



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

Tribunal Reference:	EA/2013/0114
Appellant:	Cheshire East Borough Council
Respondent:	The Information Commissioner
Second Respondent:	Beverley Moore
Judge:	NJ Warren
Member:	D Stephenson
Member:	G Jones
Hearing Date:	26 November 2013
Decision Date:	8 January 2014

DECISION NOTICE

A. Background

1. For nearly a decade there have been plans to redevelop the town centre of Macclesfield. These have generated great local interest, as is plain from the witness statements in this case including those of Mr Watson, the vice chairman of Macclesfield civic society and Mr Cash, whose business is affected. Work has still not started. This appeal arises from a request made under the Environmental Information Regulations (EIR) by Ms Beverly Moore.
2. When Ms Moore was unhappy with Cheshire East Borough Council's (Cheshire East) response to her request she complained successfully to the Information Commissioner (ICO). Cheshire East then appealed to the Tribunal.

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B. The Information Remaining in Dispute

3. Much of the information requested has now been disclosed so, rather than start with the original request, it is more convenient to state what remains in dispute:-

(a) The Legal Advice Issue

Ms Moore wishes to see legal advice supplied to Cheshire East by a leading firm of solicitors. That advice is summarised in paras 8.3 (part) – 8.6 of a report to the Cheshire East Cabinet for its meeting on 3 May 2011. The summary has been redacted from a copy of the report which has been supplied to Ms Moore.

(b) The Commercial Confidentiality Issue

Ms Moore has received an appraisal report of the development written by a consultant, but again with some redactions. Some of those redactions she is content with. A figure for site value costs refers only to acquisition of other property. She does not dispute that this should not be made public. She takes a similar view of the redaction of a named member of staff at the consultant's office.

However, she does still want to see:-

(i) Material redacted from pages 44 and 48 of the report.

(ii) Certain dates and other material which have been redacted from pages 16, 42-44, 46, 48, 54, 80, 85, 133-4, 141-43 and 264 of the report.

4. Cheshire East still maintains its refusal to disclose.

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C. Closed Material

5. We have received the information now in dispute as closed material, not disclosed to Ms Moore. We have also received on the same basis a small amount of material in witness statements sent in by Cheshire East. These are referred to in the registrar's case management notes. To disclose the disputed information to Ms Moore would defeat the purpose of these proceedings. We agree with the registrar that the limited material redacted from the witness statements supplied to Ms Moore is so intimately connected with the disputed information that to reveal those paragraphs would also defeat the purpose of the proceedings.

D. The Hearing

6. We held a hearing of the appeal. However, a week or so before the hearing date all the parties indicated that they would prefer not to attend and, instead, they sent in final written submissions. Then, very late in the day, East Cheshire discovered that there had been some inconsistencies in the redactions. They notified the other parties that they intended to appear before us at the hearing to put these right. They did so and the consequences, all of which have been disclosed to the other parties, appear in a case management note. We did not listen to, nor were we asked to listen to, any substantive submissions from East Cheshire.

E. The Legal Advice Issue

7. In respect of the legal advice and the summary of it in the report to cabinet, Cheshire East rely on regulation 12(5)(b) EIR. In summary, this supports a refusal if disclosure would adversely affect the course of justice and, in all the circumstances of the case, the public interest in exempting the information from disclosure outweighs the public interest in disclosing the information. The disputed

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information here is undoubtedly the subject of legal professional privilege (LPP).

The importance of maintaining LPP and the adverse consequences for the course of justice of a failure to do so, were the subject of analysis by the Upper Tribunal in DCLG v ICO and WR (2012) UKUT 103 (AAC), a decision binding on us.

8. Ms Moore argues in favour of disclosure. In part, her arguments are those in favour of transparency and accountability in connection with a very important issue concerning the development of her town which have now apparently been accepted by Cheshire East in the disclosure which they have made. Additionally, she is concerned that there may be legal risks attached to the scheme and does not wish legal advice to be a “cloak” covering the facts on which advice has been sought. She raises a number of possibilities about flawed and vulnerable decisions. Her concerns are fairly summarised in paras 44-48 of the ICO decision notice.

9. When it comes to balancing the public interests, we have concluded that far more weight attaches to the importance of LPP – and therefore the importance of not disclosing the information – than appears to have been afforded by the ICO. For example, (see para 56) the ICO seems to have weighed only the impact on Cheshire East in terms of being discouraged from obtaining legal advice; but, as the Upper Tribunal has made clear the public interest attaches to the freedom of public authorities generally to be able to seek legal advice in confidence and without being forced to disclose it. We differ also from the ICO in connection with the arguments in favour of disclosure. We doubt whether the size of the project influences the arguments in favour of disclosing legal advice – although it might be a factor in connection with other information. Nor would we have attached the same importance as the ICO seems to have done to an event involving a waste transport

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station. Finally, we were unable to accept that disclosure of the legal advice would reassure the people of Macclesfield that the council's approach was not based on flawed processes or deficient legal advice. It seems to us that knowledge of the fact that external advice from a very well known firm of solicitors had been sought would itself provide that comfort to those seeking such reassurance. Actually reading the advice would add very little.

10. For these reasons we allow the appeal in respect of the legal advice issue. We would have reached this conclusion even if we had not read the closed material.
11. For slightly different reasons the ICO has changed his position and now supports this outcome.

F. The Commercial Confidentiality Issue

12. On this topic we now have much more detailed information than was before the ICO. Having considered this information the ICO has sent in a further submission indicating that he has, after considering this further evidence, changed his mind.
13. We have carefully looked at the closed material which provides, in our judgement, cogently argued and fairly assessed factors in support of the redactions and against disclosure. We take into account all Ms Moore's concerns but they are, in our judgement, outweighed by the arguments contained in the witness statements filed on behalf of East Cheshire. The public interest favours non-disclosure for the reasons advanced by the ICO in paras 24-29 and 32-34 of their latest submission.
14. We therefore also allow the appeal in respect of the redacted information under Regulation 12(5)(e).

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G. Conclusion

15. We should say something further in response to Ms Moore's latest submissions dated 24 November 2013.
16. We feel unable to respond to the questions asked in 2.1, 2.2 and 2.3 in case our doing so disclosed the disputed information.
17. We have taken into account the comments made in paras 3-4 and 6-7. As to para 5, we agree that issues of "viability" are not a ground for an exemption under the EIR.
18. As to the "preferred options summary" Ms Moore will already have received the reply from East Cheshire indicating the public website on which this is available.
19. Ms Moore rightly points out that it is now not disputed that East Cheshire was in breach of their obligations under EIR. That remains the case. It is not necessary, however, for us to order East Cheshire to take any further steps because it now appears that, with the exception of information rightfully withheld, disclosure has now taken place in accordance with the regulations.

NJ Warren**Chamber President****Dated 8 January 2014**