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

Appeal No: EA/2015/0089

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0536590
Dated: 17 March 2015

Appellant: Barry James

Respondent: The Information Commissioner

2nd Respondent: London Borough of Camden

Heard at: Field House, London

Date of Hearing: 22 September 2015

Before

Chris Hughes

Judge

and

Narendra Makanji and Nigel Watson

Tribunal Members

Date of Decision: 7 October 2015

Attendances:

For the Appellant: in person assisted by Mr Lever

For the Respondent: no attendance

For the 2nd Respondent: Heather Emmerson instructed by Joanne Reeves

Subject matter:

Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal substitutes this decision for the decision notice dated 17 March 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The North London Waste Plan (NLWP) is being prepared by a consortium of seven London boroughs to set out the planning framework for waste management for their area for a period of 15 years. It will identify sites for use in waste management and planning policies for informing decisions on planning applications relating to waste management. There is a significant level of concern from groups of local residents concerned about the possibility of the development of sites in their areas for use in waste management.
2. The Appellant in these proceedings, Mr James, has been concerned about potential developments and sought information. He made four detailed requests for information (which extend for 2.5 pages of the annex to the decision by the First Respondent the ICO) from LB Camden (the borough providing the central administration for the development of NLWP) between 14 February and 19 March 2013.
3. Some information was provided, however Mr James was dissatisfied and referred four requests to the ICO for further consideration. In his decision the ICO found that material related to three of these requests did not exist and ordered the Second Respondent, (LB Camden “Camden”) to supply the requested information. Mr James appealed to this tribunal and in his appeal raised a number of issues. Some of these were clarified and, while Mr James continued to be critical of various issues relating to the handling of his requests, at the start of the oral proceedings the parties agreed that there were only two issues for the tribunal to adjudicate.

The issues for the tribunal

Issue 1

4. In his request of 14 February 2013 Mr James asked at paragraph h:-

“You have not supplied any meeting minutes for any meetings held in 2012. Please advise when POG [Planning Officer’s Group] meetings were held in 2012 and supply copies of the minutes of all such meetings”

5. Camden has stated that no minutes were kept of these meetings and so such information is not held by Camden. Mr James disputed that and accordingly the tribunal considered the evidence and reached a conclusion on this issue.

Issue 2

6. The second issue which the parties agreed remained outstanding was a request from Mr James for disclosure of legal advice. It was common ground between Camden and Mr James that what he was seeking was legal advice which had commissioned by and been provided to Camden on “site scores” the assessment of the merits and demerits of various potential sites for development for waste management purposes. Camden argued that it would harm the course of justice if this advice was disclosed, Mr James argued that the balance of public interest lay in disclosure.

Issue 1 – Minutes of Planning Officer Group Meetings in 2012

7. Mr Onslow gave evidence on behalf of Camden and confirmed the truth of his witness statement. He is a planning officer employed by Camden to act as the secretariat for NLWP on behalf of all seven boroughs. At the relevant time he was the sole official working on behalf of NLWP and functioned as the secretariat for the three groups which oversaw the development of the NLWP – The Planning Members Group, The Heads of Planning Group and the Planning Officers Group (POG). POG consisted of the policy planners from each borough and they were responsible for the nitty gritty detailed work to move the project along. As the sole individual working full-time for the project as a whole his normal practice was to participate in the meetings and take notes at the same time in a notebook. After the meeting was over he would construct the minutes which would be circulated to attendees and saved electronically. His notebooks would be destroyed shortly after they were filled and he worked through several notebooks each year.
8. 4 POG meetings were held in 2012 on 3 April, 9 May, 30 May and 9 October and no minutes existed for those meetings. Mr Onslow had decided, in response to the mounting pressure of work relating to the Examination In Public (“EIP”) of the NLWP which was scheduled to start on 12 June, not to produce formal minutes. The meetings in April and May were rolling meetings appraising planning officers of developments and chasing up on progress and actions of the attendees in preparation for that date. Mr Onslow focussed on progressing the actions in advance of the

examination in public rather than preparing minutes. The October meeting followed on from an adverse result from the EIP and Mr Onslow devoted his time to considering options for the future rather than drafting minutes. The seven boroughs acknowledged that there was too much work and shortly afterwards another officer was employed to support the work. Mr Onslow acknowledged that minutes ought to have been kept of the meeting, however he had decided that the priority lay elsewhere.

Consideration of issue 1

9. Mr Onslow's evidence was exhaustive, consistent and credible. In the light of this evidence and in the absence of any challenge to the veracity of the witness; it was clearly impossible for Mr James to make submissions that there existed undisclosed minutes of the 2012 meetings of POG. Very wisely he refrained from further arguing the issue. The tribunal was entirely satisfied by the evidence and concluded that no such information was held and the ICO's decision notice with respect to this issue was correct in law.

Issue 2 - The disclosure of legal advice

10. While there was a substantial bundle of material submitted to the tribunal on a closed basis, the clarification of the precise material being requested meant that on examination there was one document which fell within scope of the request. Mr Kelly, a solicitor with Camden who had been responsible for legal advice in respect of NLWP gave evidence. He argued that the material was subject to legal privilege protect the rights of all seven boroughs. Some information was received in confidence from third parties. The request for the advice was received while the advice was still live since Camden was then re-visiting the preparation of the NLWP in the light of the Inspector's finding that the first version of the plan failed to comply with the duty of councils to co-operate as they are required to do under the Localism Act 2011. The issue of site scores was very relevant to the plan since it explained how the plan arrived at identifying certain sites.
11. The disclosure of such advice to the world at large on a controversial issue would undermine Camden's confidence in legal professional privilege and could act as a disincentive to the frank and candid exchange of information and advice. It would discourage third parties from providing confidential and privileged information to the

Council if it were to be publicly disclosed. While there was a clear public interest in ensuring that the NLWP was lawful and robust this was ensured by the examination in public by the Planning Inspector which enabled objectors such as the Appellant to raise issues of lawfulness. The Inspector had already demonstrated the effectiveness of this by the finding that in the preparation of the first version a statutory duty to co-operate had not been properly discharged.

12. The ICO in his decision notice had considered the question of legal advice privilege within the statutory regime of EIR. These regulations provide at 12(5)(b) that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:-

“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”

13. In his submissions the ICO concluded that the specific information relating to site scores which fell within the scope of the request (document 22 in the closed bundle) should be withheld since the balance of public interest favoured non-disclosure.
14. In submissions on behalf of Mr James it was not disputed that the document fell within the ambit of regulation 12(5)(b) however it was argued that the examination in public could not correct the plan and could only confirm that it was unsound or illegal. To enable the public to prevent error they had to be sufficiently informed to respond to consultations. Focus groups consulted on the new plan were concerned about site scoring and it would enhance the public ability to comment on the plan to know what legal advice was sought in relation to site score and to know what advice had been given. A preventative intervention by electors was of value and could save money.

Consideration of Issue 2

15. The tribunal was satisfied that disclosure of the information would adversely affect the course of justice. At the time of the request the advice was live as it related to a key issue in the development of the NLWP which was still being progressed and indeed is still to be resolved. The fairness of the proceedings before the Inspector and any subsequent judicial review proceedings could be affected by the disclosure. It would also have an adverse effect on the course of justice in that a direction to disclose the advice in this case would result in a weakening of the confidence in legal

professional privilege. There are no exceptional circumstances in this case which would give re-assurance to public bodies and their lawyers that in the conduct of other cases they would not be at risk of being required to disclose advice.

16. However there is a general presumption in favour of disclosing environmental information and there is undoubtedly significant local interest in the development of the NLWP. It could be of assistance to Mr James and his colleagues to understand some of the thinking relating to the development of the plan: however, having considered the material, the tribunal is not satisfied that, in the context of an evolving document, it would significantly assist in understanding the merits or de-merits of the plan or how best to explore issues relating to the plan in the examination in public or any subsequent proceedings. Mr James and his colleagues will still be fully able to participate in the examination in public and any subsequent steps.
17. The tribunal is therefore satisfied that the public interest in maintaining the exception strongly outweighs the public interest in disclosing the information. Factors in favour of disclosure were not strong and if disclosure were ordered in this case it would significantly detract from the confidence public authorities can place in legal professional privilege in such cases. The presumption in favour of disclosure is rebutted. The material should not be disclosed.

Conclusion

18. For the reasons stated the tribunal therefore finds in favour of the Respondents on both issues and rejects the appeal.
19. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 7 October 2015