



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2013/0227

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FFR0497378
Dated: 24 September 2013**

Appellant: TRINITY HOUSING ASSOCIATION

Respondent: THE INFORMATION COMMISSIONER

On the papers

Date of decision: 6th May 2014

**Before
CHRIS RYAN
(Judge)
and
MALCOLM CLARKE
JEAN NELSON**

Subject matter: Format and means of communication, Reg 6
Exceptions, Regs 12(4) and (5)
Legal professional privilege (5)(b)
Confidential information (5)(e)

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. As this appeal comes before us the only issue between the parties is whether a contract made in August 2007 for the purchase by the Appellant, Trinity Housing Association, of certain land (“the Contract”) should have been included in the information disclosed to a member of the public who, in two letters in February and May 2012, had requested information about the transaction which the Contract recorded. In a Decision Notice dated 24 September 2013 the Information Commissioner decided that the Appellant had not been entitled to withhold the Contract and directed that it be disclosed, redacting certain bank account details. The requester had made it clear that he was happy for those details to be redacted but wished to see the whole contract, particularly as certain information about it had been made publicly available by being recorded at the Land Registry.

Background

2. In August 2007 the Appellant purchased land and property from a third party. The deal included:
 - a. an undertaking by the vendor to apply for planning permission for that development; and
 - b. an agreement by the Appellant to enter into a negotiated building tender with a third party contractor for the construction of a proposed development.
3. The transaction was recorded in the Contract, which was undated.
4. The Appellant wished to keep the detailed terms of the transaction secret and therefore lodged a summary of it at the Lands Registry, rather than a copy of the Contract.

5. In April 2009 the Northern Ireland Housing Executive (“NIHE”) declared that “design and build” arrangements of this type were contrary to procurement law. Subsequently, it called upon the Appellant to repay the funding which it had originally provided to enable the Appellant to acquire the property. This placed the Appellant facing the prospect of litigation with both the NIHE and the original vendor.
6. The request for information was made under Regulation 5(2) of the Environmental Information Regulations (“EIR”). This requires a public authority that holds environmental information to make it available on request. There is no dispute between the parties that the Appellant is a public authority for the purpose of EIR, that the requested information falls within the definition of environmental information and that the original request for information was correctly treated as an EIR request. However, the Appellant argued that it was entitled to refuse to disclose the Contract, relying on the following provisions of EIR:
 - a. Regulation 6(1)(b) (information already publicly available)
 - b. Regulation 12(5)(b) (exception for documents covered by legal professional privilege); and
 - c. Regulation 12(5)(e) (exception for confidential commercial information).
7. We deal with each challenge in turn

Does the requested information fall within the exception provided by Regulation 6(1)(b)?

8. The relevant part of the exception reads:

“(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless-
(a)...
(b)the information is already publicly available and easily accessible to the applicant in another form or format.”

9. The Grounds of Appeal argued that all the information contained in the Contract, which fell within the meaning of environmental information, had already been made publicly available at the Land Registry and/or had been passed to the original requestor. It was not therefore necessary, it argued, to disclose a photocopy of the Contract itself. We have had the benefit of studying the Contract, which was provided to us on a closed basis. We are satisfied, as a result, that it contains additional information, which has not previously been disclosed. We also accept the Information Commissioner’s argument that the whole of the Contract constitutes environmental information and that it should therefore have been disclosed in its entirety.
10. We therefore reject the Appellants claim that this exception applies.

Does the requested information fall within the exception provided by Regulation 12(5)(b)?

11. The relevant parts of EIR Regulation 12 read:

(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-

(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 an inquiry of a criminal or disciplinary nature;”

12. The Appellant argued that the Contract was covered by legal advice privilege. The Information Commissioner, while accepting that the language of the exception is wide enough to cover privilege generally, did not accept that the Contract was capable of attracting privilege. He argued that, although the form of a contract may reflect advice given to the parties during its preparation and negotiation, it did not itself constitute legal advice and was not therefore capable of attracting privilege.

13. The Appellant pointed out that the Contract included some manuscript amendments and that their conclusion clearly pointed to advice, presumably the advice that the amendments should be incorporated.

14. The Information Commissioner argued, in his written submissions to us, that the Contract was not a species of document which, once finalised and signed, could attract privilege. We believe that is clearly right. Whatever the position of earlier drafts and written or oral communications about the content of an agreement, or the likely consequences of entering into it, privilege ceases to apply once the parties agree its content and convert the negotiated draft into a final signed document recording the terms of the bargain they have struck. The manuscript amendments, apparently added immediately before signature, are in no different category to the rest of the document in this respect.

Does the requested information fall within the exception provided by Regulation 6(1)(e)?

15. The introductory language of Regulation 12(5) is set out in paragraph 11 above. Regulation 12(5)(e) provides a further exception, justifying a refusal to disclose information if to do so would “adversely affect”:

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

16. The Information Commissioner accepted that a commercial contract is likely, by its nature, to be confidential, but pointed out that in this particular case some information about it was already in the public domain. He also accepted that the contract formed part of the Appellant’s “commercial activity”. The Appellant argued that its economic interests would be damaged by disclosure because it would provide information to other landowners and developers about its general approach to certain types of contract. However, by the time the request for information had been submitted, in 2012, the NIHE had made its determination that design and build contracts breached procurement law. There was therefore no continuing commercial interest to be protected at the time of the request, since it would not then be possible for the Appellant to enter into further contracts of this nature.

17. The Appellant also argued that it would be harmed by the public becoming aware of the actual or threatened litigation it faced. In particular, it said that any future merger partner would be discouraged from proceeding with the transaction. It also argued that disclosure might make it more difficult for it to obtain planning permission in respect of the property in question. We reject all three arguments. Disclosing the Contract will disclose nothing about any disputes that might have arisen as a result of the Appellant having entered into it. It would not therefore have any effect on the Appellant’s relationship with the public, the planning authorities or any potential merger partner. We find it extraordinary, in any event, that the Appellant would contemplate entering into a merger without disclosing the existence of actual or threatened litigation (assuming that the counterparty did not discover it during the course of pre-contract due diligence).

18. We therefore find that the Appellant has presented no credible evidence that disclosure of the Contract (as opposed to its original decision to enter into it – a matter of public record) should cause any damage to its economic interests. We conclude, therefore, that the exception does not apply.

If one or other of the claimed exceptions had applied would the public interest in maintaining it have outweighed the public interest in disclosure?

19. Even if we were wrong on the application of the exceptions relied on, we think that the public interest balance, required to be exercised under Regulation 12(1)(b), does not support the maintenance of the exception in this case. There is a public interest in commercial organisations being able to conduct their business in private, although that is heavily diluted where, as in this case, the law requires the publication at the Land Registry of the essential elements of a transaction. The Appellant also argued that disclosure might hamper the activities of the Northern Ireland Audit Office, which was investigating the transaction in question.
20. Against that the Information Commissioner invited us to take into account the public interest in the public being made aware of the content of a contract which fell within a category of arrangement which was now regarded as breaching procurement law. He also argued that disclosure would not have any deleterious effect on the work of the Audit Office. He suggested that the Appellant's real complaint was that it would prefer not to be subject to what it described as "unwelcome access" to its commercial activities, which was the inevitable result of being categorised as a public authority for the purposes of the environmental information regime. Whether or not that was the Appellant's motive for refusing disclosure, we find that there is a public interest in disclosure and that the Appellant has failed to demonstrate any significant public interest in maintaining secrecy.
21. We therefore conclude that, even if one or other of the exceptions relied on had applied, the public interest in maintaining the exception would not have outweighed the public interest in disclosure.

Conclusion

22. The Appellant was not entitled to refuse to disclose the Contract in response to the original information request and its appeal against the Decision Notice should therefore be dismissed.
23. Our conclusion is unanimous.

Chris Ryan
Judge

6th May 2014