



Case Reference: EA/2023/0074  
Neutral Citation Number: [2024] UKFTT 00335 (GRC)

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

**Heard on the papers**

**Heard on: 24 August 2023  
Decision given on: 6 September 2023**

**Before**

TRIBUNAL JUDGE CARTER  
TRIBUNAL MEMBER DAVE SIVERS  
TRIBUNAL MEMBER SUSAN WOLF

Between

MARK JOPLING OBO UDNEY PARK PLAYING FIELDS TRUST LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**Decision:**

1. The public authority was not entitled to rely upon the exception under regulation 12 (5)(f) Environmental Information Regulations to withhold the disputed information; whilst in other circumstances, this would now fall to be disclosed to the Appellant, this is not to be disclosed pending a determination further to paragraph 2.
2. The Tribunal adjourns the hearing and will determine the application of the other two exceptions relied upon by the public authority at a further hearing;
3. The London Borough of the Richmond Upon Thames Council is hereby joined to these proceedings and should receive the Open and Closed Bundle.

4. Standard directions are to be sent to the parties in order to bring the appeal back to a resumed hearing.

## **REASONS**

1. This is an appeal under section 57 of the Freedom of Information Act 2000, against the Commissioner's Decision Notice IC – 185876-K2P7 which held that the London Borough of the Richmond Upon Thames Council (“the Council”) were entitled to rely on regulation 12 (5)(f) of the Environmental Information Regulations to refuse disclosure of information requested by the Appellant.
2. By way of a preliminary matter, the Appellant has clarified that its legal entity is in fact Udney Park Playing Field Trust Ltd. and not Udney Park War Memorial Playing Fields Trust. We hereby direct that the Appellant's name be changed on the record accordingly.
3. This request concerns open land, consisting of playing fields in the Council's area. The Appellant sought information as to the seeking of pre-planning advice from the Council's planning department by a third party which wished to develop the land in question. The withheld information is the pre-planning application itself, the advice provided by the Council and associated correspondence, all of which is in a Closed Bundle which we have seen. The Closed Bundle is subject to a ruling under rule 14(6) of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 such that it has not been shared with the Appellant.

### **Request, Decision Notice and appeal**

4. The request for information was made by the Appellant to the Council on 10 June 2022. This requested:

“All correspondence relating to the Pre-Application advice for any proposals for any work that requires Planning Permission at Udney Park, for the period of 1<sup>st</sup> Jan 202 to the present date”.
5. The Council refused to disclose the requested information under regulations 12(5)(d), 12(5) (e) and 12(5)(f) of the EIR. The Respondent's Decision Notice, in the event only dealt with the Council's reliance under regulation 12 (5)(f). The Tribunal does not interpret this as the other potential exemptions having been considered by the Respondent and as having failed – they were just not considered.

### **Legal Framework**

6. The Tribunal's remit is governed by section 58 of the Freedom of Information Act 2000. This requires the Tribunal to consider whether the Decision Notice 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 not before the Commissioner and may make different findings of fact from the Commissioner.

7. It is not in dispute that the EIR apply to the information requested.
8. Two provisions under the EIR are relevant to this particular decision. First, regulation 12(9) which provides:

*“(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse or disclose that information under an exception referred to in paragraphs (5)-(g)”.*

9. Second, regulation 12(5)(f) which provides:

*“(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 –*

*....*

*(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 a circumstance such that that or any other public authority’s entitled apart from these regulations to disclose it; and*

*(iii) has not consented to its disclosure. “*

10. *“Adversely affect”* means that there must be an identifiable harm to or negative impact on the interests identified in the exception. Therefore the threshold for establishing adverse effect is high, since it is necessary to establish that disclosure would have an adverse effect. *“Would”* means it is more probable than not, i.e. a more than 50% chance that the adverse effect would occur if the information were disclosed.
11. After consideration of whether the exemption above applies, it is necessary to consider whether *“in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information”* (Regulation 12(1)).
12. The relevant time for considering the application of the exception is the time of the response to the request, in this case 7 July 2022.

### **Evidence**

13. We read and took into account an open and closed bundle containing documents and correspondence. There were no witness statements. As this was a hearing decided on the papers, by agreement of the parties, there was no oral evidence.
14. As noted above, the Closed Bundle contained the disputed information.

### **Tribunal’s consideration**

15. The Tribunal noted from the Appellant's reply that:

- a. it had raised what was in effect, a new ground of appeal, that is regulation 12(9) was said to rule out reliance upon the exceptions asserted. Whilst this was a new ground of appeal, it had in fact been mentioned in its original complaint to the Respondent. In the event, the Respondent had not addressed this point in its Decision Notice. The argument is that regulation 12(9) as set out above had the effect that the exceptions claimed could not be relied upon as the likely development on the playing fields, if it included buildings, would involve emissions.
- b. it had not agreed, as asserted by the Respondent in its Response, that the Appellant had accepted that regulation 12(5)(f) was engaged – thus it was not accepted by the Appellant that a refusal to disclose would adversely affect the interests of the person, in this case, the Applicant for pre-planning advice.

2. In the event, the Tribunal decided that it did not need to determine whether regulation 12(9) was operative in this appeal, given its finding in relation to the non-applicability of regulation 12(5)(f) as explained below.

3. The Tribunal considered whether regulation 12(5)(f) was engaged. The Tribunal noted that an application for pre-planning advice is submitted voluntarily and in this case, the company applying for the advice ("the Applicant") indicated that it was confidential as it was said to contain sensitive commercial information. The Applicant did not consent to its disclosure. Thus, much of regulation 12(5)(f) applied.

4. However, the Appellant argued that no indication had been given whatsoever as to the nature of the adverse impact there would be, if disclosure was to be made, for the Applicant. The Council had merely asserted this to be the case, and relied upon the fact that the disputed information had been said to be confidential and the applicant had not consented to its disclosure. The Respondent, in the Decision Notice stated:

*"As the application specifically stated that the information must remain confidential and the information contains sensitive commercial information, the Commissioner, having viewed the information himself, is satisfied that disclosure would adversely affect their interests."*

5. Thus the argument from the Respondent was that the adverse impact would be apparent from reading the disputed information. Tribunal has considered the contents of the closed bundle and sets out its reasoning in the Confidential Annex for its conclusion that it is not satisfied, from anything in the contents, that disclosure would adversely affect the interests of the pre-application Applicant. The Tribunal considered whether there could be said to be any adverse impact caused by the fact that the information was said to be held subject to a duty of confidentiality, but concluded that that alone would not give rise to adverse impact to the applicant. There needed to be clear detail given for what the prejudice to the Applicant might be.

6. The other two exceptions which the Council sought to rely upon were regulation 12(5)(d) and (e). These were not however addressed in the Respondent's Decision Notice as it only considered regulation 12(5)(f). As such, the Tribunal has decided it should resume again to determine the applicability of those two additional exceptions (which would include the Appellant's arguments as to regulation 12(9) in relation to them) and the public interest

balancing test, if so engaged. The two remaining exceptions are engaged where there would be an adverse impact to aspects of confidentiality and relate more to the position and planning processes of the Council than regulation 12(5)(f) which relates to adverse impact to the individual applicant. Thus, even though the Council indicated previously that it did not wish to join as a party to this appeal, it is now considered appropriate and the Tribunal so orders.

Signed Tribunal Judge Melanie Carter

Date: 5 September 2023