



**Appeal number: EA/2016/0096**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**JAMES ALLEN**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER  
GUILDFORD BOROUGH COUNCIL**

**Respondents**

**TRIBUNAL: JUDGE ALISON MCKENNA  
Dr HENRY FITZHUGH  
Mr NIGEL WATSON**

**Determined on the papers, the Tribunal sitting in Chambers on 4 October 2016**

## DECISION

1. The appeal is dismissed.

## REASONS

### *Background to Appeal*

2. The Appellant made a request to Guildford Borough Council (“the Council”) on 17 June 2015 for “Details of all draft plans being discussed documented and known about for intersections on the A3 in and about Burpham. Specifically London Road Slip and Clay Lane Northbound off”. The Appellant’s request concerned the preparation of a new Local Plan for Guildford Borough. Legislation sets out the consultation process required in relation to the adoption of a Local Plan by a Local Planning Authority. A draft Local Plan was published in 2014 which consulted on a proposed modification of the A3/London Road junction. The Appellant’s home is near to the A3 and he is concerned that the Council’s plans may impact upon his home.
3. The Council responded on 8 July 2015, confirming that it held a note drafted by the Appellant which could be published with his permission. The Council confirmed that it held other information that fell within the exceptions under Regulations 12 (5) (e), 12 (4) (d) and 12 (5) (f) of the Environmental Information Regulations 2004 (“EIR”). The Council’s view was that the draft Local Plan represents an early stage in the planning process which is subject to change and a later version will be subject to formal public consultation. The Council withheld 12 documents in reliance upon regulation 12 (4) (d) EIR as it regarded them as relevant to policy in the course of development which still required private “thinking space”. The Council withheld three documents in reliance upon regulation 12 (5) (e), as it regarded them as commercial and subject to a confidentiality obligation. In both respects, the Council’s view was that the public interest did not favour disclosure.
4. The Council upheld its decision on internal review and the Appellant complained to the Information Commissioner. The Information Commissioner issued Decision Notice FER0594317 on 23 March 2016, upholding the Council’s decision that regulations 12 (5) (e) (commercial confidentiality) and 12 (4) (d) (unfinished policy) were engaged. The Information Commissioner was not persuaded that the balance of public interest was in favour of disclosure.
5. The Decision Notice did not consider regulation 12 (5) (f) as it was felt no longer to be relevant<sup>1</sup>. The Information Commissioner did require the Council to disclose a document under EIR 12 (9) which related to noise emissions.

### *Appeal to the Tribunal*

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<sup>1</sup> The Appellant has not disputed this aspect of the Decision Notice.

6. The Appellant's Notice of Appeal dated 10 April 2016 relies on the following grounds of appeal. He submits (i) that the Council has an obligation to disclose the requested information so as to include the Neighbourhood Forum, of which he is a member, in prospective planning considerations and that this outweighs commercial confidentiality considerations. He argues that the Information Commissioner has failed to appreciate the legal status of the Neighbourhood Forum and its legitimate consultative role. He further submits (ii) that the "thinking space" conferred by EIR regulation 12 (4)(d) ought not to be allowed to extend to a period of some 12 years. He relies (iii) on an alleged error of fact by the Information Commissioner in finding that a survey team had not visited the site. He provides the Tribunal with evidence to support this ground of appeal and complains that the Information Commissioner did not offer him an opportunity to submit this evidence before reaching a conclusion on that issue. He argues (iv) that the Information Commissioner's Decision Notice fails to take account of his rights under Article 8 of the European Convention on Human Rights; and finally (v) he objects to the "tone and manner" of the Information Commissioner's Decision Notice.

7. The Information Commissioner's Response dated 23 May 2016 maintained the analysis set out in the Decision Notice. We were assisted by a note about local planning processes, annexed to the Response. We note that, at paragraph 18 of the Information Commissioner's Response, it is submitted that the Appellant has not disputed that the exceptions were engaged, so that his arguments fall to be considered in assessing the balance of public interest only. The Appellant has not taken issue with this approach, which we have adopted in this decision.

8. The Council filed a Response adopting the Information Commissioner's submissions.

9. The Appellant Replied to the Responses. He refers to events post-dating the Decision Notice and suggests that the Council's case for confidentiality has ceased to exist because more information has entered the public domain. The Council made further submissions disputing the accuracy of the Appellant's statements. The Appellant filed a "Final Submission" dated 8 September 2016 in which he referred to the Government's response to a recent consultation on the engagement of neighbourhood forums in local planning.

10. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising some 350 pages, including submissions made by all parties, for which we were grateful. We also considered a closed bundle of 70 pages, comprising the withheld information.

### *The Law*

11. It was not disputed in this case that the information requested was "environmental information" for the purposes of the EIR. A public authority is required to make environmental information available to the requester unless it is excepted information and the

public interest in maintaining the exception outweighs the public interest in disclosure in all the circumstances of the case.

12. The regulation 12 (4) (d) exception is engaged when a request relates to material that is still in the course of completion, to unfinished documents or incomplete data. The regulation 12 (5) (e) exception is engaged where disclosure would adversely affect the confidentiality of commercial or industrial information provided by law to protect a legitimate economic interest.

13. The appeal is made under s. 57 FOIA as amended by regulation 18 EIR. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*“If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

14. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

#### *Conclusion*

15. As noted above, it was not disputed that the exceptions were engaged. The Information Commissioner was satisfied that the information requested was incomplete or subject to confidentiality obligations. The Appellant has made clear that he disagrees with the exceptions, but we must apply the law as it stands. We have considered the Appellant’s arguments as seeking to address the balance of public interest test. As is also noted above, the Tribunal’s task is to consider whether the Decision Notice contains an error of law or inappropriate exercise of discretion.

16. The Appellant’s case is founded on his view that the Council has not followed the correct approach to planning consultation by failing to include the Neighbourhood Forum in its considerations at an early stage. If it is the Appellant’s case that the Council has breached its substantive planning obligations, then his remedy must lie in judicial review as that is not a matter we can determine. Insofar as the Appellant’s case is that the balance of public interest test should tip in favour of disclosure in order to remedy the alleged defects in the Council’s consultation, then we are not persuaded by the Appellant’s arguments. We accept that at the

time of the information request the Council's obligation was limited to giving such advice and assistance to the Neighbourhood Forum as it thought appropriate and did not require disclosure. It follows that the Appellant's argument for reaching a different conclusion from the Information Commissioner as to the balance of public interest is misconceived. We discern no error of law in the Information Commissioner's Decision Notice in this regard.

17. We are also not persuaded that the "thinking time" involved in the development of policy is subject to any particular cut off period. We discern no error in the Information Commissioner's approach to the balance of public interest test in this respect. Finally with regard to the Neighbourhood Forum, we note that in his Final Submission the Appellant relies upon a Government consultation document which post-dates the Decision Notice in this case. Clearly, it is not arguable that the Decision Notice contains an error of law in failing to take that document into account.

18. The Tribunal accepts the Information Commissioner's submission that there is insufficient evidence to establish whether a survey was carried out in relation to the Local Plan. We do not consider that the Information Commissioner materially erred in law in failing to ask the Appellant to submit his evidence on this issue, as the Appellant's conclusions about the activity he reports are inevitably speculative. We find no error of law in the Decision Notice in this regard.

19. The Tribunal accepts the Information Commissioner's argument that Article 8 ECHR is implicitly recognised in the balancing exercise required to be conducted under the EIR. This has been recognised in previous decisions of the Tribunal. There is no arguable error of law in this respect.

20. Finally, we do not consider that there is anything in the "tone and manner" of the Decision Notice which is out of the ordinary or which provides a basis for arguing that it contains an error of law.

21. For these reasons, we now dismiss the appeal and require no steps to be taken.

**(Signed on the original)**

**ALISON MCKENNA**

**DATE: 1 November 2016**

**PRINCIPAL JUDGE**