



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2014/0294

BETWEEN

GEORGE BENJAMIN PATON

Appellant

and

INFORMATION COMMISSIONER

Respondent

Tribunal

**Brian Kennedy QC
Suzanne Cosgrave
Marion Saunders**

Hearing: 16 April 2015.
Location: Field House London
Decision: Appeals refused.
Promulgation 8 June 2015
Date:

Subject Matter: The Environmental Information Regulations 2004 (“EIR”) and reliance by the Appellant on Regulation 12(4)(a) EIR’s to withhold disclosure of the requested information.

Regulation 12(4)(a) EIR’s provides an exception to the general rule of disclosure under Regulation 5 of the EIR’s where a public authority does not hold the information requested.

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) as modified by Regulation 18 EIR. The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 17 November 2014 (reference FER0558500), which is a matter of public record.
2. A paper hearing took place on 16 April 2015. The Tribunal and parties have been provided with a paginated (1-81) and indexed Hearing Bundle (“HB”). We also have the usual pleadings including the DN, the grounds of appeal and the response on behalf of the Commissioner.

Background:

3. On 9 July 2014, the complainant wrote to Guildford Borough Council (“the council”) and requested information in the following terms:

“Please supply a copy of the GL Hearn housing projections model. This model has been prepared as part of the evidence base for the new local plan and forms part of the GLH’s SHMA document. The model is maintained, I expect in spreadsheet form. Please supply an electronic copy of the model in a conventional spreadsheet format i.e. Excel or similar. Please ensure that all assumptions are explicitly stated. Please ensure that any link that is also supplied or supplied in hard copy form.”

4. The Council responded on 12 September 2014. It stated that some of the information was not held by the Council was held by the “... consultants who prepared the model and projections for us”. The Council disclosed some information it held which fell within the scope of the request.
5. On 9 October 2014 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The Commissioner confirmed with the complainant that its investigation would seek clarification of the grounds upon which the Council was not disclosing any additional information and consider whether the Council had provided all the relevant held information falling within the scope of the request. The Commissioner established the facts as set out in the DN at paragraphs 9 – 14 and some of the pertinent facts are repeated here.
6. The Council entered into a contract with GL Hearn (“GLH”) to produce a housing projection assessment as part of the evidence base for a new local plan forming part of the Strategic Housing Market Assessment, (“SHMA”).
7. In response to the request from the Appellant at 3. above, the Council disclosed to the appellant two spreadsheets. The first included three projections. The second spreadsheet was a “Components of Change” spreadsheet that gives details of how mid-year estimates are calculated. This appears to be in effect the subject matter of the contract for the assessment, SHMA.
8. The Appellant was not satisfied that the above disclosure met his request in full in that, as he put it; “*the spreadsheets did not contain **formulae**, (our emphasis) the inputs and outputs, their interrelationships and how the outputs derive from the inputs*” (“the disputed information”).
9. The Council explained that the request relates to a housing projection SHMA, which was produced for it by consultants. These consultants produced the assessment using their own formulae. It confirmed that the SHMA, which were derived with the use of the formulae, had been disclosed to the complainant and that the disputed information is in fact these formula.
10. The Council stated that the disputed information, which the complainant believes should be held by the Council, have never been in its possession. It explained

that the projections, which it provided to the complainant in spreadsheet form, were the outcome of a project jointly commissioned by the Council, together with Waverley and Woking Borough Councils. The Council stated that none of the officers from the Council or from the other participating Councils have seen the formula/model used by the consultant to generate the projections.

11. The Council has stated that the formulae/model, upon which the projections are based, were in existence before the Council and other participating Councils commissioned the work and they are not covered by the contract for the project. It explained that the consultants would be likely to use the same formulae/model for other work commissioned by other clients. The Council has explicitly stated to the Commissioner that there is no business need for the Council to hold the formulae/model in question and that the disputed information is not held by the consultant on the Council's behalf.
12. The complainant has maintained that the disputed information should be held by the Council, however, having considered the Council's explanations and available evidence the Commissioner has concluded that the Council has correctly confirmed that it does not hold the formulae/model. The Commissioner has, therefore determined that the Council disclosed all the relevant information it holds which falls within the scope of the request and that it complied with regulation 5 of the EIR.

Legislative Framework:

13. Regulation 5 (1) of the EIR provides that a public authority that holds environmental information shall make it available on request.

14. Regulation 3(2) EIR states that: -

“For the purposes of these regulations, environmental information is held by a public authority if the information-

(a) Is in the authority’s possession and has been produced or received by the authority; or

(b) Is held by another person on behalf of the authority”

15. The Appellant in his Grounds of Appeal argues that the Commissioner erred in the DN in concluding that the Council did not hold the requested information pursuant to regulation 3 EIR and therefore erred in concluding that the Council complied with regulation 5 EIR.

16. In particular the Appellant argues “... the test of “holding” is not one of physical possession but one of ownership and/or control. The reality and substance of the situation is that the Council commissioned and paid for the information”. Pausing there, this Tribunal do not accept this analysis as it is clear from the Commissioner’s investigation that what the Council commissioned was an

assessment for housing needs, not the formulae or model used by the third party and/or subcontractor whereby that assessment was arrived at.

17. The Commissioner in his investigation with the Council learned that the housing projections were produced for the Council by GLH which in turn subcontracted the modeling to Justin Gardner Consulting ("JGC") and, as such used their own formulae to carry out the process of the assessment which was the purpose of the contract. The Council cannot have been said to have held the disputed information at any material time and nor can a third party (in this case either GLH or JGC) be said to be holding the formulae on behalf of the Council.
18. This Tribunal agrees with the reasoning of the Commissioner in his DN and Response to the Grounds of Appeal. The Appellant repeats his Grounds of Appeal in his Response (dated 15 December 2014) to the Commissioners' Response and essentially argues that the Council have misrepresented or fraudulently misinformed the Commissioner. The Commissioner has, in the course of his investigation inspected the process followed by the Council in obtaining the assessment from an outside Third Party and accepted what he has been told by the Council officials. This Tribunal has not been persuaded that the Council told untruths to the Commissioner or has tried to hide important information that it was holding. That would be an extremely serious abuse in public office and on the evidence before us we are not persuaded that it is likely to have occurred. The Tribunal are not persuaded that the Council "... has received the model in the sense it has paid for it and is using its output ..." or "It is just convenient for the GBC to claim not to have the model from which the output derives." As the Appellant has claimed.

Reasons:

19. The Commissioner investigated the Appellant's contentions carefully and has set out clearly his reasoning in his DN. We see nothing new or significant to suggest he erred in that DN.
20. We suspect there is some confusion about the use of the word such as model with the word formulae. This is perhaps best explained in a letter dated 14 November 2014 [Page 59 HB] from Vincenzo Ardilio, the Information Rights Officer with the Council to Christopher Williams, the Senior Case Officer within the Information Commissioners Office. In the 4th Paragraph thereof he stated as follows;

"Having reviewed the correspondence, I believe that some confusion may have arisen due to the interchangeable use of the word "model" and what this means. For the sake of clarity, a housing projection was produced for the Council by consultants using the consultant's own formulae. The formulae, which Mr Paton believes we should hold and provide, have never been in the Council's possession and Council officers have not seen them because they have no business need to do so. The projections (which we provided to Mr Paton in spreadsheet form) were jointly commissioned by Guildford Borough Council, together with our neighbours, Waverley and Woking Councils. We understand

that none of the officers from these councils would have seen the formulae, as they are intellectual property of the consultants we employed. The formulae, upon which the projections are based, were in existence before Guildford Borough Council and our neighbours commissioned the work and are not covered by the contract for the project. The consultants would likely use the same formulae for other work that they carry out for their other clients.”

- 21.** This is further supported, in our view, by an e-mail dated 3 October 2014 from Martyn Brake, Deputy Monitoring Officer of the Council, to the Appellant himself wherein he states at the 4th paragraph thereof [Page 37 HB];

“I have reviewed the contract with GL Heron and my interpretation of that contract is that the copyright of any documents or information that is properly subject to copyright, prepared under the terms of the contract and during the course of the contract belongs to the Council. In this case, the model was prepared prior to the contract by a partner of GL Hearn. My understanding is that the Council has no direct contractual relationship with that partner and the model is their intellectual property. They have indicated through GL Hearn that they are not willing to share the model.”

- 22.** The Tribunal Registrar in a Case Management Note dated 17 December 2014, properly in our view, directed that the Council need not be joined as a Respondent and also directed that the Council need not produce any further documents or representations. We agree and find that there was sufficient evidence for the Commissioner to reach the proper conclusions he did in his DN.
- 23.** For the reasons above we find that on the balance of probabilities the Council do not hold the requested information. The Commissioner, in our view was correct and the DN should stand. Accordingly we refuse the appeal.

Brian Kennedy QC

8th June 2015.