



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2016/0065

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FER0605501

Dated 15th February 2016

BETWEEN

Guildford Borough Council

Appellant

And

The Information Commissioner

1st Respondent

And

Extreme Oyster Ltd

2nd Respondent

Determined on the papers at Fox Court on 14th October 2016

Date of Decision 14th November 2016

BEFORE

Ms Fiona Henderson (Judge)

Mr Michael Jones

And

Mr Dave Sivers

Subject: s12(5)(e) EIRs – commercial interests

Case Law: *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association EA/2010/0012*
Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030

Decision: The Appeal is allowed

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FER0605501 dated 15th February 2016 which held that Guildford Borough Council (the Council) had failed to demonstrate that regulation 12(5)(e) was engaged. The Council were ordered to disclose the withheld information to the requestors within 35 days. The Council disclosed the spreadsheet entitled Run Appraisal¹ but continues to withhold the Guildford Masterplan Benchmark Land Values Spreadsheet which has been disclosed to the Tribunal by way of a closed bundle and constitutes the disputed information in relation to this appeal.

Background

2. At the date of the information request, the Council was in the process of preparing a draft Local Plan. The Local Plan should set out the strategic priorities for development of an area and cover housing, commercial, public and private development, transport infrastructure and protection for the local environment. It should plan positively for development and infrastructure and give clear guidance on what will or will not be permitted and where. It is drawn up by the Council as the Local Planning Authority and guides decisions on whether or not to grant planning applications². *The Town and Country Planning (Local Planning) (England) Regulations 2012* sets out the requirements for taking into account representations

¹ P95 OB

² P64 et seq OB

from stakeholders³ and sets out the requirement for formal public consultation by making a submission version of the draft local plan available for inspection⁴. It was due for consultation in Summer 2016.

3. The Council also prepared a draft Masterplan for the development of Guildford Town Centre and river corridor whose purpose was to propose and promote schemes that are deliverable and financially sound. The Masterplan was to provide evidence to support the Local Plan, but the Masterplan did not formally allocate any sites for planning purposes and thus would not carry weight in determining any planning applications. Part of the preparation of the draft Masterplan included valuations by Bilfinger GVA of identified sites in their existing state and then again with a proposed development to establish whether there was sufficient value in the development of the sites.

Information Request

4. On 2nd September 2015 Extreme Oyster Ltd⁵ wrote to the Council asking:

“We refer to the Council’s “Guildford Town Centre Masterplan” dated 27th August 2015 and, in particular, section 5 of that document entitled “Delivery”.

Please provide us with the relevant documentation which formed the Council’s evidence base for the conclusions reached in respect of viability for the development sites identified therein. In particular, we request the detailed valuation and associated documents prepared in respect of those development sites (including the site at plot U).

If not already falling within the scope of the preceding paragraph, please also supply us with copies of the following documents in relation to the sites identified for redevelopment in the Masterplan:

(i) The viability analyses undertaken;

³ Reg 18

⁴ Reg 19

⁵ The information request was conducted on behalf of the 2nd respondents, for ease of comprehension Extreme Oyster will be used throughout the decision to signify the information requestors.

(ii) The development appraisals undertaken;

(iii) The assessment of benchmark land value used to determine viability; and

(iv) Copies of any reports (both internal and for wider dissemination) prepared to assess or verify the above on behalf of the Council and /or its independent viability consultants.”

5. The Council refused the request on 29th September 2015, relying on r12(5)(e) EIRs namely that disclosure would adversely affect commercial information. This decision was upheld following an internal review dated 4th November 2015.

Complaint to the Commissioner

6. Following a complaint to the Commissioner dated 13th November 2015 the Commissioner investigated the case. During the currency of the investigation the Council published part of the information sought and the Commissioner consequently confined the decision to the remainder of the disputed information namely 2 spreadsheets.

Appeal

7. The Council have appealed the Commissioner's decision insofar as it relates to the Residual Land Values spreadsheet. They appeal on the grounds that:
 - i) The exemption is engaged.
 - ii) The public interest favours withholding the information.
8. The Commissioner initially opposed the appeal relying upon the reasoning in the Decision Notice, however, following further details provided in the Council's reply dated 28th April 2016, the Commissioner conceded that the view now was that regulation 12(5)(e) was engaged. The Appellant provided further argument relating to the public interest in their second reply dated 19th July 2016 following which the Commissioner indicated that he was persuaded that the public interest in disclosing the information does not outweigh maintaining the exemption and invited the Tribunal to substitute his Decision Notice to reflect this.

9. In light of the Commissioner's change of position, Extreme Oyster were joined by Case Management Note dated 26th May 2016⁶, they oppose the appeal arguing in their response dated 6th July 2016 that:

- i) The Council have failed to establish a causal link between disclosure of the disputed information and a detriment to the Council and
- ii) that the public interest favours disclosure.

10. All parties have now consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) GRC Rules, being in receipt of a bundle of documents comprising some 95 pages including the written arguments advanced by the parties and the information about the Masterplan that has been disclosed since the date of the request⁷, and a closed bundle containing the disputed information. In reaching this conclusion the Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules and has had regard to costs, proportionality and the narrow issues in this case. The Tribunal has had regard to all the documentary evidence before it, even where not mentioned directly in this decision.

Prejudice to Commercial Confidentiality

11. S12 EIRs provides:

—(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—

⁶ See also case management note of 26th July 2016 clarifying the identity of the 2nd respondent p42 OB

⁷ P69-95 OB

....

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

Whether the exemption is engaged

12. The applicable test for determining whether the information is in scope is not in dispute and it is agreed to be as follows⁸:
 - i. Is the information commercial or industrial in nature?
 - ii. Is the information subject to confidentiality provided by law?
 - iii. Is the confidentiality provided to protect a legitimate economic interest?
 - iv. Would the confidentiality be adversely affected by disclosure?
13. It is not disputed between the parties and the Tribunal agrees that the withheld information is commercial or industrial and that the information is confidential in nature (as it is not trivial nor is it in the public domain). In issue is whether the confidentiality is provided to protect a legitimate economic interest as it is not accepted by Extreme Oyster that there is a causal link between disclosure of information and a detriment to the Council.
14. Extreme Oyster Ltd argue that the Council's evidence amounts to no more than a *"high level analysis with no evidence to establish prejudice or harm and its appeal is based on the perceived conduct of third parties"*.
15. The Tribunal is satisfied that the assertions of fact as set out in the Council's correspondence to the Commissioner and their pleadings constitute evidence as does the documentary evidence of the procedure and processes to be followed in the implementation of the draft Masterplan as set out at the end of the open bundle. It is a matter for the Tribunal how much weight that it places upon this.
16. The Tribunal is satisfied that "would" means "more probable than not".⁹ The Council must be able to demonstrate that some causal relationship exists between the potential

⁸ Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association EA/2010/0012

disclosure of the disputed information and the prejudice which the exemption is designed to protect and that this crosses the threshold of “would” cause the prejudice claimed.

17. The Tribunal is satisfied that the disputed information consists of a breakdown of the residual land values for various sites that have been aggregated into lettered plots. The methodology for these valuations has already been published¹⁰:

“This benchmark land value has been assessed for each site either through analysis of the existing uses and an estimation of their value using valuation Office agency data or with reference to any extant planning permission for development. In addition to this value, compensation for owners and occupiers based on the statutory compulsory purchase regime has also been allowed for. A further 20% buffer has then been applied as an assumed incentive for landowners to release land for development ... the final assumed figures including 20% buffer are given in the viability results table [on p71].

18. The Council has recognised a need to be more proactive in facilitating town centre regeneration:¹¹

“Through a combination of utilising their land ownership, land assembly powers, and potentially finance ability, authorities are helping to drive those development opportunities that are seen as strategically important or catalytic...”

19. The Council’s approach to shape the proposition includes¹²:

- Directly acquire subordinate (leases) or other third party interests...
- Agree terms for joint venture with adjacent or third party landowner,
- Agree the Council’s role – land sale, JV participant, purchase investment...

⁹ Christopher Martin Hogan and Oxford City Council v ICO EA/2005/0026 and 0030 para 35

¹⁰ P70 OB

¹¹ P73 OB

¹² P73 OB

Factors which may delay the promotion of a site are recognised as including: fragmented ownership, multiple leasehold occupation, lengthy unexpired lease terms.

20. The Tribunal accepts that each lettered plot is made up of sites of different ownership and that there is a link between the success of the Council's negotiations as owner, occupier, joint partner, buyer and seller and their ability to progress the regeneration of the town centre. We accept that the Council is currently in active negotiations with the owners of 4 plots to buy those sites for development. In one current negotiation, which is yet to be completed the provisional agreement is at a figure far less than the Council's valuation. It is the Council's case that if the Council's higher valuation were known to the vendor they would demand a higher price and this would hinder the Council's ability to negotiate effectively. The Tribunal is satisfied that this is the logical conclusion to be drawn from this evidence.

21. Extreme Oyster challenge paragraph 3 of the Council's 1st reply namely that "*the development of the town centre is an ongoing process and there are likely to be further negotiations which could be similarly prejudiced*" because there is no additional detail to establish how disclosure would prejudice its negotiating position.

22. From the evidence of the Council's strategy we are satisfied that this will be an ongoing process:

*"Where Council has freehold ownership there is a requirement to manage existing occupation through dialogue and asset management. There is also the potential for the Council to facilitate delivery where it has no land ownership through acquisition of properties should they become available or the use of compulsory purchase powers though the intention would remain to acquire existing interests by agreement or to promote sites in partnership with landowners..."*¹³

and

"Following publication [of the draft Masterplan] it will be necessary to continue this process with detailed discussions with affected landowners and occupiers. This will

¹³ P77OB

be essential to facilitate discussion between landowners and developers and to assist in securing vacant possession of sites... ”¹⁴

23. Extreme Oyster have themselves made an unsolicited offer to buy part of Plot U from the Council to enable development of a property owned by them adjacent to the property owned by the Council. The Tribunal is satisfied that this is an example of a situation where the Council are likely to be hindered in their negotiations as it would mean that one party to the negotiation knows what the other thinks it is worth and hence their expectations and the basis for them.
24. Extreme Oyster argue that valuations “*inform sales prices but sale prices are dictated by the market at the time of disposal more than any assumptions recorded in the valuations. Competitors, as the Council perceive Extreme Oyster to be in respect of Plot U can make their own assumptions about the market costs and value of sites. Consequently this is not a legitimate reason for withholding the valuations.*”¹⁵
25. This argument appears to concede that valuations will inform sales prices and the Tribunal agrees with this. Whilst we accept that it is not the only factor in agreeing a price it is reasonable to conclude that a party who was minded following their own analysis to accept a lower price for the sale of land would adjust it upwards if they were led to believe that the Council were expecting to pay a higher amount. The knowledge of the Council’s analysis would impact upon the response to any starting figure and hence the course of the negotiations.
26. We are satisfied that those with whom the Council are negotiating would have an unfair advantage in negotiations as they would know whether a starting price was a genuine expectation or an attempt to obtain a very good price, disclosure would provide them with information not otherwise publicly available and for which in relation to their competitors there is no reciprocity. They would thus be unfairly disadvantaged in competing with other competitors (for to use the analogy of sealed bids, if one bidder’s bid is known the others can adjust theirs marginally in order to achieve a favourable outcome).

¹⁴ P82 OB

¹⁵ P32 OB

27. The Council argued that it would prejudice them commercially as it would mean they were less likely to achieve best value for money for the taxpayer as it would enable their competitors to outmanoeuvre them or overbid them. We agree with this conclusion.
28. Whilst the methodology has been disclosed valuation still comes down to analysis and expertise, we are not satisfied that competitors would reach the same figure when performing their own assessment and we are supported in this conclusion by the Council's evidence that they are currently negotiating a proposed purchase price below their own valuation. Whilst other factors such as fluctuations in market values would of course be expected to impact the expected price, we are satisfied that they would still be expected to be viewed through the prism of the Council's original valuation and so the information would continue to be material to the expectation and approach of those with whom they were negotiating.
29. The Council also rely upon their concern that a rival developer, knowing what the Council is looking to pay, could use the information to purchase pieces of land comprising parts of the sites and either frustrate the development or demand a ransom figure for the sale to the Council for those pieces of land. The Tribunal is satisfied that this is material to the assessment of the prejudice. It is evident from the papers that there are others who have their own uses for the land that the Council wishes to use in furtherance of its Masterplan (e.g. Extreme Oyster Ltd acknowledge that they are viewed by the Council as a competitor). If the Council were forced to disclose their valuation for each element of each plot we are satisfied that this would leave them extremely vulnerable to those seeking to exploit their need to deliver entire plots *"On a site-by-site basis, some proposals are not viable due primarily to relatively valuable existing uses. However, such sites can be packaged with neighbouring sites which are viable and hence ensure a deliverable scheme overall to ensure that development contributes to the overall vision for the town centre"*¹⁶ p 710

30. Public interest.

¹⁶ P71 OB

31. The Council accepts (as argued by Extreme Oyster Ltd) that there is a public interest in disclosure to promote transparency and accountability and to increase awareness and understanding of environmental matters, enable a free exchange of views and more effective participation by the public in environmental decision making.

32. Extreme Oyster argue that these public interests should be given substantial weight because:

- The analysis was paid for out of the public purse
- The Council are seeking to acquire property for redevelopment and are using public money to pay for the land, disclosure is necessary to scrutinise value for money
- The requested information formed part of the Council's evidence base for conclusions reached in respect of the local Plan.
- The redevelopment of the Town Centre will impact large numbers of local residents as the repercussions and impact on local community will be significant
- The scale of development and regeneration increases the need for the public to be able to review and scrutinise the actions and decisions of the Council.

33. In assessing the weight to be given to these factors we take into consideration the presumption in favour of disclosure as set out in regulation 12(2) EIRs and the public interests inherent in recital 1 of Directive (2003/4/EC) however, we are satisfied that the public interest in disclosure of the disputed information is low. We have had regard to the considerable amount of information which has already been disclosed including the values of the composite plots (as opposed to the breakdown of those figures which form the disputed information) the methodology for valuation and many of the assumptions included in the calculations. We are satisfied that there is sufficient information within the public domain already to indicate the Council's thinking, the economics behind their assessments and to enable the Council's evidence base supporting the local plan to be scrutinized. In our judgment the

breakdown of the information already provided will not add significantly to public understanding of the decision making process or the development strategy.

34. We are satisfied that accountability and scrutiny of value for money can be achieved without the disclosure of the withheld information, actual prices agreed (both as buyers and sellers) can be compared with local market comparators without the need to disclose the disputed information.

Against disclosure

35. There is an inherent public interest in maintaining commercial confidentiality. We accept that it is in the public interest to preserve a situation where public authorities can contract with private individuals and companies without prejudice to their commercial interests.

36. The Tribunal gives this factor considerable weight. As set out above the Tribunal is satisfied that there would be real and significant prejudice to the Council's commercial position resulting from disclosure. We accept that disclosure would hinder the Council's ability to obtain best value for money, would create an unequal playing field during negotiations hampering their ability to negotiate and that this is not in the public interest. We agree that it is not in the public interest if the Council have to pay more for sites or if they have to accept lower sale prices than they would otherwise have achieved.

Conclusion

37. For the reasons set out above we allow the appeal and the Commissioner's decision notice insofar as it relates to the disputed information should be substituted as follows:

In relation to the Benchmark Land Valuation information regulation 12(5)(e) EIRs is engaged and the public interest favours maintaining the exemption.

38. This decision is unanimous.

Dated this 14th day of November 2016

Fiona Henderson
Tribunal Judge