IN THE UPPER TRIBUNAL **UA-2022-001392-GIA**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 111 (AAC)**

On appeal from the First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Between:

Mr Diego Lourenco

Appellant

v

The Information Commissioner

First Respondent

and

London Borough of Barnet

Second Respondent

Before: Upper Tribunal Judge Church

Decision/Hearing date: 13 October 2023

Representation:

Appellant:	Prof Brad Blitz, as lay representative
First Respondent:	Mr Michael White of counsel, instructed by Mr Richard Bailey of the Information Commissioner's Office
Second Respondent:	Mr Francis Hoar of counsel, instructed by Ms Melissa Trichard of HB Public Law

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

What this appeal is about

1. London Borough of Barnet (**"LBB"**) is a London local authority. In recent years, it has considered a redevelopment proposal in Hendon called the *"Hendon Hub"*, which

involved the proposed redevelopment of land in the borough in partnership with Middlesex University, Capita and others, building student accommodation and other facilities.

2. Documentation was produced in relation to the proposals setting out matters such as plans costings and an 'Outline Business Case' (**"OBC"**).

3. On 9 December 2020, Mr Tony Mason (a resident of the LBB) made an application under the Environmental Information Regulations 2004 (the **"EIR**") for the disclosure of (among other things):

> "The full 'Outline Business Case' … i.e. information that LBB claim is as exempt under Item 17 of the 8th of Dec P&RC Meeting" (the **"Request"**).

4. The other aspects of Mr Mason's request are no longer relevant, because the Appellant does not pursue any appeal in respect of the First-tier Tribunal's decision on them.

5. An LBB committee meeting took place on 8 December 2020 at which the OBC was before the committee. The committee appears to have decided at that meeting that the OBC was not to be available for public inspection.

6. In due course, after further engagement with Mr Mason and the ICO, LBB disclosed a redacted version of the OBC to Mr Mason, but refused to disclose an unredacted version on the basis that the disclosure of the redacted information would adversely affect the confidentiality of commercial or industrial information (which confidentiality was provided by law to protect a legitimate economic interest) and the public interest in maintaining the exception outweighed the public interest in disclosing it (thereby bringing the situation within the exception provided by Regulation 12(5)(e) of the EIR).

7. Planning permission for the Hendon Hub development was not formally (a) sought, (b) tabled at a meeting of LBB's principal council, or (c) granted, until late 2021 / early 2022.

8. Mr Mason was not content with this position and made a complaint to the Information Commissioner (**"ICO"**). The ICO investigated the complaint and, on 5 November 2021 issued a Decision Notice in which she stated that the LBB was entitled to rely on regulation 12(5)(e) EIR (the exemption relating to commercial confidence) to refuse to disclose the unredacted version of the requested documents which were the subject of the Request (the **"ICO Decision Notice"**).

9. Mr Mason was unhappy with this outcome and appealed the ICO Decision Notice to the First-tier Tribunal (General Regulatory Chamber). Following an oral hearing on 27 May 2022, a three member panel of the First-tier Tribunal (the **"FTT"**) decided on 17 June 2022 that the ICO Decision Notice was in accordance with the law (the **"FTT Decision"**).

10. This is an appeal against the FTT Decision.

Procedural background

11. Mr Mason, who made the Request, made the complaint to the ICO, and pursued the appeal before the FTT, sadly died between the determination of the appeal to the FTT and the determination of the application for permission to appeal to the Upper Tribunal.

12. His husband, Mr Lourenco, has been substituted as the Appellant in the proceedings before the Upper Tribunal. No party has taken issue with the substitution. For ease of understanding, I shall refer in this decision to both Mr Mason and Mr Lourenco as the "Appellant". To the extent that such references relate to the period before Mr Mason's death they are references to Mr Mason, and to the extent that they relate to the following period they are references to Mr Lourenco.

13. The proceedings before the Upper Tribunal were brought with the permission of Judge Brian Kennedy KC of the First-tier Tribunal by a notice dated 19 August 2022. The basis on which permission was given is somewhat confusing: Judge Kennedy KC decided that the grounds argued by the Appellant amounted in substance to a subjective disagreement with the ICO Decision Notice and the FTT Decision upholding it, matters which were considered carefully by the FTT and which were for the FTT to decide. He said he was not satisfied that there was an error of law in the FTT Decision and he said he was satisfied that the FTT had explained its reasons to the required standard of adequacy.

14. The Appellant argued that there were material matters that were not considered by the parties or the FTT, and which resulted in "a mistake resulting in unfairness" and that "fairness determines that this applicant be entitled to argue the more detailed and nuanced position he now presents, before a higher authority, as sought at the [Upper Tribunal]". Judge Kennedy KC decided that it was in the interests of justice that the Appellant be permitted to do so.

15. Conspicuously, Judge Kennedy KC did not identify any arguable error of law and, other than identifying that the Appellant was an unrepresented litigant and was "perhaps inhibited by his prowess in weighty legal matters" and thereby disadvantaged, he did not explain why the interests of justice required permission to be given notwithstanding that he had identified no arguable error of law.

16. However, this is an appeal against the FTT Decision, not the permission decision. Permission having been granted, my task is to decide whether any of the grounds for which permission was granted are made out.

The oral hearing of the appeal before the Upper Tribunal

17. At the oral hearing of this appeal the Appellant was ably represented by Prof Blitz who, while not a lawyer, had an impressive grasp of matters of international law and had clearly spent considerable time conducting research to support his friend's appeal. I was assisted by the helpful and co-operative way that Prof Blitz, Mr White and Mr Hoar each presented their cases.

The grounds of appeal

18. The grounds set out in the UT13 application for permission to appeal which was before Judge Kennedy KC are discursive and somewhat unclear. They read as follows:

> "The decision of the [FTT} states that the [FTT] does not have jurisdiction to rule upon whether the Council has breached the Local Government Act 1972 (LGA 1972) and, that the appeal of a requester or public authority is against the decision notice and therefore not an issue for the [FTT]. I believe there is an error of law.

This case concerns the application of the [EIR], a UK instrument that provides a statutory right of access to environmental information held by UK public authorities. Contrary to the claim that neither the [ICO] nor the [FTT] has the authority to rule on a breach of the LGA 1972, I note that the rights under Freedom of Information and the [EIR] are conjoined. The [EIR] are also informed by the UK's international commitments under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The rights to information are therefore far-reaching and are binding upon local authorities.

[EIR] were introduced further to EU Directive 2003/4/EC (Recital 24). Although the UK has left the European Union, the substance of the Directive remains in effect through the [EIR]. When the UK implemented the Directive, it did so cognizant of Recital 24 which encourages countries to pass environmental legislation that increases the scope and obligations above the baseline set by the Directive, including advancing information transparency. Under [EIR], para 9 falls into this category of legislation as it increases the level of information transparency and is compatible with the Aarhus Convention to which the UK is bound.

UK Courts have identified that the Tribunal is required to consider an EIR exception in the context of: (i) all UK statute law; and (ii) all UK Common law when considering the lawfulness of a Decision Notice.

In *Highways England Company Ltd v Information Commissioner and Henry Manisty* [2018] UKUT 423 (AAC); [2019] AACR 17), the Tribunal clarified that its focus is on the outcome rather than on its findings or reasoning. In this matter, the outcome of the withholding of information and curtailment of rights to information bears on residential property disputes in the regeneration area designated as the Hendon Hub.

Further, with respect to common law, we note the decisions by the Aarhus Convention Compliance Committee, which presides over the Aarhus Convention to which the UK is a signatory.

Birkett [2011] UKUT 39 (AAC) provides a helpful summary of the duties of the [ICO] [p.43-53] and the duties of the Tribunal [p.54-60], which include identifying when to take the initiative and when to exercise derivative powers, that permit it to consider claims.

"In summary, the [ICO] has to decide whether the public authority did what it should have done under Part I of the Act. In doing so the [ICO] has a range of powers and duties under section 50. Some are spelt out. Others are derived from the nature of the process and the circumstances in which it has to operate. In order to make section 50 effective and consistent with the full range of the [ICO]'s powers and duties, it is necessary for the [ICO] to take the initiative in appropriate circumstances and to do so as a matter of duty, not of discretion. Given the limitations of what can be achieved without cooperation, the [ICO] must inevitably rely on the parties, and especially on the public authority to identify what is relevant."

> It is clear from *Birkett*, that the First-tier Tribunal exercises a full merits appellate jurisdiction and is not constrained, as stated in the decision of 17 May 2022 regarding the outcome of Appeal Number: EA/2021/0339.
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> I note also from the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (as amended)that the Tribunal may refer a case to the President of the Property Chamber with a request that the case be considered for transfer to the Upper Tribunal if the President of the Property Chamber considers that the issues in dispute are likely to be further appealed to the Upper Tribunal involve a complex or important principle or issue. The important principle here is the application of the Right to Information under the [EIR]. At no point does the decision of the [FTT] raise this possibility. Rather, the decision by the [FTT] challenges both the object and spirit of the law.
>
> I therefore contend that in the matter of Appeal Number EA/2021/0339, the decision of the [FTT] is based on an error of law."

19. In his Skeleton Argument for the hearing before me Prof Blitz reframed the arguments in the Appellant's UT13 into the following 5 grounds:

a. The FTT erred in its decision that it does not have jurisdiction to rule upon whether LBB has breached the Local Government Act 1972 (**"Ground 1"**);

b. The FTT erred in its decision that confidential information may not be disclosed and would have an adverse impact on the commercial interests of LBB (**"Ground 2"**);

c. The FTT erred in its decision that the public interest test had been satisfied (**"Ground 3"**);

d. The FTT erred in its decision regarding LBB's evidence of transparency (**"Ground 4"**); and

e. The FTT did not consider other material matters in favour of disclosure, including decisions by UK courts and principles of Common Law (**"Ground 5"**).

20. Counsel for the ICO and LBB, while noting that the grounds identified by Prof Blitz differed somewhat from those contained in the Appellant's UT13 which was before Judge Kennedy KC, were willing to accept Prof Blitz's reframing of the grounds of appeal, save that both of them submitted that the Appellant should not be permitted to pursue Ground 4 as it plainly fell outside the scope of the grant of permission, and counsel for LBB also argued that the Appellant should not be permitted to pursue Ground 5 on the same basis.

21. I agree with the Respondents that, because the Appellant's Notice of Appeal contained nothing resembling the argument now framed as Ground 4, the FTT's grant of permission did not extend to that ground, and it was not fair for the Appellant to be permitted to pursue it now. In any event the matters raised appear not to have been argued before the FTT.

22. Ground 5, too, was not reflected in the Notice of Appeal and so falls outside Judge Kennedy KC's grant of permission. In any event, it amounts to a collection of

arguments which were not pressed before the FTT and which lack merit, so I do not expand the grant of permission to include it.

The FTT's jurisdiction

23. The FTT is a creature of statute. It can only adjudicate on matters that Parliament has given it jurisdiction to decide.

24. Regulation 18 of the EIR confers on the FTT jurisdiction to hear appeals from decisions of the ICO on matters under the EIR, by importing (in modified form) similar jurisdictional provisions found in the Freedom of Information Act 2000 (**"FOIA"**).

The EIR

25. The EIR provides for a general public right of access to environmental information held by a public authority (see regulation 5(1) of the EIR). It is not in dispute in these proceedings that the information requested is environmental information.

26. The right of access to environmental information is subject to the exceptions found in regulation 12 of the EIR, which provides (so far as relevant) as follows:

> "(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –
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> (a) an exception to disclosure applies under paragraphs (4) or (5); and
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> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."
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> …
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> (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 –
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> …
>
> (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest"

27. This was the exception relied upon by LBB in this case. Regulation 12(5)(e) of the EIR reflects the wording in Article 4.4(d) of the Aarhus Convention, which provides that:

> "A request for environmental information may be refused if the disclosure would adversely affect: … The confidentiality of commercial and industrial information where such confidentiality is protected by law in order to protect a legitimate economic interest."

28. The lawfulness of a public interest balancing exercise in this context is to be assessed by reference to the public interest at the time at which the public authority refuses to disclose the information, and not at the time of any subsequent appeal:

Maurizi v The Information Commissioner & The Crown Prosecution Service [2019] UKUT 262 (AAC).

The LGA

29. As far as is material for present purposes, Part VA of the Local Government Act 1972 (the **"LGA"**) provides that a local authority's principal council must meet in public save insofar as to do so would be likely to entail disclosing "exempt" information to members of the public: section 100A of the LGA. The same applies when the council acts through committee: *ibid*, section 100E.

30. Sections 100B, 100C and 100D of the LGA provide (in short) that papers that are before the council at the public part of a meeting must be made accessible to the public. It follows that the same can only be non-disclosable insofar as they relate to a meeting or part of a meeting that was held in private, i.e. that concerned exempt information.

31. Schedule 12A to the LGA makes provision for 'exempt' information for the above purposes, which information:

> (a) includes "Information relating to the financial or business affairs of any particular person (including the authority holding that information)", where the public interest in maintaining the exemption outweighs that in disclosing the information (paragraphs 3, 10); but
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> (b) excludes information that "relates to proposed development for which the local planning authority may grant itself planning permission or permission in principle pursuant to regulation 3 of the Town and Country Planning General Regulations 1992" (paragraph 9).

32. Relevant to the latter provision, Regulation 3 of the Town and Country Planning General Regulations 1992 provides that:

> "Subject to regulations 4 and 4A, an application for planning permission by an interested planning authority to develop any land of that authority, or for development of any land by an interested planning authority or by an interested planning authority jointly with any other person, shall be determined by the authority concerned …"

33. In *R (Helen Stride) v Wiltshire County Council* [2022] EWHC 1476 (Admin), HHJ Jarman QC (sitting as a judge of the High Court) considered the meaning of paragraph 9 of Schedule 12A LGA, and concluded that:

> "37. In my judgment the meaning of the words permit both a wide meaning or a narrow interpretation, although perhaps not as wide as Mr Willers QC contends or as narrow as Mr Goudie QC contends. The wording does in my judgment suggest some temporal connection between information relating to a proposed development and the grant of permission for that development. It does not suggest that as soon as an authority as landowner proposes development, then information relating to it cannot be exempt, however far in the future and however unlikely a grant of planning permission may be. On the other hand, it does not suggest that it is only at a meeting where the grant of planning permission will be decided that such information must be disclosed. There may be a meeting of the executive to discuss proposed development on its land where a

> planning application has already been made, and it is difficult to see why the wording or paragraph 9 should not apply in those circumstances.
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> 38. In my judgment, it assists in this case to have regard to the purpose of the statutory scheme, which is to promote public access on the one hand, but to safeguard the financial and business interests of anyone, including the authority, on the other. It is clear that in the interests of transparency, once the authority is applying for planning permission for development on its own land, then such safeguards should no longer apply and the public should have access to relevant financial and business information.
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> 39. In this case, the authority accepts that once that stage is reached, there must be public access to, and hence scrutiny of, such information before planning permission is granted. Given that that will happen, the question is whether in balancing the competing interests of public access and private interest, the purposes will be served by disclosure of such information when the proposals are at an early stage. In my judgment, it is not difficult to see why proposals may be prejudiced by the early disclosure of such information. In this case, that applies in particular to the negotiations and contracting with other landowners.
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> 40. Accordingly, I conclude on ground 1 that paragraph 9 on its proper interpretation did not apply so as to render the information withheld from the public in the private session of the meeting as not exempt. The executive was entitled to proceed on that basis, and did not in so doing act unlawfully."

Discussion

Ground 1

34. Starting with Ground 1, the First-tier Tribunal's jurisdiction in the information rights jurisdiction is limited to deciding whether a Decision Notice issued by the ICO is in accordance with the law (see *Fish Legal & Shirley v Information Commissioner & Water Companies* [2015] UKUT 0052 (AAC) at [20]). It has no standalone jurisdiction, statutory or otherwise, to adjudicate on the LGA.

35. However, I am not wholly persuaded by the submission that the limits of FTT's statutory jurisdiction necessarily preclude it (or indeed the ICO) entirely from considering, as a subsidiary matter, whether information is disclosable under the LGA. That is because *if* the LGA requires a public authority to disclose information, such a requirement is surely relevant to the public interest balancing exercise that must be carried out under the EIR.

36. Prof Blitz made some quite involved arguments about the interplay between the EIR, FOIA, and the UK's international commitments under the Aarhus Convention and EU Directive 2003/4/EC. He said that paragraph 9 of Schedule 12A to the LGA was an example of legislation which had the effect of raising the bar for information transparency, and should be interpreted in that light.

37. However, it is clear to me that this is not the right case to seek to demarcate the boundaries of the First-tier Tribunal's jurisdiction. That is because both the information request and the decision to refuse it were made at a stage when the development proposals for the Hendon Hub were at a relatively early stage, long

before any planning application was submitted. Per *Stride*, therefore, it is plainly not a case in which reliance on an otherwise applicable exemption under Schedule 12A LGA would have been excluded as a result of the operation of paragraph 9.

38. Even if the FTT erred in law in deciding that it was precluded from considering whether LBB was required to disclose the requested material under the LGA, any such an error would not have been material. I therefore decline to rule on, or to analyse any further, the issue of the extent of the First-tier Tribunal's jurisdiction to consider obligations that a public authority may have to make information public otherwise than under the EIR when conducting the public interest balancing exercise.

39. Prof Blitz made some submissions that related to the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and the power under those rules for a case to be considered for transfer to the Upper Tribunal in certain circumstances, but these were misconceived because these proceedings were proceedings in the General Regulatory Chamber, not the Property Chamber, of the First-tier Tribunal, and in any event the proceedings are now in the Upper Tribunal so I fail to see the relevance of the arguments.

Ground 2

40. Turning to Ground 2, this ground amounts in substance to a disagreement with the way that the FTT assessed whether disclosure of the requested information would have an adverse impact on the commercial interests of LBB and how it balanced the public interest in disclosure against the need to protect LBB's commercial interests.

41. Prof Blitz referred me to provisions of the Local Government Transparency Code 2015 which establishes a presumption of openness and disclosure of information, requiring that public authorities should not rely on exemptions to information disclosure save where absolutely necessary.

42. While Prof Blitz said that "blanket bans" on information disclosure were prohibited, it does not appear to me that LBB applied a blanket ban. Rather, it appears to have conducted a genuine assessment of the information and disclosed what it considered disclosable. LBB did disclose the OBC, albeit in redacted form to protect commercially sensitive information, which has to be seen in the context of the early stage that the development proposals and negotiations with commercial counterparties and funders had reached.

43. An appeal to the Upper Tribunal is not an opportunity to simply reargue a case on its merits, with the Upper Tribunal considering all the issues afresh. Rather, an appeal to the Upper Tribunal can succeed only if the First-tier Tribunal erred in law, and did so in a way that was material.

44. The FTT (and indeed the ICO) appears to have conducted a conscientious assessment of the availability of the commercial confidence exception to LBB and its conclusions on that issue were within the range of options reasonably open to it on the evidence. Its decision discloses no error of law in this regard.

Ground 3

45. The third ground of appeal asserts that the FTT erred in its conclusion that the public interest test was satisfied, and in its assessment of the evidence of transparency. It is said that the FTT failed to consider the adverse impact on the

public of non-disclosure. Prof Blitz referred me to passages in *Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 0030, in which it is stated that the public interest in maintaining an exemption is to be assessed in all the circumstances of the case, and that a policy that the public interest is likely to be in favour of maintaining a exemption in respect of a specific type of information must not be inflexibly applied.

46. The Appellant makes numerous new factual assertions in relation to the merits of the Hendon Hub project and its financial viability. Such arguments are incapable of establishing an error of law on the part of the FTT for the simple reason that they were not raised before it.

47. I am by no means persuaded that the FTT failed to assess the public interest in maintaining the exemption in the context of all the circumstances, or that it was bound to conclude that LBB had applied policies inflexibly.

48. Rather, it is adequately clear from the ICO Decision Notice and the FTT Decision that the public interest in disclosure was considered and weighed in the balance both by the ICO and the FTT. As with ground 2, ground 3 amounts in substance to a disagreement with the way that the FTT weighed the factors for and against disclosure. While it is possible that another tribunal might have weighed things differently, the way that the FTT weighed the competing interests was within the range of reasonable options open to it. Similarly, there is a disagreement with the way that the FTT assessed the evidence in relation to transparency but again its assessment of the evidence was one that was reasonably open to it. Disagreement with its assessment is insufficient to establish an error of law.

49. For these reasons I am not persuaded that the FTT Decision involved the making of an error of law that was material and I dismiss the appeal.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on: **28 March 2024**