



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

Appeal No: EA/2013/0223

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0499065
Dated: 25 September 2013

Appellant: Oldham Borough Council

Respondent: The Information Commissioner

2nd Respondent: Foxdenton and District Protection Group

Heard on the papers: Field House

Date of Hearing: 2 May 2014

Before

Chris Hughes

Judge

and

Mike Jones and Narendra Makanji

Tribunal Members

Date of Decision: 11 June 2014

Subject matter:

Environmental Information Regulations 2004

Introduction

1. On 12 February 2013 the Appellant in this case (Oldham Borough Council-"Oldham") received a request for information from the second respondent (Foxdenton and District Protection Group "Foxdenton") in the following terms:-

"...full disclosure of correspondence and e-mails relating to the 110 acres of farms and attendant grazing land. This is to include HOW planning company, the three farm owners, Aldi supermarket company, and any other developers"

2. On the 11 March 2013 Oldham responded declining to provide the information and claiming the protection of section 43 FOIA-prejudice to commercial interests. Oldham subsequently reviewed the matter and concluded that the request properly fell within EIR and continued to argue that the information was protected from disclosure.
3. On 2 May 2013 Foxdenton contacted the First Respondent (the Information Commissioner-"the Commissioner"). The Commissioner investigated the matter, during the course of which Oldham disclosed certain information to Foxdenton.
4. On 25 September 2013 the Commissioner issued his decision and directed the disclosure of four categories of documents and a correspondence bundle which he listed in the decision notice. Oldham appealed against this decision on 22 October 2013 in respect of three of four categories of documents, these were:-
 - The Guest Garsden Heads of Terms,
 - The Mouchel Technical Note,
 - The e-mail correspondence.
5. Foxdenton were joined as a Respondent in this action, they have supported the stance of the Commissioner and not introduced new arguments or evidence beyond those advanced by the Commissioner.

The Scope of the Issues before the Tribunal

6. It is agreed between the parties that EIR is the appropriate statutory framework for the consideration of this request for information. The issues raised by the three disputed documents are distinct and need to be considered separately.

The Guest Garden Heads of Terms

7. Regulation 12 of EIR provides protection against disclosure on certain grounds and subject to consideration of the public interest and a presumption in favour of disclosure. The ground relevant to this document is set out at Regulation 12(5):-

For the purpose 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.

8. The parties agreed that this breaks down into four questions that need to be considered:

Is the information commercial or industrial in nature?

Is the information subject to confidentiality provided by law?

Is the confidentiality provided to protect a legitimate economic interest?

Would the confidentiality be adversely affected by disclosure?

9. It is agreed between the parties that the first two conditions are met. The Commissioner interprets the third question and fourth question as closely linked. He interprets the third question as needing to be answered in the affirmative and only so answered if there would be harm from the disclosure.
10. It seemed to the Tribunal that the issue of interpretation is more appropriately addressed by considering the actual structure of the legislation which provides three distinct steps in interpretation.
11. Sub-paragraph (e) provides a framework for considering the information itself. In this case the issue is straightforward; heads of agreement are a common part of a commercial negotiation; such negotiations are conducted in confidence; the law protects that confidence. The purpose of the confidence is to help parties conduct their business – undoubtedly in doing so is enabling parties to protect their economic interest – a perfectly normal and legitimate part of the usual commercial process. In a case such as this, with a public authority and another entity in discussions around a proposed or actual commercial relationship it seems most unlikely that the condition of paragraph (e) will not be met.
12. Having established that the paragraph (e) condition is met; the next question to be considered is whether the disclosure would adversely affect “*the confidentiality of commercial or industrial information*”. It must be noted that the harm envisaged is not to any economic interest in the sense that a public authority or parties with whom it has commercial dealings will be harmed financially by the disclosure, rather it is a different form of harm the harm to confidentiality itself which is at issue. The effect of (5)(e) is to allow a public authority to refuse to disclose commercial information because it is held in confidence and the protection of confidence is a public good which EIR recognises. The information is protected so long as it is not trivial or already in the public domain. From a consideration of the information within the document it is clear that the information contained has some substance.
13. The third step now must be considered. Having established that the information has the characteristics set out in (e) and the public authority can legitimately refuse to disclose the information “to the extent that its disclosure would adversely affect” this protected characteristic (i.e. confidentiality) and therefore the condition precedent for

non-disclosure laid out in 12(1)(a) is met; whether the public authority is able to withhold the information depends on 12(1)(b):-

"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"

14. This balancing exercise is subject to 12(2); the obligation on the public authority to apply a presumption in favour of disclosure. A presumption in favour of disclosure is simply that - a presumption. The primary issue is where the balance of public interest lies, if there is uncertainty as to how the balance falls then the presumption applies; however on a proper evaluation of the evidence if it is clear that the balance falls one way or the other then the presumption has no purchase on the issue.
15. The question of where the public interest falls is dependent on the facts of the individual case.
16. In this case there is significant public interest in a major development proposal for a large area of land within the Metropolitan Borough of Oldham. There has been media interest and a community group concerned with the impact of possible developments has been formed and sought information. There is inherent in any disclosure framework a public good in making information available, supporting a better informed public discourse on questions affecting the choices made by public or private bodies which affect the public domain. There is a value in transparency, there is a value in revealing the workings of public bodies and demonstrating how they work to enhance public confidence in those authorities or (in extreme cases) revealing substantial shortcomings.
17. In favour of non-disclosure in such a case there is first of all the harm done to the principal of confidentiality which is recognised by EIR as a good worthy of protection. Then there are the actual risks of harm to the commercial interests which would be protected by confidentiality. In seeking to elicit the actual harm or risk of harm that would flow to these interests from disclosure the Commissioner wrote to Oldham BC on 28 August 2013 :-

"Much of the Council's reasoning for withholding the information focuses on what I understand to be ongoing current negotiations or future negotiations (post planning approval) between the developer and the landowners.

However, the Council's application for pinch point funding appears to suggest... that land acquisition has been completed. Land acquisition is also not identified as being the risk which would potentially delay the development....

I would be grateful if you could provide clarification on this point."

18. In a subsequent communication the Commissioner focused on withheld information in the e-mail correspondence and Oldham replied dealing with issues which seemed to largely focus on questions in that correspondence. However the Commissioner legitimately points out in his response to the appeal (bundle page 45 paragraphs 31 - 33):-

“... The Council, the during the Commissioner's investigation failed to specifically set out how disclosure of the heads of terms would cause harm to the legitimate interest of Foxdenton LLP. Secondly, the Council has failed to set out in its grounds of appeal specifically how Foxdenton LLP's legitimate economic interest would be damaged if the heads of term were disclosed or indeed how such disclosure would disrupt any negotiations for the purchase of land save a general comment to this effect. In the absence of such arguments, the Commissioner would submit that he did not err in failing to to conclude in his decision notice that disclosure of the heads of terms would cause such harm to Foxdenton LLP.

The Council further argues that it is legitimate economic interest in reaching the most advantageous agreement that it could for the development of the site would be damaged if the heads of terms were disclosed since such disclosure would undermine the Council's negotiating position in the event that Foxdenton LLP withdrew and it became necessary for the Council to deal with another commercial partner.

The Commissioner, having considered the heads of terms, would submit that the argument is set out by the Council in its grounds of appeal are still vague and speculative and further do not explain what specific prejudice disclosure would cause to the Council's commercial interests. The Commissioner accepted in his decision notice that disclosure of this information would provide parties with an insight into the Council's practices in facilitating such developments, however, the Council has still yet to explain how this knowledge would impact on the Council's commercial interests.”

19. From a perusal of the heads of terms the Tribunal agrees with the Commissioner that it is difficult to see any substantial risk of harm flowing from disclosure of the heads of terms. This document attempts to provide a structure within which the Council and the developer will work together. It envisages the production of a contractual joint venture agreement and sets out a framework within which the two parties will move forward together. It envisages the very large number of areas in which cooperation and agreement will need to be reached and sets out a framework for the governance of the process. Its disclosure should provide some insight to the public in how such developments are carried forward and some the assurance to the public that Oldham are moving forward in a thoughtful and careful way. The Tribunal is therefore satisfied that in concluding that the disclosure of this information is not prevented by a consideration of the balance of public interest under regulation 12 the Commissioner came to the correct conclusion.

The Mouchel Technical Note

20. In appealing against the Commissioner's decision that this be disclosed Oldham relied on the exception to disclosure provided by paragraph 12(4):-

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

...

(d) of the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;”

21. The document in question is a study undertaken by a contractor as “a preliminary traffic study relating to an area of land known as the Foxdenton Development Area”. It considers the site and questions as to access to the site in terms of potential traffic issues related to possible developments. In its conclusions it recommends further studies of various aspects. As a simple question of fact and construction it is a finalised report; it is not in the course of completion nor is it an unfinished document and the request is not for incomplete data. The exceptions which Oldham seek to rely on at this point simply do not apply. While Oldham claim that there were "numerous references in the document to the unfinished and preliminary nature of the assessment that it contained" it is the assessment which is incomplete and not the document and any planning or transport study of necessity cannot be a complete and explicit statement of every relevant issue. That the document identifies further areas for consideration does not make it incomplete. This has clearly been submitted by a consultant to the Council as a finished document and that is sufficient.
22. Oldham have further sought to protect it from disclosure by relying on regulation 12(5)(e). However, here again there is a profound lack of specificity to the argument and it is difficult to see any basis upon which harm would result from disclosure of what is, after all, a scoping study for work which might be usefully submitted as part of the evidence at a planning enquiry. The Tribunal is satisfied that there are no grounds for the nondisclosure of this report and that therefore the Commissioner correctly ordered its disclosure.

The e-mail correspondence

23. In respect of this bundle of some 106 pages, Oldham has argued that Regulation 12(5)(e) is engaged. The bundle consists of a large number of documents – some of which (pages 101-106) are not in scope since they do not relate to the land in question. There is no specificity in the appeal as to how prejudice to the public interest would arise from the disclosure. In Oldham’s response to the Commissioner’s request for further information as to how harm would flow from disclosure (pages 100-101) Oldham listed a series of issues at a significant degree of generality. The Tribunal concurs with the Commissioner’s reasoning and the argument in his Reply (bundle page 50 paragraphs 53 and 54):-

“The Council makes the broad statement in its grounds of appeal that the confidentiality was to protect the legitimate economic interests of both the council and a private developer in the successful development. However, the Council has not specifically set out in its grounds of appeal why it believes that this is the case and, furthermore has failed to explain what harm to either the Council or the private developers legitimate economic interests would result from the disclosure of this correspondence.

In the absence of such arguments, the Commissioner would maintain that he was correct to conclude in his decision notice that confidentiality in relation to the e-mail correspondence was not provided in order to protect a legitimate economic interest. As such, the Commissioner would submit that he was correct to conclude that the exception under regulation 12(5)(e) is not engaged”.

Conclusion

24. The Tribunal is satisfied that Oldham has not established its grounds of appeal with respect to the e-mail bundle and therefore the appeal in respect of this set of documents must also be dismissed.
25. The Tribunal is therefore satisfied for the reasons stated that the Commissioner's decision notice is correct in law, this appeal is without merit and is dismissed.
26. Our decision is unanimous.

Judge Chris Hughes

[Signed on original]

Date: 11 June 2014