



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2015/0078

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FER0562199
Dated: 24 February 2015

Appellant: Peter Higham
First Respondent: Information Commissioner
Second Respondent: Cornwall Council

On the papers

Date of decision: 27 September 2016
Date Promulgated: 28 September 2016

Before
CHRIS RYAN
(Judge)
and
MICHAEL JONES
NARENDRA MAKANJI

Subject matter: Environmental Information Regulations 2004
Exceptions
Confidential information (5)(e)

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 24 February 2015 is substituted by the following notice:

Substituted Decision Notice

Public Authority: Cornwall Council

Complainant: Peter Higham

Decision: The Decision Notice of 24 February 2015 is substituted by a Decision Notice to the effect that, for the reasons set out below, the Public Authority is directed disclose to the Complainant, within 35 days:

- A. The following pages of the report entitled "Green Cornwall Wind Energy Programme – State 2A Cost Report at Various Sites throughout Cornwall" with the redactions indicated:
- Pages 1-7 with the following redactions:
 - Certain financial figures, the disclosure of which would breach commercial confidentiality, without serving a public interest that at least equalled the public interest in maintaining the exemption. We have decided that the financial figure in paragraph 2.06 and the percentage figures in paragraphs 2.08, 2.09, 2.10 and 5.02 may be redacted.
 - The identity of the commercial entities named in paragraphs 3.01.06, 4.01.1 – 4.01.4, 5.08 and 6.07 may be redacted on the same basis.
 - A table that precedes paragraph 1, as well as paragraph 1.01 itself, identify individuals and a partnership of individuals which are not direct employees of the Council. Disclosure would be an unwarranted interference in their right to privacy not justified by any public interest that would be served by disclosure.
 - Page 8 with the redaction of:
 - Under the heading "Site Specific Costs", the code number for each site (column 1) and description of each site (column 2).
 - All of the data below the headings for the remaining columns (numbers 3-19) and above the row entitled "Total Construction Works".
 - The information appearing on Page 9, in an order which the Council may choose, with the exception of the code number for each site (column 1), the description of each site (column 2), number of turbines (column 3), the description of the turbine

- model (column 4), turbine capacity (column 5) and total energy output (columns 6 and 7).
- B. A newly created table containing the data on Capital Charges for Prudential Borrowing aggregated from pages 13, 17, 21, 25, 29 and 33.

REASONS FOR DECISION

Introduction

1. This Appeal arises out of a proposed investment programme for 9 wind turbines being erected on 6 different sites in Cornwall. The case was previously considered by a differently constituted panel of this Tribunal in August 2015 and, on appeal from that decision, by the Upper Tribunal in March 2016 (Appeal No: GIA/3265/2015). Some of the detailed background facts were set out in those decisions and are not repeated here.
2. The effect of the Upper Tribunal decision was that the scope of the Appeal has been limited to the question of whether or not certain financial data about the turbine programme, being the data aggregated from detailed estimates in respect of each of the proposed sites, should have been disclosed under the Environmental Information Regulations 2004 ("EIR") or whether the Council was entitled to refuse disclosure on the basis that the information fell within the exception provided by EIR regulation 12(5)(e) (confidential commercial or industrial information).
3. We have decided that the information, at that level of generality, should have been disclosed because, although the exception was engaged, the public interest in maintaining it did not outweigh the public interest in disclosure.

The Request for Information and the Information Commissioner's decision that it need not have been complied with

4. On 14 August 2014 the Appellant sent a request for information to the Second Respondent ("the Council"). It was in these terms:

"I attach a Freedom of Information request from myself and [individual's name redacted] representing Cornwall Protect for the most complete available financial statement of the business case for the above Council turbine investment programme. As you will see, a suitable format if available is that used for the earlier 15M Solar Energy programme spread over 25 years – Kernow Solar Park Update

Renewables Appendix 2 (sent to me by [name redacted]) on 7 July 2014.”

5. The attachment read:

“Re: CCf s f 16M turbine investment programme

Please send reply to me, Peter Higham

I have been in contact with Cornwall Council since last February when I discovered the plan to invest some £16M in council owned turbines on council sites. [Individual's name redacted] kindly provided references to the original approval documentation in February 2012 and most of the PA proposal numbers.

On 7 July I obtained from her among related documents the earlier Capital Gateway 25 year summary financial projections for approving the £15M solar programme. Although subject to some subsequent strategic changes, this shows the financial basis for considering a capital programme by CC. I asked, through [two individual's names redacted] for a similar financial summary for the turbines, acknowledging that the scenario was evolving and estimates would necessarily be much less definitive than the solar data.

In a phone call [individual's name redacted] stated that you informed him the data is “commercially confidential”. I was advised earlier, and this has now been repeated, that I should use the FoI route for more data.

I assume some financial evaluation of the turbine programme exists since it seems inconceivable that such a major project, on which significant expense has already been committed, has no total financial estimate phased over its 25 years.

These are our questions and requests:

1. The strong impression is forming that the Council is progressing the turbine proposals through local consultation and the planning process but resisting disclosure of the programme's total finances, implications and justifications, possibly from most council members and certainly from the media and the public, at least until after planning approvals are secured. In the absence of any possibility of appeals against any such approvals, the technical argument that the business case, which is contentious, is not strictly part of the planning process is unreasonable. The project's timely evaluation and public disclosure should be a crucial part of the democratic accountability process. We therefore request full disclosure of the programme's finances.
2. Specifically, how can an aggregated outline financial estimate of seven separate projects by “commercially confidential”?

3. *To which councillors has the financial business case been available and properly explained? My councillor was just aware the project exists – nothing more.*

If the council considers the programme has a sound financial justification, it should explain it reserving only what is essential for commercial confidentiality.

I believe planning consents for the turbine sites are targeted for this year and that the information is provided urgently.”

6. The Council refused to comply with the request on the basis that:
- disclosure of the requested information would have an adverse effect upon *“the confidentiality of commercial or industrial information where such information is provided by law to protect a legitimate economic interest”* (and therefore excepted from the obligation of disclosure by virtue of EIR regulation 12(5)(e)); and
 - the public interest in maintaining the exception outweighed the public interest in disclosure.
7. The Council's refusal was upheld by the Information Commissioner when, having investigated the Appellant's complaint about the way in which his information request had been handled, he issued a Decision Notice on 24 February 2015. In it he concluded that the exception was engaged and that the public interest in maintaining it outweighed the public interest in disclosure.
8. In the course of the investigation that led to the Information Commissioner reaching that decision he had asked for, and been provided with, a copy of the information which the Council said fell within the scope of the information request. It consisted of a document entitled *“Green Cornwall Wind Energy Programme – State 2A Cost Report at Various Sites throughout Cornwall”* (*“the Stage 2A Report”*). The Stage 2A Report has been treated as a closed document throughout the proceedings to date. The Appellant has therefore been at a disadvantage in presenting his case, although this is inevitable if the decision as to whether or not disclosure should be ordered is not to be pre-judged. However, the Upper Tribunal summarised the content of the Stage 2A Report in its publicly available decision. It did so by first adopting part of the Information Commissioner's Response to the Appeal, which disclosed that the withheld information included:
- a total general costs summary over the period of the programme for all of the 6 sites*
 - Revenue/income figures over the period of the programme for each of the 6 individual sites”*

It then went on to qualify that summary by noting that *“as regards construction costs [the Stage 2A Report] appears to contain the figures for both the individual sites and in aggregated form, whereas in respect*

of operating costs and revenue it contains the figures only for the individual sites, and does not appear to aggregate them."

9. We should say that the Appellant has expressed some scepticism in his written submissions on this Appeal as to whether the Stage 2A Report is the only document held by the Council at the relevant date, which contained information covered by his information request. However, there has been no formal challenge to the Council's assertion that it held no other relevant information at the relevant time and the Council has reiterated, during the course of this Appeal, that this is the case and has provided a credible explanation for why that is the case. We have therefore proceeded on the basis that this is the case.

The first appeal process in respect of the Decision Notice

10. The Decision Notice was considered on the Appellant's appeal to a differently constituted panel of this Tribunal in August 2015. On that occasion the Tribunal decided that, although the Council's reasons for refusing disclosure were justified in respect of most of the Stage 2A Report, the introductory pages, comprising the first 7 pages, should be disclosed with some minor redactions. It considered that *"the cost commentary and the various broad assumptions and descriptions of processes are of use to the public in understanding the project and are not the details which would assist potential tenderers in structuring their tenders to the Council's disadvantage."*
11. The Upper Tribunal allowed the Appellant's appeal against that decision and remitted the case for determination by a differently constituted panel of this Tribunal. It decided that both the Information Commissioner and the Tribunal had erroneously interpreted the Appellant's information request as comprising just the introductory paragraph (quoted at paragraph 4 above and had not taken into account the attachment (paragraph 5 above). The result was that neither the Information Commissioner nor the Tribunal had considered the Appellant's assertion that aggregated outline financial estimates, drawn from the data held in respect of each individual site, must be held by the Council.
12. The Tribunal was also found to have been in error in concluding that the Council did not hold the summary information because there was no existing document which showed the information in that form. The Upper Tribunal decided that:

"...the only conclusion to which the FTT could properly have come on the evidence and submissions before it was that the Council did hold information consisting of the aggregated figures requested by Mr Higham, as those figures were in effect held by the Council as they were capable of being produced, in so far as not already recorded in that precise form, by a process of simple addition.

Later it stated:

"In general, information which can be made available by a process of simple addition of figures already compiled and recorded would appear to be information 'held' by the public authority."

13. Finally, the Upper Tribunal held that the Tribunal had failed to consider whether EIR regulation 12(5)(e) was engaged in relation to the aggregated information and how the public interest balancing test applied in relation to that information. It had considered those questions only in relation to the detailed information set out in the Stage 2A Report.

The remitted Appeal

14. Since the Upper Tribunal made its decision, each of the parties has filed written submissions supplementing the arguments put before the Tribunal prior to its August 2015 decision. One of the points raised by the Appellant was that his original information request had sought "...a financial summary of total income and costs **including** annual loan repayments, interest and net annual cash results... [emphasis in the original]". He assumed that the withheld information would include that data because an earlier request in respect of another renewable energy project had done so. However, as indicated above, the Council has confirmed that the Stage 2A Report is the only relevant information that it holds and has provided a credible explanation of the discrepancy in this respect with the information on the other project. In the absence of any evidence to the contrary we accept that statement and conclude that the aggregated financial information to be considered by reference to EIR regulation 12(5)(e) must be that either set out in the Stage 2A Report or obtainable through a process of addition from the site-specific data in that document.
15. The issues we must determine, in respect of that information, are:
- i. Is the exception engaged; and, if so
 - ii. Does the public interest in maintaining the exception outweigh the public interest in disclosure?
- We will deal with each in turn.
- Is EIR regulation 12(5)(e) engaged?*
16. The Information Commissioner argued in his Response to the Appeal that determining whether or not the regulation was engaged required a four stage enquiry to be conducted. This was the route he had followed in the Decision Notice and involved the following enquiries:
- i. Is the withheld information commercial or industrial in nature?
 - ii. Is the withheld information subject to confidentiality provided by law?

- iii. Is the confidentiality required to protect a legitimate economic interest?
- iv. Would the confidentiality be adversely affected by disclosure?

17. As the Appellant did not challenge that the information was commercial or industrial in nature or that the information was subject to confidentiality provided by law, the Information Commissioner concentrated on the third and fourth questions. He argued that the relevant economic interest needing protection was the Council's need to develop the various sites at the best possible terms for both itself and the tax payer and that it was more probable than not that this interest would be adversely affected if the aggregated financial data were to be disclosed. The adverse effect was that, even at that level of generality, disclosure could highlight to those likely to submit tenders for future site development work at any of the sites the likely profitability of placing turbines in the area, as well as highlighting the area where planning applications might be approved. This would undermine the Council's negotiating position and lead to the project costing the taxpayer more than would otherwise be the case.
18. The Council supported the Information Commissioner's arguments and laid stress on the disadvantage it would suffer if developers were able to tailor tenders for specific site development by applying to that site the aggregated financial data sought in the information request.
19. The Appellant disagreed on the test to be applied. He argued that the risk of harm needed to be "*certain or probable*" and that the "*more probable than not*" test proposed by the Information Commissioner was not appropriate. However, his main argument was that the likelihood of damage occurring was negligible. He argued that the project would involve six widely varying developments on sites spread over some 16 miles with varying conditions and operating different turbine models. His argument may be summarised by the following extract from his Grounds of Appeal:
- "The central point is that no commercial body or competitive developer could conceivably use a broad, out-of-date financial aggregation of 7 different site projects as a negotiating lever in one of them."*
20. We consider that the test to be applied is that proposed by the Information Commissioner and not the Appellant. That is to say that we must decide whether the harm which the Information Commissioner and the Council contend for is more likely than not to occur if we order disclosure. In applying that test we are attracted by the argument made by the Appellant and struck by the lack of detailed reasoning submitted by the two Respondents. The Council, in particular, should be in a position to explain how a developer may be able to apply the aggregate data to an individual site and to respond to the challenge that each of the proposed developments is so different that the

exercise would not provide the developer with any meaningful data. In reality, it has done little more in its submissions than to assert that potential developers will derive some advantage, which will be adverse to the Council's commercial interests.

21. Notwithstanding those concerns, we accept that knowing what costs the Council expects to incur and the financial returns it expects to reap from the project as a whole will hand to those with whom it may subsequently negotiate some idea of how they may be able to adjust the financial elements of a tender for work to their own advantage. That, in our view, is sufficient to engage the exception.

The public interest test

22. There is no dispute between the parties as to the fact that the obligation to disclose information on request (EIR regulation 5) may be negated if the information is found to fall within one of the exceptions provided under EIR regulation 12, but that, even if an exception is found to have been engaged, a public authority may only refuse disclosure if (regulation 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.*" It is also acknowledged on all sides that, under regulation 12(2), a public authority considering an information request must apply a presumption in favour of disclosure.
23. It has also been acknowledged by the Council from the outset that the proposed project would cause damage to the environment and that disclosure would enhance transparency in respect of the Council's activities and facilitate public debate on the proposed project. However, it argued that the Information Commissioner had been right to conclude that the factors in favour of disclosure did not match the factors in favour of maintaining the exception. This, it said, arose from the public interest in not having the tendering process undermined by the overall financial viability of a proposed site being made available to those likely to submit tenders for development work. The Information Commissioner supported those arguments.
24. The Appellant argued that the public should be made aware of the possible financial repercussions of a 25-year project, in which costs are loaded on the initial stages and potential gains deferred until much later. He reinforced his argument with criticism of the financial projections relied on by the Council on another renewable energy project – criticism that was said by the Information Commissioner to be based on speculation. The Appellant also argued that the planning process (in which the public would have a chance to participate) would not involve any investigation of the financial sustainability of the project as a whole.
25. We have already indicated that the arguments that commercial interests will be damaged by disclosure, while just sufficient to support a finding that the exception was engaged, were not supported by

compelling evidence or reasoning. We think that the Appellant is justified in arguing that, once the financial data has been aggregated, a potential developer will not be able to secure any significant commercial advantage in seeking to apply it to any one of the sites known to be under consideration. At the level of detail under consideration we consider that the disadvantage in negotiation which the Council is likely to suffer is very limited. It is at least equalled by the public interest in disclosure. In fact, it would be outweighed by those factors, but it is not necessary for us to go that far in determining the public interest balance. The strength of the public interest in disclosure stems, not from the Appellant's criticisms aimed at the financial planning for other similar projects, but from the public being made aware, in broad terms, of the costs likely to be incurred by the proposed project and the timing and amount of the financial return which the Council expects to recover. Those factors, when added to the public interest factors that the Council has accepted support disclosure, have convinced us that the public interest balance should come down in favour of disclosure.

Conclusion and consequential directions

26. For the reasons set out above we have decided that the Council should have disclosed the withheld information and that the Information Commissioner was in error in concluding otherwise.
27. We have explained in general terms that the withheld information consists of the aggregated outline financial estimates set out in, or capable of being extracted from, the Stage 2A Report. By reference to the copy of that Report provided to the Tribunal on a closed basis we direct that the following should be disclosed:
 - a. Page 8 with the redaction of:
 - i. Under the heading "Site Specific Costs", the code number for each site (column 1) and description of each site (column 2).
 - ii. All of the data below the headings for the remaining columns (numbers 3-19) and above the row entitled "Total Construction Works". The effect will be to leave just the sub-total for each of the identified elements of estimated cost and the overall total of construction costs.
 - b. The information appearing on Page 9 with the exception of the code number for each site (column 1), the description of each site (column 2), number of turbines (column 3), the description of the turbine model (column 4), turbine capacity (column 5) and total energy output (columns 6 and 7). This will leave the payback summary for each, unidentified, site. The Council may present that information in a new document in which the order in which each line of data is presented has been changed so as to prevent any line of data being attributed to the site appearing on the equivalent line on page 8.

- c. A newly created table containing the data on Capital Charges for Prudential Borrowing aggregated from pages 13, 17, 21, 25, 29 and 33 and excluding reference to any of the sites.

28. The decision of this Tribunal after the first hearing was that pages 1-7 of the Stage 2A Report should be disclosed with certain redactions. Although that part of the decision was not appealed, the precise extent of the redactions was still under consideration at the time when the Appeal was filed, following certain submissions made by the Council. We have seen those submissions and have established that the Council does not wish to supplement or amend them. We are therefore in a position to rule on the extent of the redactions sought. They fell into the following categories:

- i. Certain financial figures, the disclosure of which would breach commercial confidentiality, without serving a public interest that at least equalled the public interest in maintaining the exemption. We have decided that the financial figure in paragraph 2.06 and the percentage figures in paragraphs 2.08, 2.09, 2.10 and 5.02 may be redacted.
- ii. The identity of the commercial entities named in paragraphs 3.01.06, 4.01.1 – 4.01.4, 5.08 and 6.07 may be redacted on the same basis.
- iii. A table that precedes paragraph 1, as well as paragraph 1.01 itself, identify individuals and a partnership of individuals which are not direct employees of the Council. Disclosure would be an unwarranted interference in their right to privacy not justified by any public interest that would be served by disclosure.
- iv. It was submitted that certain information in Section 5 (Procurement) should also be redacted because the information is commercially sensitive and could compromise the Council's ability to procure the works in a compliant manner. However, we consider that the information is no more than speculative comment on which of several possible contractual structures might be adopted, accompanied by very general comments on possible ramifications on project timing. We can see no commercial disadvantage likely to be suffered by either the Council or any third party as a result of disclosure and accordingly reject the request that this information be redacted.

29. Our decision is unanimous

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Judge Chris Ryan
27 September 2016