



Case Reference: EA/2023/0137
Neutral Citation Number: [2024] UKFTT 00155 (GRC)

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

**Heard: On the papers
Heard on: 30 January 2024
Decision given on: 26 February 2024
Promulgated on: 26 January 2024**

Before

**TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER STEPHEN SHAW
TRIBUNAL MEMBER DR PHEBE MANN**

Between

DAVID BARTON

and

**(1) THE INFORMATION COMMISSIONER
(2) WIGAN METROPOLITAN BOROUGH COUNCIL**

Appellant

Respondents

Decision: The appeal is allowed

Substituted Decision Notice

Public Authority: Wigan Metropolitan Borough Council

Complainant: David Barton

The Substitute Decision – IC-211087-C6C4:

For the reasons set out below:

1. The public authority was not entitled to rely on regulation 12(5)(e) or 12(5)(f) of the Environmental Information Regulations 2004 to withhold the requested information.
2. The public authority must take the following steps:
 - a. Disclose the withheld information to the appellant within 35 days of the date of this decision.
3. Any failure to abide by the terms of the tribunal’s substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner’s decision notice IC-211087-C6C4 of 161 February 2023 which held that Wigan Metropolitan Borough Council (‘the Council’) was entitled to rely on regulation 12(5)(f) of the Environmental Information Regulations 2004 (EIR).
2. The Commissioner did not require the Council to take any steps.

Factual background to the appeal

3. In 2013, the Council received a planning application (application A/13/77766), which sought permission for a temporary worker’s mobile home to be located on site at Rothwells Stud, Senicar Lane, Wigan, WN1 2SN (“Rothwells Stud”). This application was subsequently granted for a period of 3 years. The planning permission expired in December 2016.
4. A subsequent planning application was received in February 2017 (application A17/83640/FULL), which sought permission to build a permanent essential worker dwelling at Rothwells Stud. In support of this planning application, the Applicant submitted the profit and loss accounts for Rothwells Stud for the years 2015, 2016 and 2017. This application was granted in September 2017.
5. The Second Respondent then received a planning application in August 2022 (A/22/94184/FULL) in respect of the proposed development of four detached dwellings on Rothwell’s Stud. We understand that this planning application has been turned down but the appellant is concerned that the land ‘remains technically as developed land and thus open to future applications that will negatively impact on the Green Belt unless it can be shown that no business has ever existed on this site.’

Request and response

6. This appeal concerns a request made on 18 September 2022:

“With respect to an active planning application - A/22/94184/FULL We request copies of the three year accounts submitted to the council in support of the 2017 planning application A/13/77766, for Rothwell's Stud farm, Sennicar Lane, Wigan, WN1 2SN.”

7. The Council replied on 1 November 2022 under the Freedom of Information Act 2000 (FOIA). The Council refused the request, relying on section 41 FOIA.
8. On internal review the Council decided that the appropriate regime for considering the request was the EIR. It upheld the decision to withhold the information under regulation 12(5)(e) and 12(5)(f) EIR.

Decision notice

9. In a decision notice dated 31 March 2022 the Commissioner decided that the Council had failed to demonstrate that regulation 12(5)(e) was engaged but that the Council correctly withheld the information under regulation 12(5)(f) EIR.
10. In relation to regulation 12(5)(e) the Commissioner was satisfied that the information was commercial in nature and was provided to the Council with an expectation of confidentiality but was not satisfied that the Council had shown confidentiality was required to protect a legitimate economic interest.
11. In relation to 12(5)(f) the Commissioner was satisfied that, given the nature of the information, its disclosure would adversely affect the interests of the applicant.
12. In relation to the public interest balance, the Commissioner concluded that the public's right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process. Where there are concerns about the conduct of a public authority there are, similarly, other remedies for addressing this which do not necessitate the global disclosure of the information.
13. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist.
14. Whilst he acknowledged that facilitating public engagement with environmental issues is one of the general principles behind the EIR, he did not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.
15. He concluded that the public interest favoured withholding the information.

The grounds of appeal

16. The grounds of appeal are:
 - 16.1. The decision fails to acknowledge, understand or reflect the underlying basis for the request; namely, that no "stud business" exists or has ever existed on this site, and that therefore there is no "legitimate economic interest" to protect.
 - 16.2. The decision fails to properly balance public trust in Wigan's planning process against the singular commercial interests of an individual.

16.3. The decision is contradictory with regard to the necessity of confidentiality.

The Commissioner's response

17. The Commissioner invited the tribunal to join the second respondent to address the following points:
- 17.1. Submissions from the Council (if the Tribunal decides joinder is not appropriate) to demonstrate each limb of 12(5)(f) EIR. In particular to provide evidence, with reference to the application form, guidance or any law(s), that the applicant was not under a legal obligation to provide the accounts to accompany the planning application;
 - 17.2. Submissions from the Council explaining why they believe EIR rather than FOIA is the correct regime.
18. The Commissioner said that he would provide an update of his position (i.e. whether to continue to defend the DN and/or issue a fuller Rule 23 Response) upon receipt and review of that information. No update has been provided.

Response of the Council

19. The Council submits that the EIR is the appropriate regime because the request relates to information submitted in support of planning application in respect of a building a dwelling and altering the landscape because it relates to measures affecting land.
20. The Second Respondent submits that the information in question is commercial in nature as it relates to a commercial activity, being the profit and loss accounts for Rothwells Stud.
21. The Second Respondent asserts that confidentiality is required by law in line with the common law of confidence. This is because the information is not trivial. Further, the information is not in the public domain and cannot be obtained via Companies House as it was prepared for the purposes of supporting planning application A/17/83640/FULL only. Additionally, at the time the information was shared with the Second Respondent, the provider stated on multiple occasions that it was supplied in support of the planning application only and should not be shared, explicitly imposing an obligation of confidentiality so as to protect a legitimate economic interest, being the financial state of the applicant's business at Rothwells Stud. It is therefore clear that confidentiality would be adversely affected by disclosure.
22. In respect of the exception under regulation 12(5)(e), the Second Respondent submits there is a significant wider public interest in preserving the principle of confidentiality, so as to ensure public trust in the Second Respondent as the Local Planning Authority is maintained.
23. In respect of regulation 12(5)(f), it is the Second Respondent's position that this exception is applicable to the information in question because the economic interests of the individual who provided it would be adversely affected if it were to be disclosed. The Second Respondent asserts that the disclosure of this information would not be in the spirit of the EIR as it would deter private persons from providing commercially sensitive information to the Second Respondent as the Local Planning Authority, because it would damage public trust.

24. The Second Respondent wishes to emphasise that the provider of this information stated on multiple occasions that it was supplied for the purpose of supporting the planning application only, and that it should not be shared. Further, there was no legal obligation for the Applicant to provide this information. Neither the national requirements nor the local requirements stipulate that accounts information must be provided to support a planning application, regardless of whether it is for temporary planning permission.
25. It is submitted that the information in question was submitted voluntarily, in confidence and without any legal obligation to do so. The Second Respondent asserts that it is not relevant whether the planning application would have been granted in the absence of the accounts information, as this is a hypothetical consideration and does not change the fact that there was no legal obligation for the Applicant to provide the information.
26. In the circumstances, the Second Respondent submits there is a significant public interest in maintaining the exception under regulation 12(5)(f), because disclosure would damage public trust in the Second Respondent and discourage others from sharing such confidential information in future.
27. The tribunal also took account of the Council's submissions on whether it should be a party to the appeal.

The appellant's reply

28. We have taken account of the appellant's reply and his 'final comments' sent by email dated 14 January 2024, to the extent that they are relevant to the issues we need to determine.

Legal framework

29. The EIR was originally enacted to apply the provisions of Directive 2003/4/EC of the European Parliament and the Council on public access to environmental information to England and Wales. The relevant parts of regulation 12 EIR are:

Regulation 12:

Exceptions to the duty to disclose environmental information

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.

(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—

...

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

- (f) the interests of the person who provided the information where that person—
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; ...
- 30. There is a presumption in favour of disclosure under the EIR under reg. 12(2). The result is that the threshold to justify non-disclosure is a high one.
- 31. ‘Would adversely effect’ should be interpreted in the sense that the adverse effect has to be identified and the Tribunal must be satisfied that disclosure “would” have that adverse effect, not that it “could” or “might. (See **Mersey Tunnel Users v ICO and Halton Borough Council** EA/2009/0001). This must be assessed at the time of the original decision (not the internal review - **Montague v Information Commissioner and DIT** [2022] UKUT 104 (AAC) para 63).
- 32. Under reg. 12(5)(e), subject to the public interest test, a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. This has four elements:
 - 1. Was the information commercial or industrial?
 - 2. Was the information subject to confidentiality provided by law?
 - 3. Was that confidentiality to protect a legitimate economic interest?
 - 4. Would disclosure adversely affect that confidentiality?
- 33. In **Elmbridge Borough Council v Gladedale Group Limited** EA/2010/0106 in paragraphs 18-19 the Tribunal considered the approach to the third question above, namely whether confidentiality was to protect a legitimate economic interest and concluded that disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect and that this requires consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure.
- 34. We are not bound by the tribunal’s approach in **Elmbridge** but we agree with and adopt its approach.
- 35. The Tribunal in **Elmbridge** accepted that the wording “where such confidentiality is provided to protect a legitimate economic interest” (as opposed to “was provided”) indicates that the confidentiality of this information must be objectively required at the time of the request in order to protect a relevant interest and that it is not enough that some harm might be caused by disclosure. It is necessary to establish (on the balance of probabilities) that some harm to the economic interest would be caused by disclosure.
- 36. Under regulation 12(5)(f), subject to the public interest test, a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority and did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it and has not consented to disclosure. This has four elements:

- 36.1. Would disclosure adversely affect the interests of the person who provided the information?
 - 36.2. Was the person under, or could have been put under, any legal obligation to supply the information to that or any other public authority?
 - 36.3. Was the information supplied in circumstances such that that or any other public authority is entitled to disclose it apart from under EIR?
 - 36.4. Has the person consented to disclosure?
37. If the conditions of 12(5)(e) or (f) are met, the information must only be withheld to the extent that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.

Issues

38. The issues we have to determine under regulation 12(5)(e) are:

- 38.1. Was the information commercial?
- 38.2. Was the information subject to confidentiality provided by law?
- 38.3. Was that confidentiality to protect a legitimate economic interest?
- 38.4. Would disclosure adversely affect that confidentiality?

39. The issues we have to determine under regulation 12(5)(f) are:

- 39.1. Would disclosure adversely affect the interests of the person who provided the information?
- 39.2. Was the person under, or could have been put under, any legal obligation to supply the information to that or any other public authority?
- 39.3. Was the information supplied in circumstances such that that or any other public authority is entitled to disclose it apart from under EIR?
- 39.4. Has the person supplying the information consented to disclosure?
- 39.5. If the exemption is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

The role of the tribunal

40. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Discussion and conclusions

41. It is not in dispute that the EIR is the appropriate regime, and that would have been our conclusion in any event on the basis that the request is for information submitted in support of a planning application in respect of building a dwelling and altering the landscape. This relates to measures affecting land.

Regulation 12(5)(e)

Would disclosure adversely affect the interests of the person who provided the information?

42. Under regulation 12(5)(e) we have to decide if there is a causal link between disclosure and the alleged harm and if the harm is more probable than not.
43. The Council submits that the economic interests of the individual who provided the information would be adversely affected if the requested information were disclosed. The request was for the accounts that were supplied to the Council. We note that the Council was also supplied with invoices and stud certificates. The third party said the invoices contained valuable client information which could be used by competitors. These invoices and stud certificates do not fall within the scope of the request. Other than a reference to the client information contained in invoices that could be used by competitors, the Council has not explained what impact the disclosure of the accounts would have on the third party's economic interests.
44. The Council has not pointed to any specific harm that would occur if the accounts were disclosed, nor has it explained why that harm is more probable than not. We have before us evidence that the third-party objects to disclosure, in that the representative stated 'I must stress that these are not to be made public due to their sensitive nature.' However, there is no evidence or letter from the third party that states that disclosure of the accounts would cause harm or that identifies the nature of that harm.
45. On the basis of the evidence before us we find that the Council has not identified the alleged adverse effect nor has it demonstrated how disclosure of the requested information would lead to the adverse effect based on the circumstances at the time of the request.
46. The withheld information consists of profit and loss accounts from the years ending March 2015, 2016 and 2017. The Council responded to the request in November 2022. At that date, the profit and loss accounts were between 5 and 7 years old. Most companies' profit and loss accounts are publicly available on Companies House. In the absence of any explanation as to why disclosure of these historic profit and loss accounts would adversely affect the third party's interests, we are not satisfied that it would.
47. In those circumstances the Council is not entitled to rely on regulation 12(5)(e) and we do not need to consider the other limbs of regulation 12(5)(e) or consider the public interest. We find that regulation 12(5)(e) is not engaged.

Regulation 12(5)(f)

48. For the reasons set out above, it follows that we do not accept that any confidentiality was to protect a legitimate economic interest. We do not accept that disclosure would cause any harm to the economic interests of the third party. In the circumstances it is not necessary to consider the other limbs of regulation 12(5)(f). We agree with the Commissioner that regulation 12(5)(f) is not engaged.

Summary of conclusions

49. For those reasons we conclude that regulations 12(5)(e) and (f) are not engaged. The Council was not entitled to rely on either of those exceptions to withhold the information. The appeal is therefore allowed and we have ordered the Council to disclose the withheld information.

Signed Sophie Buckley

Date: 26 February 2024

Judge of the First-tier Tribunal