



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

**Appeal Reference: EA/2019/0147**

**ON APPEAL FROM:**

The Information Commissioner's Decision Notice: FER0794694

**Date of Hearing: 16 September 2020**

**Before**

**JUDGE ROBERT GOOD**

**TRIBUNAL MEMBER(S)**

**MS ANNE CHAFER AND MR MICHAEL JONES**

**Between**

**JULIAN SAUNDERS**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**SANDWELL METROPOLITAN BOROUGH COUNCIL**

**Respondent**

**Subject Matter**

Environmental Information Regulations 2004 (EIR)  
Regulation 12(5)(e) (Commercial or Industrial Information)  
Regulation 13 (Personal Data)

## DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the tribunal refuses the appeal. The withheld information is not disclosable under Regulation 12(5)(e). It is not in the public interest for this information to be disclosed. The Council's searches have not revealed any other information.

### REASONS FOR DECISION

#### **Introduction**

1. The appeal concerns the disclosure of information relating to the possible development of a site called Lion Farm Fields. The request for information was initially made and treated as a request under the Freedom of Information Act 2000 (FOIA) and was only subsequently considered under EIR when Mr Saunders complained to the Information Commissioner (ICO) and she identified the request as involving environmental information.
2. Sandwell Metropolitan Borough Council (the council) changed its position during this process having realised that it had more information that it had previously identified.
3. Unfortunately, there has been delay. The request for information was made 28 January 2018, the appeal was first listed for hearing on 10 September 2019. That hearing was adjourned as were hearings listed for December 2019 and March 2020.
4. This appeal was originally listed with another appeal, involving the same parties, the length of each hearing being estimated at half a day. It was

adjourned because the council stated that there was further information that had not been disclosed and they needed time to collect and decide whether this further information could be disclosed to Mr Saunders. The request was supported by the ICO and Mr Saunders. A further reason was that the Chief Executive, Mr Stevens, had only taken on this position on 16 July 2019 and he was not initially aware of these proceedings and was unprepared to give evidence at the tribunal. Parts of the further information was then withheld either because it was personal data or because it was commercial information.

5. There is a lack of trust by Mr Saunders in the behaviour and actions of the council, which is evident in some of the critical language he uses to describe the council's actions. Mr Stevens, recognised, in giving evidence, that the failure of the council to accurately identify the information being sought by Mr Saunders only confirms Mr Saunders view of the council. Having said that, Mr Saunders, at times during the hearing, acknowledged that Mr Stevens and his staff have assisted him in understanding the council processes and actions.

## **The Hearing**

6. Because of the Covid-19 pandemic, this hearing was conducted using the Cloud Video Platform (CVP), with all the participants joining from their homes except for Mr Stevens and members of his legal department, who were at the council offices.
7. The council was represented by Mr Robin Hopkins. Mr Saunders represented himself. Mr Stevens was the only witness and he gave evidence in both the open session and the closed session.
8. There was a closed session, where the participants joined into a different virtual hearing room. A gist of that hearing was produced by Mr Hopkins and agreed by the tribunal. That gist is reproduced below. There was only one

period when there was difficulty in joining at 2.00pm but this was resolved with the assistance of the clerk. Otherwise, the hearing was completed without incident.

9. The tribunal considered an open bundle of 396 pages and a closed bundle of 154 pages.
10. The gist from the closed session was given to Mr Saunders after the lunch break and he agreed a 15 minute break to consider this and two further documents which had been identified after lunch. The gist is longer than usual. Nevertheless, it is helpful to re-produce it in full to formally record the outcome from the closed session.

11. The gist from the closed session is:

“Mr Saunders has made clear that parts 3, 6 and 9 of his request are in issue. As to part 3, the Council has already made clear (see page 153 of the open bundle) that much of the historic correspondence had been conducted by lawyers rather than Mr Knight-Adams or companies controlled by him, and would therefore not have fallen within the terms of the request. Otherwise, the Council’s searches have not unearthed any documents within the scope of part 3 that are not in the closed bundle.

Specific additional documents from 2015 relating to the exercise of the option were discovered following points made by Mr Saunders this morning. They were discovered by a Council officer searching being prompted to search for these specific documents, but would not have been caught by the Council’s search parameters in dealing with part 3 of Mr Saunders’ request. These documents are held as attachments to an email between Council lawyers, rather than between the Council and Mr Knight-Adams.

As to part 6, the Council has explained that the option sum was arrived at by agreement between the parties and that the individual named in the request

was not involved (see page 156 of the open bundle). The Council has not found any recorded information on this issue.

As to part 9 of the request, the Council showed the Tribunal the records in the closed bundle of the meeting and correspondence that informed the report to Cabinet in November 2017. The Council was thus not arguing that no such documents existed. Instead, it was arguing that those documents were exempt under regulation 12(5)(e) EIR.

The Council explained that, for regulation 12(5)(e) EIR purposes, it considered that the withheld information was clearly commercial in nature, as it related to a substantial commercial development in which the Council had a commercial interest.

The withheld information was subject to duties of confidence at common law, based on the nature of the information and the reasonable expectations of the parties. As an illustration of that expectation, much of the correspondence was expressly marked 'private and confidential'.

The remaining issue as regards the engagement of the regulation 12(5)(e) EIR exception was whether disclosure in response to Mr Saunders' request in early 2018 would have harmed commercial interests. The Council stated that it did not need to rely on or adduce evidence as regards Mr Knight-Adams' own interests, as it sufficed to rely on its own commercial interest in ensuring as far as possible that this project went ahead successfully. The public disclosure of the withheld information would have frustrated that commercial objective.

Mr Stephens spoke to his closed witness statement in explaining why the Council made that contention. Mr Hopkins showed the Tribunal examples of the withheld information and submitted that their public disclosure would impede the success of the project.

The Tribunal pressed the Council as to why these documents are exempt, given that the ICO in her decision notice was not persuaded by the Council's arguments on regulation 12(5)(e) EIR. The Council's case is that the information under consideration at that stage (which was then disclosed following the ICO's order) was different to that which is now being withheld.

The latter reveals details of the parties' proposals, negotiations and work-in-progress discussions about the project, and for the most part was very recent at the time of Mr Saunders' request."

## **Factual Background**

12. Mr Saunders requested 9 pieces of information from the council 28 January 2018 (p143). All the requests related to information regarding a proposed development of the Lion Farm Fields. The request was initially made and responded to under FOIA. The document disclosed under the request were the minutes of the Asset Management and Land Disposal Cabinet Committee of 19 December 2012 (pp158-164).
13. On receipt of the complaint by Mr Saunders, the ICO decided to investigate under the EIR. Following the decision of the ICO, which ordered further disclosure, the council sent Mr Saunders the information ordered (pp 205-238). The council did not appeal the ICO decision.

## **Issues**

14. Mr Hopkins, on behalf of the council, stated that the council had searched its data bases and had identified all the documents, through that process, which related to the requests made by Mr Saunders and that he had been given these documents, redacted because of personal data and commercial confidentiality, under Regulation 12(5)(e) and Regulation 13 of EIR. Mr Saunders agreed that the redaction of personal data was not an issue for this tribunal.
15. Mr Saunders told the tribunal that he was no longer pursuing information about an extension of the option agreement, because he accepted that there has been no extension. However, he considered that there must be more

documents relating to the proposed transaction than the council have disclosed.

16. Of his original 9 requests, Mr Saunders only wanted the tribunal to consider request 3, 6 and 9. These are: Request 3 "Please disclose all documents passing between SMBC and Jeremy Knight Adams and/or companies over which he exercises significant control." Request 6 "How was the original option fee calculated and by whom? Please confirm whether Mr David Willetts was involved in any aspect of this matter." Request 9 "At paragraph 3.3 of the Report to Cabinet for the meeting on 15<sup>th</sup> November 2017 it is said that Jeremy Knight Adams 'has already incurred significant expenditure in securing adjoining land to develop the scheme' What evidence does SMBC have that this is true? What adjoining land does SMBC refer to."
17. Mr Saunders wanted to tribunal to consider request 3 because he believes there are more documents; request 6 because he believes that there must be information about the calculation of the option payment figure; and request 9 because he does not believe that the council has disclosed all the information required of it by the ICO in the decision of 29 March 2019. He also wanted the tribunal to consider whether the public interest in disclosure outweighed the public interest in maintaining the commercial interest exemption.
18. During the hearing, Mr Saunders asked Mr Stevens about the document at page 394 item 3.11 which reads "At the end of the first 12 month period in 2014, the developer served the appropriate notice to request an additional 12 months which was approved by the Area Director as part of the original delegation." Mr Stevens agreed that this document should exist and further agreed that he would see if it could be located. The search produced documents pp395 and 396, both with redaction for personal data and commercial interest exemption and were sent by email to Mr Saunders after the lunch break.

19. The disclosure of this extra information raised further concerns in Mr Saunders' view. One of the documents, a letter from the developer to the council dated 15 May 2015 described the development option as 'Land at Newbury Lane, Oldbury'. This is a new description of the area. In Mr Saunders' view, the council has, in the past, used various descriptions, including 'project Patrick' in order to conceal what was happening from the public. This has had the effect of concealing documents which are effectively hidden by the use of these descriptions, so that they do not appear when there is an electronic search for, 'Lion Farm Fields'.

### **Findings, Reasons and Conclusions**

20. The issues in this appeal are relatively straightforward. Is there more information which should be disclosed? Is the redacted commercial information correctly withheld under Regulation 12(5)(e) and, does the public interest in maintaining the exception outweigh the public interest in disclosing the information.
21. Mr Stevens accepted in his evidence that the information systems used by the council were not satisfactory. He identified both a problem with the storing, searching and retrieval of information, and with a system failure which the council has notified Microsoft about. However, he was as certain as could reasonably be expected that all the relevant information had been retrieved and provided in either the open or closed bundles.
22. Mr Saunders is doubtful because he considers that a development of such a large area would inevitably produce more documents. His view is only strengthened by the identification of two further documents during the lunch break.



23. However, the two documents which were identified during the hearing were specific. They were in a pdf file, which had been labelled by the system with a random number. As a result, the document would not have been successfully revealed by a data search. These were attached to an email, which also would not have been matched by the search parameters. It was only possible to locate the documents because of a reference to them and because someone in the office was able to work out where, from that reference, where they might be located. This was not an electronic search. It was a specific search for a particular document where there was some indication as to where the documents may be located.
24. The identification of two further documents reinforced Mr Saunders' complaint that the searches undertaken were too limited. Since the initial request the council have searched under further categories and identified the information in the open and closed bundles. The tribunal find that, although not in a timely manner, the council has searched its databases and has produced all the relevant documents from those searches. On this basis, the tribunal finds that there is no other information.
25. Mr Saunders finds it unbelievable that a significant project like Lion Farm Fields would not have far more documents and correspondence. The start of the project dated back to 2013 when an option was granted to a developer, and Mr Saunders told the tribunal that nothing was known about these plans until 2015. He believes there was deliberate concealment on behalf of members and staff at the council. The tribunal is unable to comment on motives and actions from several years ago. However, when Mr Stevens instructed that further searches should be made this produced more information to meet Mr Saunders' request as well as identifying the systems' problems with the Council's electronic storage method.

26. The tribunal are satisfied that as a result of Mr Stevens' intervention the Council has made every reasonable effort to identify relevant information and disclosed this information to the tribunal. Two examples are firstly, the request for the minutes of the first meeting with the developer. This took place in 2012 and the council have disclosed diary entries but say there are no notes or minutes of this meeting. Mr Saunders' view is that, if there were no minutes, then there should have been. The tribunal is satisfied that there is no further information about this meeting which the council has been able to locate. The same is true for the request for information on the calculation of the option fee.
27. The tribunal has heard from Mr Stevens in both open and closed sessions and is satisfied that the negotiations around this development project are ongoing and, in part through delay, have become complicated. The tribunal is satisfied that, although some of the information dates back several years it is part of a commercial negotiation which must be kept confidential because it is sensitive and it is necessary to keep it confidential to protect the council's commercial interests. The negotiations were entered into with the intention that the contents remain confidential and the letter and documents are marked strictly private and confidential evidencing this intention. The tribunal accept Mr Stevens' evidence that these negotiations, although long-running are at an active and critical stage.
28. Mr Saunders does not trust the council and its historic failure to be open with the community. Hopefully, trust is being re-built to at least a limited extent. Having looked at the documents and heard from Mr Stevens the tribunal is satisfied that, under his leadership, the council have made every reasonable effort to identify relevant documents within the scope of Mr Saunders' request. These have been either disclosed to Mr Saunders with the redaction of personal data or withheld because of commercial confidentiality.

29. Mr Saunders argues that there is significant public interest in the outcome as it may have widespread effects on the local community. This may be true. However, the tribunal is concerned with balancing the public interest about disclosure of the historical and current commercial negotiations which have not concluded. The tribunal accept that significant commercial and reputation harm would come to the council if this information was released to the public at large. The balance lies, at this stage, in the public interest in non-disclosure so that the council can conduct negotiations in private and not jeopardise their commercial interest in this matter.

**R Good**

**Judge of the First-tier Tribunal**

**Date of Decision: 16 November 2020**

**Date Promulgated: 18 November 2020**