



Case Reference: EA/2023/0074  
Neutral Citation Number: [2024] UKFTT 163 (GRC)

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard on the papers**

**Heard on: 19 February 2024  
Decision given on: 28 February 2024**

**Before**

TRIBUNAL JUDGE CARTER  
TRIBUNAL MEMBER DAVE SIVERS  
TRIBUNAL MEMBER SUSAN WOLF

Between

MARK JOPLING OBO UDNEY PARK PLAYING FIELDS TRUST LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

LONDON BOROUGH OF RICHMOND UPON THAMES COUNCIL

Second Respondent

**Decision:** The appeal is allowed.

**Substituted Decision Notice:** The Second Respondent is to disclose the requested information (subject to appropriate redaction of personal information of individuals named in the documents) within 35 days of the promulgation of this decision.

## REASONS

1. This is the second decision in an appeal under section 57 of the Freedom of Information Act 2000, against the Information Commissioner's Decision Notice IC - 185876-K2P7 which held that the London Borough of the Richmond Upon Thames Council ("the Council") were entitled to rely on regulation 12 (5)(f) of the Environmental Information Regulations ("EIR") to refuse disclosure of information requested by the Appellant.
2. The first decision was issued on 5 September 2024 and was that the Commissioner had erred in upholding the reliance of the Council on regulation 12(5)(f) of the EIR. The Tribunal adjourned the hearing to join the Council as a party and to hear from it and the other parties with regard to the other exceptions originally relied upon by the Council, that is regulation 12(5)(d) and (e). In the event, the Tribunal only heard from the Appellant and the Second Respondent.
3. The request for information was made by the Appellant to the Council on 10 June 2022. This requested:

*"All correspondence relating to the Pre-Application advice for any proposals for any work that requires Planning Permission at Udney Park, for the period of 1<sup>st</sup> Jan 202 to the present date".*

4. As noted in the last decision, the request concerns open land, consisting of playing fields in the Council's area. The Appellant sought information as to the seeking of pre-planning advice from the Council's planning department by a third party which wished to develop the land in question. The withheld information is the pre-planning application itself, the advice provided by the Council and associated correspondence, all of which is in a Closed Bundle which we have seen. The Closed Bundle is subject to a ruling under rule 14(6) of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 such that it has not been shared with the Appellant.

### Legal Framework

5. The Tribunal's remit is governed by section 58 of the Freedom of Information Act 2000. This requires the Tribunal to consider whether the Decision Notice made by the Commissioner is in accordance with the law or where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that not before the Commissioner and may make different findings of fact from the Commissioner.

6. It is not in dispute that the EIR apply to the information requested.

7. Regulation 12(5)(d) and (e) provides:

*“(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 –*

*....*

*12(5)(d) ... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect... the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.*

*12(5)(e) ... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect... the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”*

8. “Adversely affect” means that there must be an identifiable harm to or negative impact on the interests identified in the exception. Therefore the threshold for establishing adverse effect is high, since it is necessary to establish that disclosure would have an adverse effect. “Would” means it is more probable than not, i.e. a more than 50% chance that the adverse effect would occur if the information were disclosed.

9. After consideration of whether the exceptions above apply, it is necessary to consider whether “in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information” (Regulation 12(1)).

10. The relevant time for considering the application of the exception is the time of the response to the request, in this case 7 July 2022.

### **Evidence**

11. We read and took into account an open and closed bundle containing documents and correspondence. There were no witness statements. As this was a hearing decided on the papers, by agreement of the parties, there was no oral evidence.

12. As noted above, the Closed Bundle contained the disputed information.

### **Tribunal’s consideration**

13. First, the Tribunal considered whether regulation 12(5)(d) was engaged. In order for this exception to apply, it was necessary that the particular process to which the disputed information related were “proceedings” within the meaning of the EIR. This term is not defined in the EIR. The guidance, which was quoted in the Second Respondent’s submissions, states:

*“Regulation 12(5)(d) – confidentiality of proceedings (Environmental Information Regulations)” sets out what can be considered proceedings for the purposes of Regulation 12(5)(d):*

*Definitions of ‘proceedings’ in the Oxford English Dictionary include:*

- *doings, actions*
- *a legal action or process*
- *a record or account of the activities of a society or of papers submitted to it.*

*These definitions suggest that ‘proceedings’ can cover a range of activities; however, the ICO considers that the word implies some formality, i.e., it does not cover an authority’s every action, decision, or meeting. The Upper Tribunal has defined ‘proceedings’ as “the final decision-making stages of an authority”.*

*It will include, but is not limited to:*

- *formal meetings to consider matters that are within the authority’s jurisdiction*
- *situations where an authority is exercising its statutory decision-making powers*
- *legal proceedings.*

*In each of these cases, the proceedings are a means to formally consider an issue and reach a decision. ‘Proceedings’ could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority: both of these have a degree of formality. What constitutes an authority’s proceedings may be set out in its constitution, in its standing orders, or in law.*

.....

*However, ‘proceedings’ should not be defined so widely as to mean any meeting you hold, as these would not necessarily have the required degree of formality,”*

14. The Upper Tier Tribunal case mentioned in the Guidance above is the case of Department for the Economy (Northern Ireland) v Information Commissioner and White (GIA/85/2021). The ICO Guidance had quoted a relevant paragraph from the Upper Tier decision, which is as follows:

*“The scope of ‘proceedings’ is not defined. However, I consider that the term must broadly apply to the final decision making stages of an authority...In the particular circumstances, the [Department] and TRUK were engaged in legal proceedings, which were not in themselves the proceedings of the [Department] as they fell to be*

determined by the High Court. However, in the course of the legal proceedings, the appellants had to make their own decisions about how those proceedings should be conducted...it appears to me that the decisions taken by the [Department] about their conduct of the legal proceedings potentially falls within the scope of their own regulation 12(5)(d) 'proceedings'. This is because their own conduct of the litigation required formal decision making steps and consideration of evidence and legal advice. I consider that the FtT has erred by holding otherwise."

15. The Second Respondent, which did not address this case despite its mention in the Guidance, did however draw attention to the reference in the ICO Guidance above to examples of what may be proceedings for these purposes as including "consideration of a planning application by a planning authority". It argued that the proceedings in which the information requested was received or created by the Council is to be viewed as the "Formal pre-application service". The Council's website describes this as follows:

*• Formal pre-application service - This service is chargeable and provides informal officer advice on a specific scheme. The fee is dependent on the type of advice you would like and the size of the development.*

16. The Tribunal noted first, this was pre-application and differed therefore to the example given in the Commissioner's guidance, there being no actual application for planning permission. Moreover, despite the reference to "formal" on the webpage, in the following sentence it referred to this as "informal officer advice". This reflected that this was not, in the Tribunal's view part of any formal process or put differently it lacked formality. This was a voluntary process and the Council's website expressly stated that "this service cannot provide any guarantee that a proposed development will receive planning permission". There were no decision making powers being exercised in the provision of pre-application advice, statutory or otherwise, let alone this being part of the "final decision making stages of an authority". This was more of an administrative process than proceedings as such. The factual matrix was moreover distinguishable from the Upper Tier case cited above, the background to which was a formal licence having been issued and in turn a formal decision taken as to its extension.
17. For these reasons, the Tribunal decided that the Council was not entitled to rely upon the exception at regulation 12(5)(d) in refusing to disclose the disputed information.
18. With regard to the exception at regulation 12(5)(e), the Commissioner's guidance "Commercial or industrial information (regulation 12(5)( e))" sets out the four tests for the exception to apply:

*"The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality.*

*The exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:*

*The information is commercial or industrial in nature.*

*Confidentiality is provided by law.*

*The confidentiality is protecting a legitimate economic interest.*

*The confidentiality would be adversely affected by disclosure."*

19. Whilst the parties argued contrary positions with regard to the first three tests, the Tribunal based its decision that the exception did not apply on the basis that it was not, in any event, satisfied that any confidentiality would be adversely affected by disclosure.
20. Tribunal had reconsidered the disputed information (in the Closed Bundle) for these purposes.
21. The Council continued to rely on the fact that the disputed information had been said to be confidential and the applicant had not consented to its disclosure. In addition, it was now set out in its recent submissions that the pre-application service user had stated that *"particular aspects of the proposal reflect sports which are "successful and growing at great pace" and the service user has to "work very hard to stay ahead of competitors and new entrants to the market"*.
22. The Council argued that premature disclosure would give insights to competitors which they would otherwise not have vis the service users views and projections for the sporting market, appropriate facilities to invest in and the scale of investment required. It was asserted that the disputed information would be used by competitors to cause harm to the service users plans to retain and improve upon its market position.
23. The Tribunal took the view that these new submissions did not take matters any further forward, as they were not supported by any evidence or a degree of specificity as to the nature of the competition or how particular parts of the disputed information, if disclosed, could give rise to harm and what that harm would be. The Tribunal paid close attention to the disputed information in order to seek to discern for itself whether any of this was apparent on the face of the information. In its view it was not. Its reasoning that it is not satisfied, from anything in the contents of the disputed information, that disclosure would adversely affect any confidentiality of a legitimate economic interest are set out in the Annex to this decision.
24. In the Tribunal's view, the exception at regulation 12(5)(e) did not apply.

25. Finally, the Tribunal noted that the Second Respondent had indicated in its submissions that it accepted that certain of the disputed information would fall to be disclosed further to the application of regulation 12(9). This provides:

*“(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse or disclose that information under an exception referred to in paragraphs (5)(d)-(g)”.*

26. The Tribunal did not determine whether regulation 12(9) was operative in this appeal, given its finding in relation to the non-applicability of regulation 12(5)(d) and (e) as explained above. As the Second Respondent had not indicated what information it was proposing to disclose, the Tribunal was in any event unable to determine the correctness of its interpretation of this provision to the current circumstances.

27. The appeal is dismissed and the Second Respondent ordered to disclose the requested information (subject to appropriate redactions arising from personal information of any individuals) within 35 days of promulgation of this decision.

**Signed Tribunal Judge Melanie Carter**

**Date: 27 February 2024**

