



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FER0870530**

Appeal Reference: EA/2020/0118

Considered on the papers

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

SUZANNE COSGRAVE & ALISON LOWTON

Between

TERENCE LETHEBY

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DECISION

The appeal is dismissed.

REASONS

1. On 13 May 2019 Mr Letheby wrote to Elmbridge Borough Council and asked:-

“Please state what discussions have taken place in 2018 and 2019 regarding the Local Plan, the Green Belt and the Core Strategy with the following Companies. Please state the cost of any such advice.

*Ove Arup and Partners
Environmental Agency*

Dixon Searle LLP
Aecom Infrastructure
Troy Hayes Planning"

2. The Council initially responded on the basis that FOIA applied but later responded on the basis that the Environmental Information Regulations were the relevant information regime for this information. On 21 June it disclosed the costs of the advice. In 17 July Mr Letheby asked for an internal review of the decision not to provide more information. On 21 July it provided a summary of the issue each contractor was advising on but declined to provide the detailed information relying on regulation 12(4)(d) of EIR which states: -

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.*

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;

3. Mr Letheby complained to the Information Commissioner who investigated. The Council explained the origin and purpose of the material in question:-

14. The council has stated that the withheld information includes email correspondence between the parties in question and comprises discussion and refinement of evidence. It confirmed that the information relates to the Local Plan which is in the course of development through public consultation. The council explained that the Local Plan will in due course be examined by an Independent Local Plans Inspector in a public process. It clarified that an evidence base has been prepared with the assistance of consultants and other parties.

15. The council confirmed that it considered that the withheld information takes the form of discussions around emerging options and draft documents and that it all constitutes material in the course of completion. The council explained that the material in question will be likely to form part of a final policy document, namely, the Local Plan.

4. The Commissioner having considered the explanations of the council found that the exemption was engaged and in the light of that considered whether the public interest was best served by disclosure or withholding the material. She acknowledged the importance of the public interest in transparency and accountability about the Local Plan which would address key issues for the area over the next 15 years including employment, housing and environmental protection. She considered the Council's explanations (paragraphs 23-25) about

delays in the process and the various steps being taken that disclosure would open up various issues which would delay and distract from the work as well as the need for candid debate:- *"It has submitted that proposals need to be tested, weighed and, where necessary, challenged and for this to happen effectively, a safe space away from public scrutiny is needed. The council has argued that, should discussions in relation to live options be made public, candour and frankness in debate would be discouraged and there would be a chilling effect which would deter parties from engaging fully."* She also considered the amount of material which the Council had published to support accountability and to facilitate Public participation.

5. She concluded that while sympathetic to the desire for greater transparency, the disclosure would impede the Council in its work of developing the plan and on balance *disclosure at this time would more likely than not damage the public interest in ensuring it is an effective exercise.* She also noted that there was a formal timetable for consultation and engagement and that disclosing the Council's deliberations at this time would serve the public interest.
6. In appealing against this decision Mr Letheby stressed the public interest in disclosing the information. He argued that residents and conservation groups knew that the plan was incomplete. The Local Plan would have significant influence over 15 years. The Council was spending a lot of time on preparing the plan and it would take very little time to disclose the information. The Council should be frank in their discussions with experts and they should not be inhibited by public scrutiny.

Consideration

7. Freedom of information laws such as FOIA and EIR take as their starting point that there is a public interest in making information held by public authorities available to the public. However, these laws recognise that disclosure can have some undesirable effects and accordingly they lay down circumstances in which access to information is restricted.
8. The process of the Local Plan is intended to ensure that councils prepare well thought out plans for future development, reflecting the needs of their area within a policy framework laid down by central government. In order to achieve this a huge amount of work is required to analyse the challenges facing councils and develop an approach which can be shared with residents and others and then robustly tested through the public examination of the Plan which will be informed by a range of information contained in supporting documents. This of necessity generates a large amount of information and discussion within the council and with its consultants on many issues which are then finalised in the plan and documents.

9. The disclosure of the information when it is incomplete could create confusion and be misleading as well as potentially causing a significant and unnecessary burden on those wishing to take part in the process when the finalised documents are formally published.
10. Mr Letheby is probably correct when he states that compared to the time the Council is spending on preparing the plan, disclosing the information requested would take very little time, however following the disclosure there would be significant unnecessary burdens on the Council replying to issues raised by the public on matters in the working documents which are not the final considered judgements of those drafting them. The Council in the internal review response made clear supporting documents will be published with the consultation document when that document is finished and promulgated. Further the internal debates of the Council staff and consultants as they explore issues and test ideas before they are validated, and the implications of these ideas worked out will be more candid if they are not published until those preparing the documents are satisfied with their thinking on the issues.
11. The Council is working through a timetabled process which includes a formal opportunity for public engagement within the process as the elements of the Plan are in a more developed state.
12. The tribunal is satisfied that the Commissioner has correctly struck the balance of public interest in this case and the appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 22 November 2020

Date Promulgated: 23 November 2020