



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

**Appeal No: EA/2016/0257**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FER0618404**  
**Dated: 4 October 2016**

**Appellant: Nick Daines**

**Respondent: The Information Commissioner**

**Heard on the papers**

**Date of Hearing: 11 May 2017**

**Before**

**Chris Hughes**

**Judge**

**and**

**Malcolm Clarke and Paul Taylor**

**Tribunal Members**

**Date of Decision: 29 May 2017**

**Subject matter:**

Freedom of Information Act 2000

Environmental Information Regulations 2004 regulation 12(4)(d)

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 4 October 2016 and dismisses the appeal.

### **REASONS FOR DECISION**

#### **Introduction**

1. A Strategic Housing Market Assessment (SHMA) for a local authority assesses the number of housing units required over the period for which the local plan will be adopted. In October 2015 Wealden District Council (“the Council”) had its local plan in an initial consultation stage and it published a preliminary version of its SHMA under a memorandum which explained:-

*“This SHMA is a draft final document and some detailed elements are still subject to clarification and possible amendment. However, the overall fundamental aspects which provide the basis of our preferred options for testing are considered robust.”*

2. Residents were invited to comment on the local plan including the draft final SHMA. There were to be further stages of consultation leading to the consideration of a revised version of the plan by a planning inspector in a public examination in 2017 before an anticipated adoption of a final version of the plan in 2018.
3. Mr. Daines is concerned about housing and planning issues in his area. He wrote to the Council on 25 November 2015 seeking information:-

*“The council has commissioned GVA to produce a Strategic Housing Market Assessment to inform the ongoing issues, Options and Recommendations consultation. Please provide a copy of the correspondence between the Council and GVA concerning this commission. (Correspondence to include letters, e-mails, faxes, orders, notes or minutes of meetings, notes of phone calls etc.)*

*If the Council considers that any information of a commercial nature dealing with the terms of the commission are sensitive, then these commercial terms may be redacted.”*

4. The Council initially considered that the cost of dealing with the request would exceed the cost limit provided under s12 of FOIA. In a letter dated 27 November 2015 the Council explained this fact and set out two options through which Mr Daines

could reduce the scope of his request to fall within the appropriate limit. Following communication with the Council Mr Daines agreed to limit the scope of the request to the second option which required the Council to “*review emails relating to the draft documents, including attachments which contain the Council’s comments on the draft document.*” (email Mr Daines to the Council of 2 December 2015).

5. By a letter of 8 December 2015 the Council confirmed that it had considered the request under EIR and concluded that the information was exempt under Regulation 12(4)(d) which provides for the protection from disclosure under EIR if the request relates to “*material which is still in the course of completion, to unfinished documents, or to incomplete data.*” On review the Council maintained its reliance on this provision, however it disclosed some information within the scope of the restricted request. Mr Daines complained to the Respondent Information Commissioner (ICO) arguing that the potential for the future amendment of the SHMA was irrelevant as the document to which his request related had already been published and in any event the public interest was in disclosure.
6. In her decision the ICO noted that the document had been described as a “draft final document” and it was clear that the Council anticipated that it would be amended in the light of comments received in the consultations, new demographic data and changes in government policy. The publication of this version was part of process of producing a final version. While it is a discrete stage of development it was not, in the context of the development of the SHMA and the adoption of the Local Plan, a finished document. The request was for emails between the Council and its consultants which covered the appropriateness of methodology, clarification of issues, comments on various previous drafts and, since the effective date of the request was December 2015, comments subsequent to the publication of the draft which affected future versions of the SHMA. The ICO therefore concluded that the SHMA was not complete and the exemption was engaged by the request (DN paragraphs 18-23)
7. In weighing the public interest the ICO noted the Council’s arguments that:-
  - The request captured strengths and weaknesses of the several versions of the SHMA and the Council needed to be able to challenge the robustness of the consultants’ work away from public scrutiny

- Releasing the information would divert the public from the most recent version towards drafts which had been amended or dismissed and would divert the Council's scarce resources.
  - The SHMA was a significant part of the preparation of the policies for the Local Plan and there needed to be a safe space for the development of those policies
8. The ICO accepted the force of the argument with respect to the need to protect a safe space for policy formulation; noting however that the correspondence recorded what would be expected in such a process and therefore this reduced but by no means extinguished the chilling effect, she accepted that the diversion of public attention would have detracted from the consultation process and could have delayed the whole planning process by consuming scarce resources. She did not accept that there was a significant risk of legal challenge.
9. The ICO recognised the significant public interest in understanding how the SHMA was produced, but noted that the published draft explained its methodologies and referenced its sources. She noted that the Council, in publishing it, had stated that it was "*robust*". She noted that the disclosure would allow scrutiny of how the Council managed its consultants.
10. In weighing the arguments she concluded that disclosure would undermine the consultation process by distracting the public and would also lead to a diversion of resources. The public interest in maintaining the exemption outweighed the benefits of disclosure with respect to the majority of information. However, she ordered the disclosure of some information.
11. Mr Daines challenged her conclusion. He made detailed comments on the decision and in his summary (grounds of appeal paragraphs 5-19) he argued two key issues – the conclusion that the SHMA was not a final document was incorrect and further that the weighing of the balance of public interest had not been properly performed.
12. He argued that while the document was subject to subsequent amendment it was the most up to date document and would be amended in the light of new information "*thus at the time of publication, the SHMA was complete and finished and could not trigger the exception.*"

13. With respect to the balance of public interest, in particular he argued that disclosure would not distract public debate which would be concerned about the number of houses envisaged. He argued that the SHMA was not part of the local plan and since the SHMA was not a policy the disclosure would not have a chilling effect on discussions.

#### Consideration

14. There are two issues for the tribunal to consider, the first is whether regulation 12(4)(d) is applicable to this request. This regulation protects information from disclosure when a request relates to “*material which is still in the course of completion, to unfinished documents or to incomplete data*”. The document published in October 2015 was explicitly expressed to be draft and subject to amendment. At the time of the request it was therefore unfinished or incomplete. Furthermore much of the information captured by the request related to emails on earlier versions than the draft published in October these versions were never published. These documents remained draft even after the publication of the October version. The October document was a part of a longer process and at the time the request was considered that process was continuing and the final version of the SHMA had not been completed (decision notice paragraph 23). The tribunal is therefore satisfied that the ICO correctly concluded that the exemption was engaged.
15. The second substantive issue is where the balance of public interest lies with respect to disclosure. The request must be seen in the context of the publicly available information at the time of the request and the value to the public of the additional information put into the public domain by acceding to the request. The draft document published in October 2015 is detailed containing an explanation of its methodology and indicating where it obtained the data it used. That information has enabled Mr Daines to make what he considers to be trenchant and informed criticisms of the SHMA (reply 14 December 2016 paragraph 39). While he states that he finds certain figures unconvincing and he expressed the wish that the tribunal “*would agree that it lacks any rigour*”, that is to mistake the function of the tribunal. The point he makes can be made by him now in the consultation process or later in the proceedings before the planning inspector. The Council has already published the information he needs to rebut its arguments. Mr Daines has no argument of substance explaining

why disclosure of the information would assist in public understanding and participation. On the other side of the balance the tribunal is satisfied that there are real risks of confusion and obstructing the public's effective engagement with the planning process by releasing out of date drafts and material, this diversion of the public would foreseeably impact on the ability of the Council's officers to make progress with the complex work of developing a robust plan for consideration by the planning inspector and adoption by the Council, by both absorbing time in dealing with the confusion and in inhibiting the effective development of the policy discussion through a chilling effect on the interchanges and discussions which underpin it. The tribunal is satisfied that the ICO has carefully explored the issues in this case and has come to nuanced decision which properly reflects the public interest.

16. The tribunal is satisfied that the ICO's decision is correct in law and dismisses the appeal.

17. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: