14. The figure in 2.06.

15. The commercial entities identified in 4.01.1 – 4.01.4, 6.07

Conclusion and remedy

16. The appeal is allowed in part.

17. The Council has 14 days to identify any further matters in the first 7 numbered pages where the disclosure would cause harm and to apply to the tribunal for redaction of that information.

18. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 20 August 2015