



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2018/0195

**Heard at Fleetbank House
On 7 February 2019**

Before

**JUDGE HAZEL OLIVER
MRS ANNE CHAFER
MR NIGEL WATSON**

Between

LENNOX RYAN

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:

The Appellant – In person
The Information Commissioner did not attend

DECISION

The appeal is dismissed except as follows:

Paragraph 14.11.1 of the information withheld under Regulation 12(5)(e) is to be disclosed to the appellant.

SUBSTITUTED DECISION NOTICE

The Information Commissioner's Decision Notice stands except as follows:

Paragraph 3 is amended by the adding the further bullet point, "To disclose the information in paragraph 14.11.1 of the information withheld by the Council under Regulation 12(5)(e) as the exception was not correctly applied to this paragraph".

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 13 August 2018 (Decision Notice FER0713831, the “Decision Notice”) in which the Commissioner decided that certain information should be not disclosed by the appellant under the Environmental Information Regulations 2004 (“EIR”). It concerns disclosure of information about negotiations on the disposal of land owned by Kent County Council (the “Council”) in Dartford.

2. The information relates to negotiations between the Council and Tesco relating to the sale of land by the Council, and the lease of land back to the Council on Lowfield Street, Dartford. The information sought by the appellant is correspondence between the Council, the Council’s agent and Tesco. There was a sale of land by the Council consisting of an Adult Education Centre and car parks to St James Investments in 2004. This was sold on to Tesco in 2008 as part of the acquisition of land for a major regeneration development. The terms of the original sale agreement included an obligation to provide a shop unit for community use to be leased back to the Council. This was to be at a nominal rent, with the Council paying the costs of constructing the building up to £350,000. Tesco announced in January 2015 that it would not be proceeding with the development plans due to unfavourable market conditions. Tesco sold the land to MB Dartford Ltd, and the Council has been negotiating with the residential developer Meyer Homes in relation to the new owner’s development proposals.

3. The appellant has made several previous information requests to the Council on this topic. Some information has been disclosed, some has been withheld, and some requests have been the subject of Decision Notices by the Commissioner. On 5 December 2014 the appellant sought information about the negotiations on the acquisition of land from Tesco by the Council, and the contractual obligations relating to this acquisition. In Decision Notice FER0580869 (dated 16 July 2015) the Commissioner found that the Council was entitled to withhold this information under the exception in regulation 12(5)(e) EIR (commercial confidentiality).

4. On 20 September 2017 the appellant wrote to the second respondent and made the following request, which is the subject of this appeal:

“The Information Commissioner’s Decision Notice dated 16 July 2015 upheld the Council’s view ie not to release the information requested on the grounds of confidentiality and of possible harm to commercial interest, because the Council was in on-going negotiations with Tesco at the time of the request.

Over two years later the negotiations should have been concluded; please let me know where the Council has published the details and outcome of the negotiations, which should answer question 4 of the FOI request.”

5. The Council initially refused the request under sections 41, 43(2) and 22 of the Freedom of Information Act 2000 (“FOIA”). The appellant requested an internal review. The Council provided the outcome of the review on 16 January 2018. The Council stated that EIR applied to the request. The Council relied on the exceptions in regulation 12(5)(e) (commercial confidentiality), 12(4)(e) (internal communications) and 12(5)(d) (confidentiality of proceedings)

in order to withhold its own internal communications, correspondence with its agents and Tesco, and correspondence containing legal advice (the “Withheld Information”).

6. The appellant made a complaint to the Commissioner dated 29 September 2017. The Commissioner carried out an investigation, which identified some third-party personal data in the Withheld Information. The Council disclosed to the appellant 13 out of 14 documents that had previously been withheld on grounds of commercial confidentiality, with redactions for third party personal data under regulation 12(3) EIR. The Council continued to withhold a chain of internal emails under regulation 12(4)(e). The Council also withheld section 14.11 “Negotiating Strategy” in one document relating to negotiations with Tesco (the “Disputed Information”), under regulation 12(5)(e).

7. The Commissioner decided that:

- a. The Council had been entitled to rely on regulation 13(1) in relation to personal data contained in the Withheld Information.
- b. The Council had been correct to apply regulation 12(5)(e) to the Disputed Information.
- c. The public interest in disclosure of some of the information in the internal emails outweighed the exception being maintained, and the Council was ordered to disclose this information apart from one email.

The Appeal

8. The appellant appealed against the Commissioner’s decision. The appeal is put on the following basis:

- a. The Commissioner issued the Decision Notice without sight of correspondence between the appellant and the Council which post-dates the Decision Notice. This correspondence shows that the negotiations with Tesco had fallen through, there was a deal with MB Dartford Ltd, and this has removed the covenant to provide a shop front for community use. The reasons for withholding information under Decision Notice FER0580869 (dated 16 July 2015), that negotiations were ongoing, no longer applied.
- b. The appeal refers to the fact that the community has lost a much-needed Health and Social Care centre and has lost the use of the Market Street car park, and the Council has lost revenue from this car park. The appellant says that his previous question 4, which was about value for money and not personal information or internal communications, remains unanswered.

9. These grounds of appeal relate to the Disputed Information – namely the withholding of section 14.11 “Negotiating Strategy” in one document relating to negotiations with Tesco. The appellant has not appealed the other elements of the Commissioner’s decision.

10. The appeal states that the reasons for the loss of the Health and Social Care Centre should be established by disclosure - including details of any on-going negotiations, and why no breach of contract action was used to enforce compliance with the obligation in the relevant sale agreement. In box 6 (outcome of the appeal), the appellant asks for publication of details of the deal which the Council has concluded with MB Dartford Ltd, including any financial compensation or provision of a shop unit without a shop front. He also asks for a review of Decision Notice FER0580869.

11. The Commissioner's defends the appeal, and the response can be summarised as follows:

- a. An appeal that is based on new correspondence cannot succeed – the Tribunal must dismiss an appeal unless the appellant can show that the decision notice was not lawful or the Commissioner ought to have exercised her discretion differently, on the basis of material available to the Commissioner at the relevant time.
- b. The new correspondence reveals no error of law or discretion. The Commissioner was aware that the negotiations with Tesco had ended, and bases her reasoning upon the fact that the Disputed Information reveals the Council's negotiating strategy in a way that may prejudice the Council in future negotiations. In addition, the Council had told the appellant that its negotiations with Tesco had discontinued in its response to his request.
- c. The Commissioner applied regulation 12(5)(e) correctly to the Disputed Information. The exception is engaged, and this is not challenged by the appellant in the appeal. The Commissioner's analysis of the public interest balance was detailed and nuanced, and finds that the Council had correctly applied the exception as it had disclosed most of the information and withheld only that which would prejudice its future negotiating position.

12. The appellant provided a reply to the Commissioner's response as follows:

- a. The Commissioner's decision was premature and unfair as it was arrived at before consideration of all the facts.
- b. The appellant is now convinced that FOIA should have been applied, and the Tribunal is asked to examine the strong probability that sections 41 and 43(2) of FOIA would have resulted in full disclosure.
- c. Decision Notice FER0580869 related to a request about value for money. The main reason in the Decision Notice was that disclosure would prejudice ongoing negotiations, but it now appears there were no on-going negotiations with Tesco. The Commissioner was wrong to accept the Council's claim without examination, and the appellant was not aware of this at the time.
- d. The Council's negotiating strategy has completely failed, and there is public interest in knowing why this happened.
- e. Any assumption in favour of disclosure is not apparent in the Decision Notice.

Applicable law

13. The relevant provisions of EIR are as follows.

- 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;*

.....

5(1) *...a public authority that holds environmental information shall make it available on request.*

.....

12(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.*

12(2) *A public authority shall apply a presumption in favour of disclosure.*

.....

12(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 -*

.....

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

14. Requests for environmental information are expressly excluded from FOIA in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC.

15. The Court of Appeal gave guidance on determining whether information is "environmental" and the application of regulation 2(1)(c) in ***The Department for Business, Energy and Industrial Strategy v Information Commissioner and another*** [2017] EWCA Civ 844 (known as “Henney” after the second respondent). This requires identifying the measure or activity that the information in question is "on" – meaning it is about, relates to or concerns the measure in question. The measure must then affect or be likely to affect the elements or factors in regulation 2(1)(a) or (b). Merely relating to or being connected to one of the environmental factors, however minimal, is not sufficient. But, the test for environmental information is not restricted to what the information is "specifically, directly or immediately about" and the wider context should be considered.

16. 12(5)(e) is not limited to information provided by a third party. The information in question must be commercial or industrial. The information must be subject to confidentiality provided by law. An obligation of confidence can be implied, and the three-stage test in **Coco v A N Clark (Engineers) Ltd** [1969] RPC 41 applies: (1) the information must have the "necessary quality of confidence", in that it is not publicly accessible and is more than trivial; (2) the information must have been imparted in circumstances that implied an obligation of confidence, whether this is explicitly or implicitly; and (3) disclosure of the information must be unauthorised. The confidentiality must protect a legitimate economic interest, which would, on the balance of probabilities, be harmed by disclosure. Finally, it must be shown that the disclosure of the information would adversely affect the confidentiality.

Evidence

17. We had an agreed bundle of open documents consisting of the appeal, response from the Commissioner, appellant's reply, and supporting documents, all of which we have read. We also had a closed bundle of documents consisting of the Disputed Information. We have considered and taken all of this material into account in making our decision.

Submissions

18. The appellant provided various submissions in his appeal and in his reply to the response of the Commissioner. The appellant also attended the hearing and provided oral submissions, which we address in our discussion below. The appellant provided further written submissions on 12 February 2019. These had not been directed by the Tribunal and arrived after we had agreed and drafted this decision, but in any event having viewed the extra submissions we take the view that they do not make any difference to our reasoning.

19. The Commissioner did not attend the appeal hearing, and relies on the submissions in the response. The Commissioner also provided written submissions in response to the appellant's reply, which we have read and taken into account. The Commissioner submits that the Disputed Information is environmental information for the purposes of the EIR, based on the tests set out in the relevant caselaw. Alternatively, the Commissioner submits that the Disputed Information is exempt under section 43(2) FOIA (prejudice to commercial interests).

Issues for the hearing

20. The issues for the hearing were discussed with the appellant and agreed as follows:

- a. What is the permitted scope of the appellant's appeal?
- b. Can the appellant appeal a Decision Notice based on correspondence which post-dates that decision?
- c. If the appellant can appeal on this basis, does this correspondence reveal any error of law or discretion?
- d. Does EIR apply to the Disputed Information?
- e. If so, is the Disputed Information exempt under regulation 12(5)(e) EIR?
- f. If not, is the Disputed Information exempt under section 43(2) FOIA?

Discussion and Conclusions

21. What is the permitted scope of the appellant's appeal? We find that the permitted scope of the appeal is about the Disputed Information only.

- a. The appeal document suggested that the appellant was seeking to challenge the Commissioner's previous decision on this subject (Decision Notice FER0580869), but he accepted at the start of the hearing that he understood this decision could not be revisited during this appeal.
- b. The appellant has also asked for details of ongoing negotiations and publication of details of the deal which the Council has concluded with MB Dartford Ltd. The appellant confirmed at the hearing that the land was sold to MB Dartford Ltd and a deal negotiated with the Council after he had submitted his request for information on 20 September 2017. This was a follow-up to the request he had made in December 2014. A public authority is required to disclose information held at the time of the request. At the hearing the Tribunal explained to the appellant that this appeal could only deal with information which existed at the time he made his request. In addition, the Commissioner understood the request to relate to negotiations with Tesco, and this is also the Tribunal's reading of the request – both due to the wording of the request itself, and because it was a follow-up to an earlier request about negotiations on an acquisition from Tesco. The Tribunal therefore finds that information about a deal and/or negotiation between the Council and MB Dartford Ltd does not fall within the scope of the request which is the subject of this appeal.

22. Can the appellant appeal a Decision Notice based on correspondence which post-dates that decision? The Commissioner submits that the assessment of whether the Decision Notice was lawful and/or whether the Commissioner ought to have exercised her discretion differently, must be made on the basis of material available to the Commissioner at the relevant time. The appellant submitted that the decision was premature and unfair, as it was made before the Council had submitted its answer to his last question and before he had provided his response. The appellant confirmed at the hearing that no dates or deadlines had been provided by which the Commissioner would provide her decision. It does not appear that the appellant had been told that no decision would be made until a certain point, and we note that the Decision Notice is dated some six weeks after the Council had provided its response to the Commissioner.

23. In these circumstances, we agree with the Commissioner's submissions on this point. There is nothing to suggest that the appellant was misled as to when the Commissioner would make her decision. The appellant cannot demonstrate that the Commissioner erred in law or in the exercise of her discretion (as required by section 58 FOIA) by referring to material that was not available to the Commissioner when she made her decision.

24. If the appellant can appeal on this basis, does this correspondence reveal any error of law or discretion? We have found that the appellant cannot appeal on this basis. Nevertheless, for completeness we have also considered the appellant's submissions about this correspondence. We find that the addition of this correspondence would not have made any difference to the Commissioner's decision. The appellant submits that the correspondence is important for two reasons.

- a. Firstly, the appellant's email of 13 August 2018 and an email from the Council of 24 August 2018 indicates that negotiations with Tesco had ended and Tesco had sold the land on to MB Dartford Ltd. However, as submitted by the Commissioner, she was already aware at the time of the Decision Notice that negotiations had ended, and her decision is based on the potential effect on future negotiations. See for example paragraph 86 of the Decision Notice – "*Although the Tesco negotiations have been concluded, a disclosure of the information risks affecting the councils negotiating tactics in the future...*".
- b. Secondly, at the hearing the appellant explained that he received information from the Council which confirmed there had been an agreement about use of Dartford Library as an alternative venue for community services (in a disclosed email dated 8 April 2013, at page 247 in the open bundle). However, the appellant said that this probably would not have changed the Commissioner's decision. Again, we understand that the appellant feels the Commissioner did not have all of the relevant information, but we do not find that this additional correspondence would have made any difference to her decision.

25. Does EIR apply to the Disputed Information? We find that EIR rather than FOIA applies to the Disputed Information. We are mindful that environmental information is to be given a broad interpretation, and Regulation 2(1)(c) specifically lists "land" as one of the elements of the environment. We agree with the Commissioner's view that the Disputed Information falls within Regulation 2(1)(c) of EIR as it is a measure affecting or likely to affect the environment or designed to protect the environment. The measure in question is the Council's approach to negotiations about land. The appellant confirmed at the start of the hearing that he now accepted that EIR applied to his request.

26. Is the Disputed Information exempt under regulation 12(5)(e) EIR? We consider the various parts of this test below. In doing so, we have considered the content of the Disputed Information as contained in the closed bundle. This consists of professional advice from agents in relation to negotiation tactics and strategy options in order to improve the Council's bargaining position. The Disputed Information is a small section of a wider Option Appraisal report prepared for the Council by Glenny LLP, the remainder of which has been provided to the appellant.

27. Is the information commercial or industrial in nature? We find that the Disputed Information is clearly commercial in nature. The information relates to advice on strategy for commercial negotiations relating to the disposal of land and associated contractual arrangements.

28. Is the information subject to confidentiality provided by law? We find that the information is subject to confidentiality provided by law.

- a. The information does have the necessary quality of confidence. It is not trivial, and is not in the public domain. The Council has released the majority of the document to the appellant, but has withheld this specific information because it would reveal negotiating tactics and strategies. Release of this information would potentially provide other parties to similar negotiations with a commercial advantage, and so is not trivial in nature.

- b. The information was imparted in circumstances that imply an obligation of confidence. We agree with the Commissioner's view that employees of the Council who took part in the negotiations, or were aware of the contents of the information, would have been aware that a disclosure of the information would be likely to cause significant detriment to the Council in relation to future negotiations. We also note that the document itself states "*This report is confidential to the client for the specific purpose to which it refers*" (paragraph 15.2, page 148 of the bundle). This point was not argued by the parties, but indicates that the agents who prepared the report regarded it as confidential to the Council.
- c. Disclosure of the information would be unauthorised. Employees of the Council (and the agents) would have been aware from the nature of the information that disclosure without authority from the Council would be unauthorised.

29. ***Is the confidentiality provided to protect a legitimate economic interest?*** We find that the confidentiality is provided to protect a legitimate economic interest, and that this would be adversely affected by disclosure. We are mindful that the test under EIR is that the interest "would" be adversely affected, rather than that it might be so affected. As negotiations with Tesco had ended at the time of the request, the issue is whether disclosure would cause harm to the Council's position in future negotiations. As reflected in the Decision Notice, the Council's position is that the Disputed Information would provide parties it is negotiating with in the future with an insight into its tactics, and this would be detrimental to its ability to conduct negotiations and achieve the best possible outcome in the future. Having viewed and considered the Disputed Information, we agree with the Commissioner's view as set out in paragraph 69 of the Decision Notice that disclosure of the relevant tactic may lead parties considering negotiations with the Council to change their negotiating strategy. We are satisfied that confidentiality is in place to protect the Council's legitimate economic interest in the effectiveness of future negotiations, and this interest would be adversely affected by disclosure.

30. ***Would confidentiality be adversely affected by disclosure?*** In light of the above findings on confidentiality and protection of legitimate economic interests, including the harm that would occur if confidentiality was not protected, we find that confidentiality would be adversely affected by disclosure.

31. ***Does the public interest in maintaining the exception outweigh the public interest in disclosing the information?*** Having considered this issue carefully, we find that the public interest in maintaining the exception does outweigh the public interest in disclosing the Disputed Information, save for one paragraph as explained below. In making this finding, we have applied the presumption in favour of disclosure in accordance with Regulation 12(2) EIR.

32. The appellant provided further information at the hearing about the public interest in disclosure. He explained that the community had been due to be provided with an adult education centre as part of the sale agreement. Matters took so long that an adult education centre was set up elsewhere in 2013. The community also has an urgent need for a health and social care centre, so this was the alternative space that Tesco agreed to provide under the sale agreement. However, the Council's negotiations failed and Tesco pulled out. As a result, the health and social care centre has been moved into the library – which is an unsuitable space for this service and has halved the size of the library. Ongoing pain has been caused to the community by these decisions. The land has now been sold on again to the builders Bellways (Thames Gateway). The appellant's position is that whatever negotiation strategy

was used by the Council, it has clearly failed, and the public should know what this was in order to call the Council to account for failing to further the public good.

33. Having heard the appellant's explanations, we agree that there is a significant public interest in understanding what happened with this deal, and why attempts to obtain the adult education centre and the health and social care centre failed. It is clear that matters have not progressed as expected, and Dartford has been left without the community provisions that were intended. Disclosure of information about how and why this happened would further the public interest in holding the Council to account for its conduct of this matter, and help to ensure that the same thing does not happen again. This forms part of the wider public interest in understanding how the Council approaches land deals and accountability in spending of public money.

34. However, the Council has disclosed the vast majority of the information requested by the appellant. The Disputed Information is a small part of a larger document which has been disclosed. Although it partly furthers the interests put forward by the appellant, it relates to advice on negotiation tactics on a specific topic. The documents that have been disclosed provide information about the wider situation. The appellant questioned at the hearing whether the Council has failed to disclose other information about negotiations, but we have nothing to suggest that the Council has withheld other information within the scope of the appellant's request.

35. There is also a significant public interest in maintaining the exception. As noted by the Commissioner, there is a clear public interest in allowing the Council to approach negotiations on a level playing field. Disclosure of specific negotiation tactics would undermine the Council's ability to negotiate similar deals with land owners on a commercial basis, as those land owners would be aware in advance of the Council's likely tactics. This would prevent the Council from obtaining the best value in its land deals, with a consequential effect on the public purse. It is clearly in the public good for the Council to be able to conduct effective commercial negotiations.

36. The appellant made the point at the hearing that the Council's negotiation tactics had clearly failed, and so disclosure would not damage the public interest because those failed tactics were unlikely to be used again. However, having viewed the Disputed Information, it is not clear how the advice on these specific negotiation tactics was used by the Council - or whether these tactics were put into effect at all in this case. In these circumstances, they may well be tactics that are used again by the Council in future negotiations, and disclosure now would damage the Council's position in such future cases. The appellant also made the point that these are the agent's negotiating tactics, not the Council's. However, as already set out above, the Disputed Information is in fact advice from the agents to the Council, and so would be viewed as tactics that the Council might use again in the future.

37. We are satisfied that the public interest in maintaining the exception does outweigh the public interest in disclosing the Disputed Information. We have made this assessment based on the factors set out above, taking into account the specific nature and content of the Disputed Information and the amount of other information that had already been disclosed by the Council during the course of these proceedings. Although there is a significant public interest in understanding why the community facilities promised by the original sale agreement have not materialised, the Disputed Information would not greatly further this understanding and disclosure would cause substantial damage to the public interest.

38. As we advised the appellant at the hearing, we have viewed the Disputed Information to verify that the exception should be maintained. Although the exception applies to the majority of section 14.11 “Negotiating Strategy”, the reasons for withholding the information do not apply to paragraph 14.11.1. This paragraph does not contain any actual advice to negotiation tactics, and refers to matters that had already been covered above in the same document. We find that this paragraph should be disclosed under EIR.

39. We uphold the decision of the Information Commissioner and dismiss the appeal except as follows: Paragraph 14.11.1 of the information withheld under Regulation 12(5)(e) is to be disclosed to the appellant.

Judge of the First-tier Tribunal

Date: 18 February 2019