ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0508919

Dated: **8th. June, 2014**

Appeal No. EA/2014/0025

Appellant: St.Albans City and District Council ("SACDC")

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Paul Taylor

and

Jean Nelson

Tribunal Members

Date of Decision: 18th. September, 2014

Date of Promulgation: 24th September 2014

The Appeal was determined on the papers.

Subject matter:

E.I.R regulation 12(5)(e) and (f) Whether the requested information was commercially confidential.

Whether disclosure would have an adverse effect on the interests of the party providing the information to SACDC.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.
SACDC is required to disclose the requested information contained in the closed bundle within 28 days of the publication of this Decision.

Dated this 18th day of September, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1. Early in 2012 Oaklands College and Taylor Wimpey, ("the developers"), indicated to SACDC that they would apply for planning permission for a substantial housing estate on green belt land, together with the redevelopment of the college buildings and facilities, at Smallford College, St. Albans. The residential development was designed to help fund that redevelopment. Permission for a similar development, which required a finding of very special circumstances because of its impact on the green belt, was granted by the Secretary of State, who had called - in the application, in 2009.

2. As is commonplace with such developments, the developers entered into detailed pre - application negotiations with the planning department of SADC , obtaining for a fee advice as to the presentation of their detailed application to the planning committee. VRG Planning ("VRG") acted as agents for the developers and Armstrong Rigg Planning ("ARP") as consultants.

3. The proposed development was expected to arouse considerable public interest and it did. Marshalswick North Residents Association, represented by Ms. Gaynor Clarke, strongly opposed the plans for development. It presented a petition to SACDC in late 2012. The Planning Performance Agreement ("the PPA") was signed in March, 2013. A public consultation exercise took place with meetings in March and April, 2013, at which a considerable body of information was made available by the developers.

4. A summary of feedback from the consultations was provided by the developers in May, 2013.

5. The application was submitted on 23rd. May, 2013

The Request

6. Ms. Clarke, on behalf of the Marshalswick North Residents Association, made the following request of SACDC, received on 17th. June, 2013:

"Please provide via email copies of all minutes/notes of meetings, formal or informal between Taylor Wimpey and SADC planning department, regarding proposals to build 350 homes on Oaklands College land on Sandpit Lane. The dates required are from 1st. January, 2012 - 13th. June, 2013.

Please also provide copies via email, of any email, written correspondence, formal or informal, between SADC(sic) Planning Department and Taylor Wimpey or Oaklands College regarding the above proposed development. The dates required are 1st. January, 2012 - 13th. June, 2013."

6 SACDC responded on 16th. July, 2013. It refused to supply the information requested, , relying on the exception furnished by EIR regulation 12(5)(e) - where disclosure would have an adverse effect on commercial confidentiality. That stance was maintained following an internal review.

7. Ms. Clarke complained to the ICO on 13th. August, 2013.

8. His investigation examined the Council's reliance on the exceptions provided for in regulation 12(5)(e) and 12(5)(f) which SACDC also cited. During that investigation a quantity of requested information was disclosed to the residents' association. None of it contained anything of substance relative to

the pre - planning discussions. It was simply a traffic in emails setting up meetings, acknowledging the receipt of documents and covering other routine matters.

The ICO's decision

9. As to regulation 12(5)(e), the ICO found that each of the requirements for the engagement of this exception was met save that SACDC had failed to demonstrate that disclosure of any of the requested information would have an adverse affect on the commercial interests of either SACDC or the developer. Inevitably, he made the same finding as to adverse effect when considering 12(5)(f). Having determined that neither exception was engaged, he did not make findings as to the public interest.

10. SACDC appealed.

The Appeal

11. Its grounds of appeal were largely reiterated in its Reply.

12. It described the nature of pre - application discussions which are designed to produce proposals from the developer as to which the planning officers can give advice on the formulation most likely to be acceptable to the planning committee.

13. It emphasised the volume and the quality of information provided by the developer to the planning authority for the purposes of pre - application advice. Such information was, we were told, frequently or generally confidential in nature and of considerable interest to potential competitors. So it was implicit that nothing arising in pre - application advice would be passed on to third parties. Any disclosure would damage the commercial interests of the developer and of the planning authority (here SACDC). Moreover, it would destroy trust, not only between this developer and SACDC, but between SACDC and the industry generally. Information shared in confidence must not be revealed.

14. A letter from the developers was exhibited in which they stated that they would have provided different pre - application information or none at all , had they believed that it might be disclosed to third parties.

15. SACDC further cited paragraphs 188 and 189 of the National Planning Policy Framework which emphasised the importance of pre - application engagement with the developer as an important tool in the achievement of better planning decisions. The planning process, as a whole, was highly transparent

16. The ICO 's argument in response was essentially based on the absence, as he saw it, of clear evidence that disclosure would adversely affect the legitimate economic interests of either SACDC or the developer on the facts of this case, having regard to the nature of the withheld information. If that were right, neither exception relied on by SACDC would be engaged.

The Law

17. It is common ground that this appeal involves environmental information within regulation 2 of the Environmental Information Regulations, 2004 ("the EIR"). Regulation 12(5) sets out the exceptions to the duty imposed on public authorities to provide environmental information Regulation 12(5)(e) provides

"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"

The wording of the exception is perhaps slightly odd since it is the economic interest which is liable to suffer the adverse effect and which the exception is

intended to protect .The maintenance of confidentiality is simply the means of protection. A breach of confidentiality which does not harm the underlying economic interest does not engage the exception.

18. Regulation 12(5)(f) enacts an exception where disclosure of the information would adversely affect *"the interests of the person who provided the information"* (to the public authority) where that person was not obliged to supply it to any public authority, where the authority was not entitled to disclose it other than under the EIR and where the person does not consent to disclosure. Each of those conditions is satisfied so that the only live issue is adverse effect. So either both or neither of these exceptions are engaged. They can be considered together.

Our decision

19. A fundamental point is that the Tribunal, like the ICO, is not asked to decide whether, as a matter of principle, all pre - application information supplied by a developer to a planning authority benefits from these exceptions. It is required to examine the particular information withheld in this case and to say whether it engages such exceptions. In any particular case it seems highly unlikely that an exception will apply to all the material relevant to the request. That trite observation is borne out by the decision of SACDC to disclose a quantity of routine administrative material after the initial refusal.

20. The sensitivity of material disclosed pre - application to a planning authority by a developer may, presumably, vary considerably from one application to another. Furthermore, that sensitivity may diminish to a significant degree with the passage of time. The timing of a request is frequently critical, whether the commercial interests at stake are subject to FOIA or the EIR. The confidentiality of information, hence the risk of damage to commercial interests, may be greatly reduced after the submission of the planning application

21. However, regardless of timing, we agree with the ICO that SACDC failed to relate the principles that it asserted to the material withheld in the closed bundle. It is not enough to state as a general rule that all information passing between developer and planning authority during the pre - application phase is intrinsically confidential and that its disclosure automatically threatens economic interests. Indeed, we found no express requirement of confidentiality anywhere. Much of the information within the ambit of the Request, both disclosed and withheld, involves routine administration, fixing meetings and proposing agendas. To suggest that its disclosure would damage the developers' interests, whenever it was made, strains credulity.

22. SACDC made no attempt to identify to the Tribunal particular information in specific documents within the mass of those withheld, disclosure of which in June, 2013 would damage the interests of the developers or of SACDC. The Tribunal read the documents in the closed bundle but was unable to find anything which, by June 2013 at any rate, appeared too sensitive to disclose.

23. Indeed, substantial parts of the closed bundle were plainly in the public domain. The leaflets welcoming the public to the two public consultations ("Welcome to our exhibition") (CB 111 et seq. and 275 et seq.) were withheld. So were the Inspector's report to the Secretary of State following the earlier planning inquiry in March, 2009 and the Secretary of State's decision. The scoping report of December, 2012 was also withheld , though it is hard to see what interests of the developer it revealed. Feedback from the public consultations, presumably a summary of openly registered reactions to the intended application from members of the public, features in the closed bundle too. The emails of July, 2012 at CB 381 appear at OB 209. There may be other duplications.

24. The firm impression formed by the Tribunal was that SACDC approached its EIR obligations by withholding indiscriminately whatever had been created pre - application and even a few documents which post - dated it. We conclude that it treated this body of documents in accordance with a general classification which paid no regard to particular information or the timing of the Request.

25. We wish to emphasise most strongly that this decision does not purport to lay down any general rule as to disclosure of information supplied by a developer to a planning authority for the purpose of obtaining pre - application advice. There may well be cases, perhaps many cases, where this process involves the provision of commercially sensitive material which, even after the application has been submitted, demands scrupulous protection. There may be others where a request made post - application, when transparency is essential to the procedure, must be complied with because the time for confidentiality has passed. Each case must be judged on its own facts.

26. For these reasons, we are not persuaded that this decision will discourage, let alone blight the useful practice of seeking pre - application advice. Developers will understand that genuinely sensitive information will be protected as long as it remains sensitive. They should not, however, expect either the ICO or the Tribunal to uphold reliance by public authorities on exceptions justified merely by the label of confidentiality protecting economic interests, attached indiscriminately to a mass of documents without reference to the particular interests in particular documents said to be threatened.

27. Major developments frequently involve great conflicting public interests. This is an area of public life in which the withholding of significant information from the local, sometimes the national community demands clear justification, both in determining whether the exception is engaged and, if it is, where the balance of public interests lies.

28. It follows from our finding in paragraph 26 above that we do not believe that SACDC is threatened with the loss of fee revenue from pre - application services by disclosure of the withheld material in this case. More generally, developers do not face thoughtless disclosure of commercial secrets. If their interests are demonstrably threatened by disclosure, it is highly likely that the regulation 12(5)(e) exception will be upheld.

29. We therefore find that, for similar reasons, neither of the exceptions provided for by EIR regulation 12(5)(e) or (f) is engaged. Like the ICO we do not therefore proceed to consider the public interest arguments.

30. For these reasons we dismiss this appeal.

31. Our decision is unanimous.

Signed David Farrer Q.C.

Tribunal Judge

18th. September, 2014