



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2012/0263

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50431297
Dated: 27 November 2012**

Appellant: Dr Ian Jackson

Respondent: The Information Commissioner

Heard at: Field House, London

Date of Hearing: 8th May 2013

Before

Chris Hughes

Judge

and

Jean Nelson and David Wilkinson

Tribunal Members

Date of Decision: 19 July 2013

Attendances:

For the Appellant: in person

For the Respondent: Laura John (Counsel) Helen Davenport (Solicitor)

Subject matter:

Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 27 November 2012 and dismisses the appeal.

Dated this 19th day of July 2013

Judge Chris Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Cambridgeshire County Council entered into a major construction contract with BAM Nuttall for the construction of a guided busway extending 16 miles from Huntingdon to Trumpington. The scheme was opened in August 2011 and there have been disputes between the parties to the contract over delays and cost-overruns which have attracted public concern. In July 2011 the Council launched proceedings in the Technology and Construction Court against BAM Nuttall which continue.
2. On 20 September 2011, Dr Jackson (the Appellant in these proceedings) submitted the following information request to Cambridgeshire County Council (“the Council”):
“Please send me copies of all correspondence and documents, relating to the Cambridgeshire Guided Busway, between you and the adjudicator dealing with the dispute with BAM Nuttall or between you or any other adjudicator, arbitrator, tribunal or court.

Please also send copies of all correspondence and documents you have received from BAM Nuttall which you understand to have been also sent or disclosed to any adjudicator, arbitrator, tribunal or court.

If this is too voluminous please provide a list of the correspondence (indicating at least the date and general nature of each item) so that I may narrow my request”.
3. The Council responded on 18 October 2011 and explained that no matters relating to the Busway dispute had been referred to arbitration although the dispute had been the subject of four adjudications. Further, the Council advised that an application to the Technology and Construction Court had been made and it informed the Appellant that its submissions could be obtained from the Court on provision of a fee. The Council resisted the request relying on Regulations 12(5)(b) and (f) and 13(1) of the Environmental Information Regulations. With respect to Regulation 12 (where the exemption from disclosure is subject to a public interest test); in concluding that the balance of public interest lay in not making a disclosure of the information the Council informed Dr Jackson:-

“The guided busway is a major transport project. Details of some of the dispute between the Council and BAM Nuttall are public knowledge and there is a public interest in furthering understanding of this process. However, this is balanced against the adverse effect that the disclosure of the information would cause.

There is a strong public interest in the Council not adversely affecting the confidentiality of the proceedings. The Council participated in the adjudication process in an attempt to resolve specific disputes during the operation of the contract in the most expedient and cost-effective way. There is a public interest in the Council taking such action, even when this requires us to agree to and comply with the assurances of confidentiality that are a necessary part of this process. It is not in the public interest to the Council to renege on this agreement and to breach confidentiality.

There is also a public interest in the Council operating in an environment in which a third party, in this case BAM Nuttall, can engage in the adjudication process in the expectation that we will respect confidentiality. By extension, it is not in the public interest for the Council to disclose information when such an act could dissuade a third-party from engaging in an adjudication process in the future. Additionally there is a strong public interest in the Council protecting is,, and therefore the tax payers position by not adversely affect the course of justice while it is in the process of litigation.”

4. Dr Jackson complained to the Information Commissioner (the Respondent in these proceedings –“The Commissioner”).
5. In its submission to the Commissioner (bundle pages 68-75) the Council noted that the disclosure would:-

- Place in the public domain confidential information due to be considered by the Court
 - The proceedings were live and there was a strong public interest in not jeopardizing court case and the Council's position
 - The case related to technicalities of a major construction contract and not misconduct in any shape, there was little public benefit in disclosing the technical information
 - BAM Nuttall had engaged on the basis that their submissions to the adjudicator would remain confidential, they might not engage in such a process if they felt that such documents would be disclosed while the issue was subject to legal proceedings
6. The Commissioner published his decision notice on 7 November 2012. That decision considered the broad legal framework and concluded that the request was properly considered under the Environmental Information Regulations (EIR) and upheld the Council's position relying on Regulation 12(5):-
- “(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that is disclosure would adversely affect–*
- (a)...*
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct a inquiry of a criminal or disciplinary nature”.*

The appeal to the Tribunal

7. In his Revised Grounds of appeal Dr Jackson addressed the issues raised in the Decision Notice and argued:-
- The documents were not covered by litigation privilege
 - That the argument with respect to the course of justice was incorrect and that while the Commissioner (DN para 52) appeared to accept *“the argument which says that the course of justice should be allowed to play out, away from the hindrance of outside comment and interference”* the process of justice was normally an open one and the presumption should be in favour of disclosure. Fear of criticism was not a relevant objection to disclosure and the argument

(DN para 46) that disclosure would make the parties less free and frank in the proceedings was not sustainable since *“in adversarial proceedings over millions of pounds parties are normally extremely careful and guarded”*

- The information requested had or would be submitted in evidence and cannot be “without prejudice”
- The adjudication process was not inherently confidential and the issue arose from the confidential obligations of the arbitration agreement
- With respect to 12(5)(f) even if harm to BAM Nuttall arose from disclosure of its material to which it had not consented, the public interest was in that disclosure
- The lack of confidentiality would not discourage others from entering into arbitration in the future since the advantages of arbitration were substantial in any event
- The public interest in disclosing was overwhelming given the scale of the sums involved *“Under the circumstances it is extremely important for the public to be able to see the details of the dispute between Cambridgeshire and BMA Nuttall. At the moment we have very little hard information”*

8. In his response the Commissioner maintained the position he had adopted in formulating his Decision Notice. In his skeleton argument he set out his response to Dr Jackson’s amended grounds of appeal. He submitted that adjudication process which the Council and BAM Nuttall had used was confidential and the agreement provided:-

“The Adjudicator and the Parties shall keep the adjudication confidential, except so far as is necessary to enable a Party to implement or enforce the Adjudicator’s decision.”

9. Confidentiality agreements in dispute resolution proceedings are binding even when one party is a public body. He noted :-

“17. It is clear that there would be an adverse effect on the course of justice if documents covered by a legally valid confidentiality agreement, such as in the present case, are disclosed to the general public under FOIA/EIR. It may be that it is in the public interest to override confidentiality agreements in certain individual cases, but

that is a separate consideration from the question of whether there would be an adverse effect on the course of justice from doing so.

18. The reasons for upholding the confidentiality of alternative methods of dispute resolution are well recognised. The assurance of confidentiality provides an incentive (often a powerful one) for parties to pursue settlement of their disputes out of court. If settlement can be achieved it not only saves the parties' costs but also the expenditure of public funds on court proceedings. In this case, the Construction Industry Council Model Adjudication Procedure states its object as "...to reach a fair, rapid and inexpensive decision upon a dispute..." (para 1, General Principles [O/3/79]. It also encourages openness and candour by the parties in the settlement process.

... The Commissioner accepts that contracting parties engage in alternative dispute resolution for a wide variety of reasons, and that the availability of confidentiality is only one such reason. However, it is nonetheless well-established that confidentiality is valuable as an incentive, and that it would undermine the efficient and expeditious resolution of disputes outside of court if it were not to be upheld.

...The Commissioner's conclusion, in his Decision §§44-45 [O/1/9], was that there would be an adverse effect on the course of justice if parties were not able to participate in dispute resolution with openness and candour, and that the ability to communicate without prejudice as part of the process underlines the fact that parties do participate on an open and candid basis. That conclusion was correct. If parties knew that their communications would be disclosed under FOIA/EIR, it is likely that they would be more guarded in what they say. That may well undermine the efficacy of the process."

The questions for the Tribunal

10. The issue before the Tribunal was the application of Regulation 12 of the Environmental Information Regulations "**Exceptions to the duty to disclose environmental information**". The Tribunal had to determine whether "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority

to conduct an inquiry of a criminal or disciplinary nature” would be adversely affected and “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”.

Oral submissions and analysis

11. It was agreed that the points with respect to litigation privilege and Regulation 12(5)(f) were no longer relevant to the issue before the Tribunal which was concerned with the application of 12(5)(f).
12. Dr Jackson properly pointed out that while the agreement between the Council and BAM Nuttall contained a confidentiality agreement, and the effect of the Scheme for Construction Contracts (England and Wales) Regulations 1998 was to impose an agreement to adjudicate on the parties which contained a confidentiality clause in the absence of an agreement to go to adjudication; it was open to the parties in their initial negotiations to agree an adjudication process without such a confidentiality clause in which case one would not be imposed.
13. He argued that the only prejudice which could arise to BAM Nuttall would be if disclosure showed mistakes by them or bad behaviour. If it had done wrong then it was not in the public interest to suppress that information. If the company simply feared that what was revealed would be misunderstood then that was not a valid reason for non-disclosure. The project had been controversial throughout, the EIR required a restrictive interpretation of the exemptions.
14. Although some information might come out later it would not necessarily be the same documents and it would not be as timely – if there was to be proper public scrutiny of the conduct of the construction and of litigation it should be done sooner rather than later.
15. Counsel for the Commissioner submitted that the information in question was properly considered as confidential and subject to a legally binding confidentiality agreement. The threshold for an adverse effect was clearly met and the need for confidentiality in ADR was well recognised. It was part of the incentive to pursue resolution away from court thus saving time and money, the hope was that parties would engage in it openly and frankly. If Tribunal decisions created uncertainty as to

the status of such confidential arrangements then there could be a chilling effect. The courts accepted the value of confidentiality as a proper incentive for ADR to be used. While there was a public interest in disclosing information about the dispute the predominant public interest was in ensuring the appropriate resolution of the dispute.

Conclusion and remedy

16. In considering this appeal the Tribunal was acutely conscious that secrecy should not be an objective of a public authority in the general conduct of its business.
17. The Tribunal was satisfied that the exemption was engaged. There was a substantial dispute between the Council and BAM Nuttall which was before the Court. It had been preceded by adjudications held within a scheme which provided for confidentiality and where the statutory framework underpinning the scheme recognised the value of confidentiality. The ability of parties to communicate on a without prejudice basis underlined the point that parties do deal in a candid way within the adjudication process. The Tribunal was satisfied on the evidence that the in this specific case there would be an adverse effect on the current litigation if there was disclosure. There was a further more general adverse effect that a decision would call into question the effectiveness of the ADR arrangements for construction disputes, which very often involve a public sector purchaser. The lack of confidentiality of the ADR stages of such disputes would make the resolution harder to achieve and impact adversely on subsequent litigation, and so on the course of justice.
18. It is helpful to consider what is already in the public domain with respect to this case. Although he stated that the public don't know the detail of the dispute; Dr Jackson was aware that the disputes concerned delay and cost overrun and the claim and counterclaim in the proceedings currently before the Technology and Construction Court total £103 million. The essence of the issue is known to the public and was itemised by Dr Jackson in the Tribunal. Furthermore as he was informed by the Council when it responded to his request, information about the council's case could be obtained from the Court on payment of a fee. The disputed information itself consisted of very detailed information in various forms addressing specific points, it comprised witness statements, diagrams, photographs . The substantial issues were in the public domain and the disclosure of the detail would not add significantly to the

public's understanding of the difficulties of the busway project. It was not possible to know at this stage how the dispute would be resolved or how much information would be released either through proceedings in court or otherwise; however the financial resolution would be in the public domain and that in itself would give a significant indication of the merits of the dispute.

19. The Tribunal concluded that the balance of public interest was very strongly in favour of maintaining the confidentiality of these documents in order to protect the course of justice both in this case and many other such disputes; the value of disclosure of the material was limited, the adverse impact on dispute resolution of disclosure substantial. The appeal is dismissed and the Commissioner's Decision Notice upheld. If there were to be change in the arrangements underpinning construction dispute resolution then this should be explored through a careful process of public debate and consultation leading to an amendment of the statutory framework.

20. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 19 July 2013