



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50694803**

Appeal Reference: EA/2018/0102

**Considered on the papers at Field House
On 30 May 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

STEVE SHAW & DAVE SIVERS

Between

MID DEVON DISTRICT COUNCIL

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

NICK QUINN OBO CHRISTINE QUINN

Second Respondent

Cases:

C-316/01 Glawischnig
DBEIS v ICO and Henney [2017] EWCA Civ 844

REASONS

The proceedings

1. In these proceedings the Appellant (“the Council”) appealed against a decision of the First Respondent (“the Commissioner”) that it should disclose information requested by the Second Respondent (“Mr Quinn”). During the course of the proceedings most of the information was disclosed and a single page of information which was Appendix 1 to a report, was in dispute. The Commissioner in her final submissions supported the withholding of this residual piece of information.

The request

2. On 25 May 2017, Mrs Quinn wrote to the council and requested information in the following terms:

“Please provide me with all the information the Council holds regarding the formation of the private limited company subsequently known as 3 Rivers Developments Ltd. All information to include reports, meeting minutes, emails and notes by officers and elected members”

3. On 30 March 2017 the council’s cabinet agreed to the creation of a property development company, wholly owned by the council, under powers given to the council by the Localism Act 2011. The activities of the company were set out in paragraph 9 of the report and they were the acquisition of land and the development on that land of housing and commercial property in order to create income for the council to support its frontline services (bundle page 199).
4. The background to the request for information was that there had been a proposal from 3 Rivers Development Limited to build houses on land opposite where Mr and Mrs Quinn lived.

Issues before the tribunal

5. There are two issues for the tribunal to determine:-
 - Whether it was correct for the request to be treated as falling within the scope of the Freedom of Information Act (EIR). During the course of the proceedings Mr Quinn argued that the relevant legal framework was the Environmental Information Regulations (EIR).
 - Whether the public interest favoured the disclosure or withholding of the information in the light of the exemption in FOIA s43(2) (protection of commercial interests) or EIR regulation 12(5)(e) (protection of confidential commercial information).

The correct legal framework

6. In information rights issues FOIA only applies to situations in which EIR does not. Therefore, the starting point is to determine whether EIR applies to the information requested.

7. In EIR the scope of information within its ambit is defined (regulation 2(1):-

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”

8. The information withheld is a single page setting out a budget for a proposed property development. Patently this is not information about the state of the environment or factors affecting it (subparagraphs a and b), nor is it a report on implementing environmental legislation or information on the state of human health and safety as affected by the environment (subparagraphs d and f). The issue is whether it falls within subparagraph c, ie whether a single page budget of a proposed development can be a measure ... plan ... programme likely to affect the elements of the natural environment or factors affecting the natural environment.

9. There is extensive caselaw on this issue. While EIR is to be interpreted purposively the Court of Justice of the EU (C-316/01 *Glawischnig*) held that the this legislation was not to be interpreted “to give a general and unlimited right of access to all information held by a public authorities which has a connection, however minimal, with one of the environmental factors mentioned. In the leading Court of Appeal case (*DBEIS v ICO and Henney*) it was held that “simply because a project

has some environmental impact it does not follow that all information concerned with a project must necessarily be environmental information”.

10. While any human activity is bound to have some impact on the environment the boundaries are clearly drawn and the tribunal is satisfied that this financial information about a proposed building project does not possess the characteristics which bring it within the scope of EIR.

11. The relevant exemption to be considered is therefore that within s43(2) of FOIA. This provides:-

“43 Commercial interests.

....

(2)Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

12. In support of the claim that this exemption is engaged the council submitted that the disclosure of the information would be likely to prejudice the commercial interests of 3 Rivers Development Limited. The council (bundle page 111) argued that the table of costs concerned one specific development which had not yet started. The IC supported the council in accepting that disclosure would enable potential suppliers to the company to know the company’s available budget and profit margin. This would enable potential suppliers to know its bargaining position and thus know how hard they could push for higher prices. The disclosure would therefore give contractors a negotiating advantage over the company which would adversely affect its economic interests, since any commercial entity will use the legitimate advantage obtained from the disclosure of the company’s budget and profit margin. The tribunal is satisfied that exemption is clearly engaged.

13. Mr Quinn challenged the commercial sensitivity of the information, arguing that it was simply an estimate created to support the creation of the company and that, from information which had been disclosed, the withheld information could not be seen as indicating that disclosure would harm the functioning of the company in a commercial marketplace. He also argued that the process was excessively secret and that there was public opposition to the development.

14. In considering the balance of public interest the tribunal recognised that there is always some public interest in disclosing information about a housing development, in this case the fact that it is carried out by a company owned by the local planning authority must add to the public interest in the matter. Against this must be set the harm to the commercial interests of the company. Furthermore, the planning process enables the public to have access to considerable information about the issues raised by a development and to comment on them – this meets the public interest. The additional information

about the budget of the development adds very little to this accountability while threatening the commercial interests of the development company. The public interest in financial transparency will be met by the council publishing its accounts in accordance with the regulations governing those accounts. The tribunal is satisfied that the public interest favours withholding of this financial information and to that extent the appeal is allowed.

15. It may be noted that there is no practical impact on the choice of statutory regime FOIA/EIR in a case such as this where the balance of public interest is clearly against the disclosure.

Chris Hughes

(Judge of the First-tier Tribunal)

Date of Decision: 20th June 2019