



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50840962**

Appeal Reference: EA/2020/0200P

Considered on the papers

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

MARIAN SAUNDERS & ANDREW WHETNALL

Between

ANDREW BELL

Appellant

and

INFORMATION COMMISSIONER

First Respondent

Cases:-

R v Derby Magistrates Court ex parte B [1995] UKHL 18

DECISION AND REASONS

The appeal is upheld in part. East Suffolk and North Essex NHS Foundation Trust is ordered to disclose that part of the disputed information to which legal professional privilege does not attach (subject to redaction of personal information) within 35 days.

REASONS

1. East Suffolk and North Essex NHS Foundation Trust (“the Trust”) entered into an arrangement to build further facilities on one of their hospital sites. Public

authorities entering into large contracts are required (except in certain specified circumstances) to invite tenders from potential contractors to ensure that they obtain value for money and the announcement of the tender competition is placed in the Official Journal of the European Union (OJEU), where the outcome of tenders is also announced.

2. Mr Bell sought information from the Trust on 22 January 2019:-

“With reference to the Contract award notice 2018/S 246-563390 published in Supplement to the Official Journal of the European Union on the 21st December 2018 and relating to the above, I wish to request the following information;

- 1) A copy of the Option Agreement between Noviniti Colchester Ltd and the trust.*
- 2) A copy of the independent valuation advice the Trust received prior to the grant of the option and subsequent ground lease.*
- 3) A copy of the legal advice received by the Trust that this transaction is exempt from the Public Contracts Regulations 2015 (as amended) and Directive 2014/24/EU”*

3. The Trust replied on 20 March having considered the request under the Environmental Information Regulations (EIR) since it related to the development of land. It disclosed the valuation and option agreement subject to some redactions and refused to provide the legal advice it had received. In withholding information it relied on regulation 12(5)(b) for legal advice, regulation 12(5)(e) for commercially sensitive information, regulation 12(3) for personal data and regulation 12(4)(d) for draft information.

4. At the request of Mr Bell, who was concerned about the withholding of commercial information and legal advice, the Trust carried out a review of its decision and notified him of the outcome on 30 April 2019:-

In summary we have concluded that the exemptions applied to the information requested were appropriate and the Trust was entitled to redact or withhold the information as set out in the original response. We set out our rationale below together with any comments on the original response:

- We can confirm that the Trust does hold the documentation sought;*
- We consider that the information withheld from the documents did fall squarely within the exemptions applied.*
- We consider that all four exemptions apply to the information requested.*
- We have reconsidered the public interest test taking into account the time that has passed since your original request and the fact that the deal between Noviniti and the Trust has now closed. We have concluded that as the Trust is likely to enter into similar agreements in the future that the information remains commercially sensitive and to disclose it to the world at large would prejudice the ability of the Trust to participate in future commercial ventures.*
- There is a public interest in allowing the public to understand the basis upon which agreements are finalised, however to disclose the information requested would prejudice the Trust’s future commercial position.*

- *The majority of the documentation sought was disclosed and only the exempt information was redacted.*
- *We note that the original decision did not set out the public interest test in relation to the reliance of the legal privilege exemption. We have considered the public interest in relation to this exemption as part of the review and have concluded that there is an inherent public interest in the Trust being entitled to take legal advice with the expectation it would not be disclosed. There is a strong presumption that legal advice will be confidential and accordingly we consider the public interest favours the maintenance of the exemption.*
- *We have therefore upheld the decision of the Trust at first instance to withhold the information under the exemptions.*

5. Mr Bell complained to the Information Commissioner who investigated and issued her report on 12 June 2020. She considered the application of two exemptions, relating to legal advice and relating to commercial information, and whether in the light of these exemptions the information should be disclosed.

6. In considering the legal advice she explained that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice and the breadth of the meaning of that exemption which included the provision of legal advice. She noted that the information had not been released and that these documents comprise confidential communications between a client and legal advisors for the purposes of obtaining legal advice and was therefore covered by Legal Professional Privilege on the basis of advice privilege. She noted that the advice related to a project which was not complete, that an adverse effect upon the course of justice can result from the undermining of the general principle of legal professional privilege and concluded that such adverse effect would result from this disclosure. She weighed the public interest in transparency around the actions of public authorities so as to promote public understanding and whether the Trust had obtained value for money. She made her decision on the contents of the information, and the Trust's decision-making process and conduct. In particular she found:-

"36. The Commissioner has no evidence that the Trust, in seeking legal advice, was aiming either to justify or to conceal its reasons for decisions about the awarding of the contract."

7. She concluded that the legal advice should not be disclosed.

8. With respect to the commercial information the information commissioner noted that some further information had been disclosed, and characterised the other information:-

"41. For the information in the valuation report that continues to be withheld; in reference to the first bullet point, the Trust confirmed the information is commercial in

nature and consists of detailed formulae, percentage yields and pricing details concerning the development. It argues it is in nature as it relates to a commercial agreement between the Trust and Noviniti (the developer) for the development of land.

42. The Commissioner has reviewed the remaining withheld information within the report and she is satisfied that it is commercial in nature. It is a report into the assessment of the premium that should be paid for the grant of a lease over the land. The report details the agreement made with Noviniti and goes into specifics of the agreement, including costings, timings and financial breakdowns."

9. She confirmed that there was a confidentiality agreement in place. She accepted the Trusts arguments that it was only seeking to withhold the most sensitive commercial information and that it was under financial pressure and was encouraged to find innovative solutions.

"...this will often involve partnerships and commercial arrangements with third parties and commercial entities. The Trust must be able to obtain best value when managing assets and using public funding and disclosing the remaining withheld information would adversely affect the Trust's commercial reputation and its ability to obtain best value when contracting with third parties. The third parties may factor in the increased risk of their confidential information being disclosed and increase costs to the Trust or they may choose not to share important information with the Trust or not enter into a contract at all.

48. The Trust is also of the view that disclosing this information would harm the legitimate economic interests of Noviniti. The information is commercially valuable as it forms part of a proprietary structure developed by Noviniti which is of critical importance to its business model. Disclosure would enable competitors to acquire specialist knowledge and financial modelling information to the detriment of Noviniti's legitimate economic interests. It would place pressure on Noviniti's current third party funding arrangements and impact upon it being able to obtain appropriate and commercially competitive funding in the future.

49. The Commissioner recognises both the Trust and Noviniti have already invested time and resources into the proposals and planning at the time of the request. The Commissioner understands when the request was initially made the construction had not begun but by the time the Trust was made aware of the complaint to the Commissioner, construction was well underway and nearing completion hence the reasons the Trust has now agreed to disclose the majority of the information.

50. That being said, at the time of the request and the internal review the project was still in the early stages and the Commissioner accepts the disclosure at that stage would have adversely affected the commercial interests of the parties involved, mainly Noviniti. The information withheld is the most proprietary and is specific to not just the project but also Noviniti. The consequence of this disclosure is that it may place Noviniti at a disadvantage in future bids by providing competitors with in depth details of Noviniti's pricing structure and calculations.

10. In considering the public interest she concluded that disclosure would create a distorted market and could result in contractors being unwilling to share information with the Trust thus placing it at a disadvantage. Disclosure would

go against the creation of a free and open market. While she recognised that *“there is a public interest in openness, transparency and accountability. There is also a public interest in ensuring that public money is being spent appropriately. It is understandable that members of the public will be concerned about any projects which involve spending large amounts of public money”*; she concluded that the public interest did not favour disclosure.

11. Mr Bell, in appealing to the tribunal argued that the trust had failed to show that it had secured value for money and financial pressures did not justify the Trust in withholding the information, without disclosing the information it was impossible to show that it had secured value for money. The Trust had failed to disclose the advice which justified it claiming that the transaction was exempt from the Public Contracts Regulations 2015. The Trust had acknowledged that there was a public interest in accountability, withholding the advice prevented scrutiny of the decision-making process.

12. In resisting the appeal, the Information Commissioner emphasised the points made in her decision notice. With respect to the commercial interest she set out the test for determining that the exemption was engaged:-

- (1) The information in question is “commercial or industrial”;
 - (2) The information is subject to confidentiality provided by law;
 - (3) Such confidentiality is provided to protect “a legitimate economic interest”;
- and
- (4) The disclosure of the information would adversely affect such confidentiality.

13. She referred to guidance on the implementation of the Aarhus Convention from which EIR is derived:-

“Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.”

14. She concluded that disclosure would cause commercial harm to the Trust in diminishing its ability to enter into commercial arrangements and for Noviniti, *“disclosure of the information would enable competitors to acquire specialist knowledge and financial modelling information to the detriment of Noviniti’s legitimate economic interests. It would place pressure on Noviniti’s current third party funding arrangements and impact upon it being able to obtain appropriate and commercially competitive funding in the future”*. She concluded, on balance that the public interest lay in non-disclosure.

Consideration

15. Regulation 12 of EIR provides (so far as is relevant):-

Exceptions to the duty to disclose environmental information

12. – (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and

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

(2) A public authority shall apply a presumption in favour of disclosure.

...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

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

...

16. Mr Bell has argued that in the interests of accountability of the Trust's decision-making the legal advice it relied upon in order not to seek competitive tenders should be disclosed. There is force in the argument that the legal justification for the decisions of a public authority should be clear. However the justification for disclosure is not as strong as Mr Bell suggests. The legal regime governing the tendering of contracts with public authorities is detailed and complex and has different requirements according to the circumstances of the specific transaction. As the Information Commissioner found there is no suggestion that there is any wrong-doing (dn paragraph 36, paragraph 6 above). There is however considerable public interest in maintaining legal professional privilege, not only in terms of protecting the confidentiality of the Trust in its relations with its lawyers but more broadly as was summarised by Lord Taylor in *Derby Magistrates*:-

"But it is not for the sake of the appellant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason, I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege"

17. While that statement clearly must be read in the light of the balancing of interests required under FOIA/EIR it reflects the very considerable public interest in ensuring that legal professional privilege continues to be recognised as providing a reliable protection of confidentiality. The very modest public interest in disclosure of this legal advice in these circumstances does not begin to outweigh this interest.

18. The commercial interest is however altogether less substantial. The interests protected by regulation 12(5) are disparate and clearly have different weights, which is reflected by the distinction between the simple listing of four different interests in (a) *“international relations, defence, national security or public safety”* to the statement of the interest and the further requirements for it to be protected contained in (e) *“the confidentiality of commercial or industrial information”* and *“where such confidentiality is provided by law to protect a legitimate economic interest”*.

19. The withheld information is characterised by the Information Commissioner as:-

“the Trust confirmed the information is commercial in nature and consists of detailed formulae, percentage yields and pricing details concerning the development. It argues it is in nature as it relates to a commercial agreement between the Trust and Noviniti (the developer) for the development of land.

...

It is a report into the assessment of the premium that should be paid for the grant of a lease over the land. The report details the agreement made with Noviniti and goes into specifics of the agreement, including costings, timings and financial breakdowns.”

20. The information relates to the granting of a lease of part of the Colchester Hospital site and the financial arrangements which underpin it. The Trust describes the pressure it is under to come up with innovative solutions. This seems to the tribunal to be a somewhat immodest claim. The information is about the structuring of a deal whereby the Trust receives improved buildings and Noviniti Colchester provides capital and receives income. This is clearly not intellectual property under 12(5)(c) and it clearly has some commercial interest – it is a commercial transaction. However, it is site specific (indeed the contracting party has been created to carry out this transaction) and relates to how much value the contractor thinks can be extracted from the transaction and how much the Trust has to contribute. The over-arching framework is the UK tax regime affecting freehold and leasehold property the incomes derived from them and the transaction costs. The consequences of such transactions include the provision of buildings and services for the trust, the creation of retail leasehold units, the extraction of a surplus by the contractor and the minimisation of tax liability. In essence it is the application of normal business processes in relation to a lease of this particular duration using generally available knowledge of tax law, the costs of the specific construction and the ability of the contractor to access funds.

21. The interest protected would appear to be a legitimate economic interest, however *“Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors”*. The tribunal is not satisfied that disclosure would cause any damage to the economic interests of the Trust or the special purpose vehicle

(whether created to minimise tax or otherwise) since this is a combination of publicly available knowledge which anyone can access and a specific public asset.

22. The Tribunal also finds it relevant that the agreement was entered without benefit of competitive process as Mr Bell notes. Competitive exposure is a factor which plays a large part in assuring the public that good value has been obtained: even where the details of particular bids remain confidential the public authority is able to show that competitive price and reasonable rate of return has been tested by competition. In the absence of such process it can be argued that the justification for maintaining confidentiality faces a higher bar than in more competitive circumstances, and there is less justification for allowing a protective carapace around details of price, return and profitability.
23. The tribunal is therefore not satisfied that the commercial exemption is engaged. However, even if it were the public interest rests decisively with transparency rather than an overvaluing of secrecy which prevents accountability and prevents the public understanding what has been done and why. The tribunal is satisfied that disclosure of the information at the time it was requested would not have caused such harm to the legitimate economic interests of the Trust and Noviniti Colchester as would outweigh the public interest in understanding this transaction.
24. The appeal is allowed in part.

Signed Hughes

Judge of the First-tier Tribunal
Date: 2 December 2020