



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

Appeal No: EA/2014/0072

BETWEEN

EAST DEVON DISTRICT COUNCIL

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

JEREMY WOODWARD

Second Respondent

Tribunal

**Brian Kennedy QC
Suzanne Cosgrave
Paul Taylor**

Supplementary Decision

Subject Matter: The Environmental Information Regulations 2004 (“EIR’s”) and reliance by the East Devon District Council, (“the Council”) on Regulations 12(5)(b) and 12(5)(e) EIR to withhold disclosure of the requested information.

Regulation 12(5)(b) adverse affect on the course of justice

Regulation 12(5)(e) adverse affect on the confidentiality of commercial information

Introduction:

1. This supplemental decision relates to an appeal brought under section 57 of the FOIA. The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("the DN") dated 10 March 2014 (reference FS50498100), which is a matter of public record.
2. The Tribunal issued an interim decision on the 5 May 2015 which ruled on whether the Council was entitled to rely on the exception set out under regulation 12(4)(e) EIR (internal communications). Our ruling was that the Council was not entitled to do so and we gave our reasons for coming to that conclusion.
3. We went on to consider additional exceptions claimed by the Council. We issued a Closed annex to the interim decision including a table headed "*Table of Proposed Redactions Showing the Tribunal's Position as at 4 May 2015*". This table identified each of the additionally proposed redactions and showed the Tribunal's ruling in relation to each one. Where it was indicated "*Redaction Opposed*" the Council were ordered to disclose the previously withheld information.
4. There were two exceptions claimed across a variety of documents which were regulations 12(5)(b) (*the course of justice, the ability of a person to receive a fair trial...*) and 12(5)(e) (*the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*).
5. In relation to regulation 12(5)(b), the Tribunal agreed that it was engaged in some instances and the public interest balance was such that the Council ought to be able to withhold certain legal advice which had been supplied in relation to the proposed move. Whilst the public interest in transparency and accountability, along with the ability to scrutinise the legality of actions, weighs heavily in favour of disclosure, the ability of public authorities to consult their legal advisors in confidence similarly weighs heavily on the counter side of the argument. In our assessment of the public interest balance, we noted that the issue was still live and therefore that disclosure would cause prejudice to the Council's relocation project.
6. However, certain claims in relation to the application of regulation 12(5)(b) were rejected on the basis that the relevant information is anodyne and could not be considered to be legal advice specific to this project with any consequential impact on the course of justice. The proposed course of action being discussed in one document was an obvious one; the threat that opponents to the project might make claims of a conflict of interest is, in our opinion, something, which any determined objector will be alert to.
7. Regarding the Council's claims that regulation 12(5)(e) was engaged and the balance of public interest favoured withholding the Tribunal again accepted some but rejected others.
8. The Tribunal accepted the need for confidentiality surrounding discussions about potential sites. We also accepted the need to withhold the names of certain commercial organisations with whom the Council was holding confidential discussions. We recognised that premature disclosure of these details would cause uncer-

tainty amongst the employees of those business. We also accepted that to reveal details of sites under consideration would, at the time of the request, prejudice the Council's own commercial interests. We took into account the arguments of transparency and being able to scrutinise whether the Council were efficiently seeking value for money. However, we placed more weight on the Council's ability to negotiate a fair price for its land requirements, unhindered by the landowner being given advance notice of their interest.

9. Turning to the proposed application of regulation 12(5)(e) which the Tribunal rejected; we did not consider that there was any commercial confidentiality in relation to the contractor "*Kensington Taylor*" as it is public knowledge that they are contracted to the Council. We noted this from evidence submitted by Mr. Woodward and it follows that there can be no prejudice to commercial interests through disclosure of this as it is already in the public domain. As we found that the regulation was not engaged we did not go on to consider the public interest test.

The Issues:

10. In the interim decision we explained that there was legibility problems with parts of the disputed information until late in proceedings. Specifically, six pages of financial appendices to the progress reports were only legible in the final version of the Closed bundle which was received by the Tribunal on 3 March 2015. Consequently until shortly before the interim decision was issued we had been unable to form a view and that there had been no opportunity to receive submissions as to the application of regulation 12(5)(e).

11. The Closed annex addressed the Tribunal's position on the proposed redactions under regulation 12(5)(e) in relation to each of the financial appendices. Given that there were a number of these and they were in the same format, the Tribunal created a template to be applied by the Council to each of them. The template identified each item and gave our decision and reasons why the proposed redaction(s) either had or had not been accepted.

12. Our decisions for each of the proposed redactions were split into two categories; those claimed in respect of figures i.e. budgets, actual expenditure and budget variances, and those claimed in respect of text.

13. In relation to the figures in the budget reports we ruled that regulation 12(5)(e) was not engaged in the majority of instances. Few of the figures appeared to have the qualities described by the Council as being commercially confidential. In our view, the figures do however serve to inform the public about the overall cost of the project, the original budget and the variance from that budget at each reporting point.

14. In some instances, the figures represented costs incurred directly, or to be incurred directly, by the Council. Consequently the Tribunal were again not convinced that the regulation 12(5) (e) was engaged as there could not be said to be commercial confidentiality, particularly where no third party supplier was named.

15. It was our decision that regulation 12(5)(e) was not engaged in relation to costs actually incurred by the Council who as a public body would be required to publish its accounts. The Tribunal therefore ordered disclosure of this information.

16. Finally, the Council had sought to withhold details of budget variances. It was our decision that by themselves the budget variance figures did not disclose any could be said to be commercially confidential.

17. However, the Tribunal did accept that some of the figures did engage regulation 12(5) (e) and that the public interest balance favoured withholding that information in order to protect commercial interests. Certain information related to on-going contractual negotiations. We recognised the weight to be given to the potential for disadvantage to the Council i.e. the prospective contractors inflating their quotes to match known budgeted allocations, and hence militating against the Council achieving best value.

18. Some text described activities, with no characteristic of commercial confidentiality. This included inter alia, a description of services that had been delivered by Kensington Taylor, a supplier previously named publicly as the contracted architect on this project. Similarly, a description of services provided by Davis Langdon, the appointed project managers, had been redacted. In three instances no supplier was named hence there was no third party to be due any duty of commercial confidentiality.

19. Finally, the Tribunal did allow redaction of some headings within the budget statements, which refer to requirements for future services by a number of named suppliers, some of whom were in the process of agreeing contracts. As we were told that the contractual negotiations were live at the time of the request the Tribunal ruled that the supplier names should be withheld. We decided that the public interest balance was in favour of withholding this information, balancing the public interest in accountability and transparency against the prejudice caused to the Council's commercial interests through disclosure. In concluding, as we did, that the requisite information should be withheld, the Tribunal recognised the significant weight to be accorded to the Council's obligation to achieve best value for public funds and the prejudice to that obligation that would be likely to occur if this information was disclosed before contracts were concluded. We also note that disclosure is likely to occur once contractual negotiations have concluded, at some point in the future.

20. We indicated in the interim decision our uncertainty as to whether or not all the project reports, within scope of Mr. Woodward's request, had in fact been provided.

28. and further we remain uncertain as to whether or not all the relevant information has been provided to us. As an example, it appears (from the Closed bundle) that a report "5" issue date 7 January 2013 exists, whereas we have only seen report "5A" (9 January 2013). Pending clarification of this we propose to order disclosure of that information which we have been able to consider against the above exemptions, on a staged basis. We will do so initially through a closed annexe to this judgment, on 5 May 2015, until any

proper objections can be considered and by way of Directions in relation to those pages upon which we require further submission

21. On the 8 May 2015, the Council sent their response to the interim decision and Directions. They indicated that they did not intend to make further submissions in respect of any other redactions to the financial appendices.

22. Regarding the query which the Tribunal had raised about "reports 5" & "5A", they said this:

At Point 28 of the Tribunal's judgment there is reference to Reports 5 and 5A. Report 5 was only ever a report in draft form written by Mr. Steve Pratten and reviewed by Mr. Cohen but never published for use in meetings about the relocation project. It was subsequently rewritten as Report 5A which has been sent to you as part of the 'Closed Trial Bundle' as of 3 March. It is the Council's objective view that 'draft' Report 5 is outside of the scope of the initial request and not within the scope of this appeal.

23. Having considered the Council's response the Tribunal decided that it needed to satisfy itself as to the contents of "report 5" and "report 7" We issued the following directions on 18 May 2015:

" The Tribunal thanks the parties for their further correspondence and directs as follows;

a) That the Appellant (" the Council") confirms that the issue date of the Project report 7 is in fact 31 July 2013 which we would [sic] mean that it is not within the scope of the request.

b) Directs disclosure in accordance with the annexed table with the marked allowed redactions to take effect forthwith. The Tribunal further directs that the Council send closed copies of report 5 and 7 to the first respondent ("the Commissioner") and the Tribunal forthwith so that the Council and the Commissioner can make any relevant representations on scope, disclosure and redaction as appropriate and

c) The Tribunal will then finally deliberate on these two outstanding documents."

24. The Commissioner sent his response on the 10 June 2015. His view is that "report 5" does fall within the scope of the request.

25. The Commissioner had asked the Council to identify the differences between "reports 5" and "5A" in order to clarify the extent of changes between the two documents. He noted that, from the Council's response to his inquiries, it appeared that "report 5A" has some additions to it but no deletions from "report 5". Consequently any changes appear to be minimal.

26. Regarding "report 7" the Commissioner agreed that as it was dated after Mr. Woodward's request of 14 February 2013 it is not in scope.

27. The Council made a response to the Commissioner's submissions on the 11 June 2015 in the following terms:

"The Appellant accepts the Commissioner's submission that Report 5 should now be considered to be within the scope of the original request of 14/02/2013. The Appellant had always considered Report 5 to be a draft version of 5A, which was never published or used to consider the Relocation by either the Relocation Working Party or Members. It therefore accepts that it falls to the Tribunal to make a decision on document 5 as to any redactions it proposes in line with its previous deliberations. The Council is fully prepared to publish this document as soon as the Tribunal publishes its final decision. As previously stated the Council does not seek to redact the document in any way."

28. The Council acknowledged the Commissioner's finding that "report 7" fell outside the scope of the request. They added that, in any event, the report was to be published with similar redactions to those that the Tribunal had already proposed in its interim decision. The Tribunal welcomes this gesture.

Reasons:

29. The Tribunal finds that "report 5" is within scope of Mr. Woodward's request. As with the other reports considered this report does not engage the regulation 12(4)(e) relating to internal communications. The recent response from the Council that it was a draft might be considered to be a late claim under regulation 12(4)(d) although not specifically referred to as such. However in our consideration of the material we would not accept this exception is engaged for the following reasons and in this we agree with the reasoning of the Commissioner, the report is not marked "draft", it has an issue date of 7 January 2013, whereas "report 5A" has an issue date of 9 January 2013 and both versions were authorised by David Langdon but on different dates; "report 5" was authorised on 7 January 2013 whereas "report 5A" was authorised on the 9 January 2013. Finally, there are differences between the two reports, however small they may be.

30. It is our view that disclosure of "report 5" is within scope of the request and should be disclosed. We acknowledge and welcome the Council's comments of 11 June 2015 that it will not seek to claim exceptions in the event that disclosure is ordered.

31. The Tribunal agrees with the Commissioner and the Council that "report 7" is not within scope of the request given that it is dated after Mr. Woodward's request of 14 February 2013.

Conclusion:

32. Following 28 days of the date of this notice, unless appealed, the Council shall disclose:

- "*Report 5*". "*Appendix B*" thereto should have redactions in accordance with the template set out in the Closed annex to the interim decision dated 5 May 2015 (at pages 1 to 8).
- "*Appendix B*" from each of reports 1, 2, 3, 4, 5A and 6 in accordance with the template set out in the Closed annex to the interim decision dated 5 May 2015 (pages 1 to 8).

33. Our decision is unanimous.

Brian Kennedy QC

26th July 2015.