ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FS50498804

Dated: 18th. December, 2013

Appeal No. EA/2014/0003

Appellant: Frank Bowen

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Malcolm Clarke

and

Gareth Jones

Tribunal Members

Date of Decision: 25th. June, 2014

Date of Promulgation: 2 July 2014

The Appellant appeared in person

The Information Commissioner was not represented but made written submissions

Miss J. Hooper, solicitor and Mr. Lee Richards, development surveyor for the City and County of Swansea Council were in attendance.

Subject matter: Whether requested information was made available.

Reg. 12(5)(e) of the Environmental Information Regulations, 2004

Commercial Confidentiality of information requested and the public interest.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 25th. day of June, 2014

David Farrer Q.C.

Judge

[Signed on original]

The Decision

The Request

1. The City and County of Swansea Council ("the Council") granted a 250 year lease of a prominent waterside site, then a boatyard, to Celtic Marine Limited ("Celtic") in October, 2011. Celtic's previous lease had expired but it continued to occupy the site, though no commercial activity was taking place. The lease, as amended, provided for a blend of commercial and residential development, which was said to be consistent with current planning policy and a strategic change in the character of waterside development in recent years.

2. On 23rd. January, 2013 Mr. Bowen's MP, Mr. Geraint Davies, made a series of Requests for information from the Council on his behalf. They were -

   "1 Why was (Celtic) given the 250 year lease in October, 2011?

   2 Who else was offered this lease?

   3 Who, exactly, authorised this deal?

   4 How much did (Celtic) pay for this 250 year lease?"

3. The Council provided some of the information relating to the first three requests but refused to disclose the information requested in the fourth, relying on the exemption enacted in FOIA s.43(2) - commercial confidentiality. Further correspondence elicited an answer to the third.

4. Mr. Bowen made direct Requests on 4th. February, 2013, namely -

"1 Why was a 250 year [lease] granted to [Celtic] "(He observed that Celtic had been dormant since 2005). ("Request 1")

2 How much money was raised by the deal? ("Request 2")"

These Requests give rise to this appeal. A third Request was complied with and plays no part in this appeal.

5. The Council disclosed information in response to Request 1 but refused to answer Request 2 for the same reason as for Request 4 from Mr. Davies. As to Request 1, it stated that, since Celtic occupied the site at the date of the grant of the new lease, it had security of tenure pursuant to the provisions of Part 2 of the Landlord and Tenant Act, 1954 so that the Council could not offer a lease to a new lessee. In seeking an internal review of these decisions Mr. Bowen asked why Celtic was granted a 250 year lease rather than a ten - year extension. The answer was that Celtic's financiers had asked for a long leasehold interest to protect their investment and that lease terms were now longer than in the past. It referred also to the rights of residential tenants under the Leasehold Reform Act, 1968 and the need to allow them to extend their interests to a similar length. Some residential development of the Celtic site was intended.

<u>The Complaint to the ICO</u>

6. Mr. Bowen complained that he had received no response or adequate response to the third Request from his M.P. nor to either of Requests 1 or 2.

Following receipt of the Decision Notice the Council disclosed information satisfying the third Request from Mr. Geraint Davies MP. We do not propose to rule on that Request, since any ruling would have no practical effect.

The Decision Notice

7. The ICO rightly ruled that all these Requests were for environmental information as defined in Regulation 2(1)(a) and (c) of the Environmental Information Regulations, 2004 ("the EIR") so that FOIA s.43(2) did not apply. The material exception was reg.12(5)(e) of the EIR. The two provisions are not identical but the distinction is of little or no practical consequence in this case.

8. He ruled that, as to Request 1, the Council had disclosed the relevant information, so that its obligations under EIR reg. 5 were satisfied.

9. As to Request 2, EIR reg. 12(5)(e) was satisfied and, taking proper account of the presumption favouring disclosure enacted in reg. 12(2), the public interest nevertheless favoured withholding the information.

The Appeal

10. Mr. Bowen appealed. The grounds were extensive and requested disclosure of some matters that formed no part of the Requests or the Decision Notice. As the ICO observed in his response, the grounds may be summarised as -
(i) The Council failed to comply with its duty to disclose information as to

Request 1. (ii) The exception under Reg. 12(5)(e) was not engaged as to Request 2 and (iii) If it was, the public interest favoured disclosure.

11. As to Request 1 Mr. Bowen 's criticism of the ICO's finding concentrates on his "acceptance" that residential development should take place on the Celtic site in the future notwithstanding current planning policies. He submits that the grant of a 250 - year lease by reference to potential residential lessee rights under the Leasehold Reform Act was misconceived. He questioned the applicability and effect of the Landlord and Tenant Act, 1954 as regards Celtic's overriding right to remain in occupation and to negotiate a new lease. He requested the names of the "financiers", an issue outside the Requests and not raised by the Decision Notice.

12. As to Request 2, he drew attention to the disclosure of the minutes of a meeting on 27th. February, 2014 of the Council's Audit Committee which included a report by accountants on behalf of the Wales Audit Office on the Celtic lease negotiation. In dealing with governance issues that report disclosed the fact that property officers had calculated the total (undisclosed) value of the transaction as below the threshold of £500,000 at which the Head of Corporate Property might make a delegated officer decision as to the grant. This, argued Mr. Bowen, undermined the claim that the price paid for the lease, in whatever form, was commercially sensitive. Further, the claim that disclosure would damage the Council's relationships with the private sector was untenable. The facts that the terms of the lease were not finalised at the date of the Requests and that a planning application affecting the use of the site was still unresolved did not increase the sensitivity of the information, rather the reverse. As to the public interest. Swansea Council taxpayers were entitled to know what "they" were getting for the sale of

"their" property and it was a right which overrode the interests of Celtic in confidentiality. The statutory presumption was a further factor supporting disclosure.

The Law

13. The relevant EIR provisions are

Reg. 5(1) " *Subject to* (the exceptions and other statutory conditions not engaged here) *a public authority that holds environmental information shall make it available on request".*

Reg. 12(2) *"A public authority shall apply a presumption in favour of disclosure"*

Reg. 12(5) " . . . . *For the purposes of paragraph 1(a)* (which provides for exceptions to the Rule 5(1) obligation) *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".

By virtue of Reg. 12(1)(b) an exception may only be maintained where the public interest in maintaining it outweighs the public interest in disclosure.

Our Decision

14. We address first the substance of Mr. Bowen's appeal as to Request 1. The issue here is whether the Council made available the information requested, namely - Why grant a 250 - year lease to Celtic? Neither the ICO nor the Tribunal is concerned with the justification advanced in answer to that simple question, whether commercial or legal. The ICO rightly took *"no view on the accuracy of the information held or the merits of the positions of the respective parties"* If the Council's reasoning was wrong, that may be a matter for redress elsewhere but certainly not in this jurisdiction. The Tribunal's task is simply to determine whether the Council made available the relevant information which it held. As to its substance, it clearly did.

15. The Council provided information in summary form, first in its reply to Mr. Bowen of 12th. February, 2013, secondly to Geraint Davies MP on 13th. February, 2013 and finally following its internal review of 5th. March, 2013. The initial replies were in virtually identical terms. The effect of those responses was as set out in paragraph 5.

16. An issue has arisen as to the form in which it was made available. The information was held in the form of a "*Report of the Head of Corporate Property - Delegate Decision Amendments to Lease - Swansea Marina" to* the Council's Audit Committee dated 26th. February, 2010, ("the report") which was eventually disclosed by letter of 27th. February, 2014, from which the requested financial information had been excised. The explanations for the exclusive negotiation with Celtic and the grant of the 250 - year lease were

for practical purposes as summarised in the Council's replies. Before disclosure of that edited report, which, in its original form constituted the closed bundle in this appeal, the ICO was minded to seek a substituted decision as to Request 1 on the ground that Reg. 6(1), read in conjunction with the definition of environmental information in Reg. 2 (1) and the code of guidance to the Aarhus Convention required the original document (so far as material) to be disclosed rather than a summary, unless the requester expressed some other preference.

17. That argument may be correct but the Tribunal is not minded to substitute another decision here, given that it would be of entirely academic interest. The public now has access to the original and was properly informed by the previous replies as to the Council's reasons. The appeal as to Request 1 therefore fails.

18. We turn to Request 2. For the Reg. 12(5)(e) exception to be engaged the following matters must be established as more probable than not -

(i) The information was of a commercial or industrial character - which is here beyond dispute;

(ii) It was confidential at the time of the Request;

(iii) That confidentiality was provided by law;

(iv) Its purpose was the protection of a legitimate economic interest ;

(v) Disclosure would adversely affect that confidentiality, hence that interest.

If those requirements are satisfied, then the public interest test enacted in

Reg. 12(1)(b) comes into play.

19. The first question is the scope of this Request. Its wording embraces all payments, whether in the form of premium (designated as "additional capital receipt" by the Council) or rent, to be earned by the Council from the grant of the lease. However, the correspondence and the ICO's submission indicate that an agreement was reached with Mr. Bowen but not, it seems, the Council, during the investigation, to treat it as limited to the premium payable for the lease, hence excluding rental payments. We assume that this limitation was linked, at least in part, to uncertainty at the date of the Request - and probably still today - as to the final value to the Council of the grant of the lease. We note that, in its letter to the ICO dated 27th. September, 2013, the Council did not consent to the revised interpretation of the scope of Request 2 but stated that "it is not clear what (Mr. Bowen) is asking".

20. The restricted interpretation is not made clear in the Decision Notice nor does that Notice suggest any distinction that could properly be drawn between premium (or other capital receipt) and rent when considering the reply to Request 2. It seems that, having excluded rental payments from his decision without stating that he was doing so, the ICO found that disclosure of the premium figure engaged Reg. 12(5)(e). If that was right, the limitation made no difference to his decision.

21. This course poses potential problems. The Tribunal's task is to decide whether the Decision Notice "is in accordance with the law" (s.58(1)(a)). That should involve an assessment of the findings of the Decision Notice,

not a review of the preceding correspondence or, in this case, the ICO's Response to the Grounds of Appeal, to ascertain what exactly the ICO was deciding. If the Request has been modified by agreement before the issue of the Decision Notice, that must be spelt out in the Notice so that the Tribunal and the public know the scope of the Request and the subsequent decision with which the Tribunal was dealing. Simplification of an unambiguous Request (which this one was) during the ICO's investigation is often highly desirable and consistent with the provisions of FOIA but, if it is to be treated as a modification of the original Request, then it should be with the consent of both requester and public authority and should be clearly set out in the Decision Notice. It is difficult to see how a public authority can be found to have failed in its obligation to disclose something other than what it was asked to disclose. If it agrees to a restriction in the scope of the Request, then it has an opportunity to reconsider disclosure on the new basis before a Decision Notice is issued. Alternatively a new Request, can be made, framed in more limited terms, so that the authority has an opportunity to reply afresh. In this case the Council refused to disclose any financial information within the terms of Request 2 so that advice pursuant to s.16 of FOIA, indicating how the Request might be rendered acceptable, would have been of no practical value to Mr. Bowen.

22. Here the Council indicated as late as 15th. November, 2013, that it was treating Request 2 as covering all forms of receipt resulting from the grant of the lease. As in its letter of 27th. September, 2013, it stated that *"this is a live scheme"* and *"the final values have not been concluded"* It repeated a number of determining factors, which clearly showed that it was not adopting the limiting revision of the original Request. Somewhat oddly, the Decision Notice, apparently framed on the basis that these elements of the in-

formation were not now within scope, cites these statements when assessing whether there was a legitimate economic purpose requiring protection.

23. If the appeal relating to Request 2 were to be decided on the basis of the original Request, the Council could and should have replied, pursuant to FOIA s.1(1) that it did not hold the information requested. It did not do so.

24. Given the scope of the Decision Notice and the Tribunal's function under s.58, we have approached this Request on the basis that it is confined to an inquiry as to the premium agreed, though neither the ICO nor Mr. Bowen attempts to explain how or why this restriction should influence the Tribunal 's decision. In the absence of argument or evidence identifying any distinction between premium and rent or any other form of income from the lease relevant to our decision we find no such distinction in the context of this Request.

25. The information as to "additional capital receipt" and any other form of payment to the Council was contained in the report (see paragraph 16 above). The report is therefore the requested information.

26. As to the criteria for engaging this exception we do not doubt that the pricing information was confidential at the date of Request 2 and that such confidentiality was protected by law. Current prices paid by a large company to its suppliers or its landlord are usually sensitive and the position is no different where the other contracting party is a public authority. Indeed, each party generally enjoys a right to secrecy as against the other in respect of such matters, a right conferred by the common law and frequently by the express

terms of their contract, though there is no evidence as to such terms in this case. Here we judge that the Council was equally entitled to confidentiality with Celtic and its development partner.

27. There is unequivocal evidence that Celtic and its partner strongly objected to disclosure and that the financial terms of the lease were still not finally agreed at the date of the hearing. The disclosure of a threshold figure in the report to the Audit Committee of 27th. February, 2014 has no bearing on this appeal because such a figure was not in the public domain at the date of Request 2 nor the Replies.

28. Mr. Bowen disputes that either the Council or Celtic had a legitimate economic interest in confidentiality so far as the agreed capital payment was concerned. We disagree.

29. This lease is not ancient history. Its structure is evidently agreed but, to quote the Council, "it is a live scheme", that is to say a work in progress, probably even today. The relevant planning issues are still to be resolved; the results will affect receipts from the lease. Competitors are generally avid for information as to what a similar concern is paying for the services it obtains. There is no reason to doubt the claims made by Celtic or its development partner that that is the case here. These are legitimate economic interests which are protected by confidentiality.

30. Information as to the funding of the purchase of the lease is not germane to this Request or any other made by or on behalf of Mr. Bowen. It is not apparent why the issue was raised with Celtic.

31. It follows from these findings that, in the Tribunal's opinion, disclosure of the premium payable for the lease would adversely affect the confidentiality of this information causing damage to those economic interests.

32. We turn lastly to the question of the public interest.

33. Clearly, the public, specifically the residents of Swansea, has a legitimate interest in seeing that the local authority has acted in its best financial interests as taxpayers and in ensuring maximum transparency in local affairs, consistent with efficient and fair administration. The public interest is not, of course, an issue in respect of Request 1 because no exception was relied on in that context; the Council asserted simply and the Tribunal finds that it had made available the requested information.

34. On the other hand there are powerful reasons why, in the public interest, confidentiality should be maintained. They involve the future of the Celtic site project, as to which disclosure would unjustifiably damage the interests of the developer and its relations with the Council. Whether it would undermine trust to the extent of the developer withdrawing is uncertain but far from impossible. The Council argues that disclosure would probably reduce its ability to get the best possible value from this transaction, a serious prospect that could not be ignored.

35. Perhaps equally significant is the likely effect on the Council's future relations with other private sector contractors. Confidentiality is a critical consideration in development ventures and such ventures form an essential part

of the work of a major public authority. Disclosure of sensitive financial information by such an authority, contrary to the wishes of the contractor, would probably prejudice future deals to a significant degree.

36. We conclude, taking proper account of the presumption, that the public interest favours maintaining the exception.

37. For these reasons we dismiss this appeal as regards both outstanding Requests.

22. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

25th. June, 2014