



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0188 (P)

Decided without a hearing on: 4 December 2020

Before

**JUDGE SOPHIE BUCKLEY
MARION SAUNDERS
EMMA YATES**

Between

COLIN COURTNEY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules. The code for the form of remote hearing is P.

DECISION

1. For the reasons set out below the appeal is dismissed.
2. There is a closed annex to this decision in order not to undermine the rule 14(6) direction.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FER0893274 of 4 May 2020 which held that Buckinghamshire Council ('the Council') was entitled to rely on section 43(2) (commercial interests) of the Freedom of Information Act 2002 (FOIA). The Commissioner did not require the Council to take any steps.

Procedural matters

2. We have not been provided with a copy of the letter from Homes England which formed appendix D to the letter from the Council to the Commissioner dated 16 March 2020. We assume that it was omitted in response to the case management directions of the registrar dated 22 September 2020 which stated that it should either be included in the open bundle or excluded from the closed bundle. We considered whether to postpone the hearing and ask for a copy of the letter to be provided but decided that it was not in accordance with the overriding objective. The Commissioner summarises Homes England's reasoning at paragraph 29 and we have proceeded on the basis that this is an accurate summary of the relevant content of the letter.

Factual background to the appeal

3. The request relates to a Housing Infrastructure Fund grant of £12m made from Homes England to Wycombe District Council to be spent on road infrastructure works which form the first section of a relief road to facilitate the building of new homes as part of Princes Risborough Expansion Area (PREA) set out in the Wycombe District Council Local Plan. The PREA includes 2500 new homes and social, green and physical infrastructure. The grant was initially announced in February 2018. Formal approval, subject to terms and conditions, was received from Homes England in June 2019.
4. The terms and conditions which have to be met to release the funding include, for example, a specific condition that requires the Council to demonstrate commitment to commence the compulsory purchase order process in respect of land.
5. The request was originally submitted to Wycombe District Council, which has since merged with other councils to form Buckinghamshire Council.

Request and Decision Notice

The Request

6. Mr. Courtney made the request which is the subject of this appeal on 29 July 2019:

The 12m HIF award regarding Princess Risborough, can you advise the contract terms and other conditions that are associated with this award please?

The Response

7. The Council responded on 5 September 2019. It stated that it was considering the request under the Environmental Information Regulations 2004 (EIR). They withheld the information under regulation 12(5)(e) (confidentiality of commercial information), in part because the terms and conditions of the grant were still being ratified. On 29 November 2019, after the agreement had been finalised, the Council indicated that it had reconsidered the request under FOIA and stated that the information was being withheld under s 43(2) (prejudice to commercial interests).
8. After an internal review the Council upheld its decision on 17 January 2020.

The Decision Notice

9. The Commissioner accepted that the information was commercial in nature. She accepted that the prejudice envisaged would be to the commercial interests of the parties concerned. The Commissioner was satisfied that the Council had demonstrated that a causal relationship exists between the potential disclosure of the information being withheld and the prejudice to the Council's and Homes England's commercial interests.
10. The Commissioner found that the Council had clearly demonstrated that the disclosure of information would be likely to have a detrimental effect on its commercial activities, specifically that loss of revenue would be likely to occur through a wider loss of confidence in its ability to discuss such projects confidentially at an early stage.
11. Further the Commissioner agreed that Homes England would expect that discussions with the Council would be confidential and that disclosing the information could affect the Council's ability to maintain and form partnerships with other external organisations. It also risks its future commercial and business possibilities in this area, if information of this sort is disclosed at too early a stage in the process. Disclosure would also be likely to compromise the Council's relationship with Homes England who have stipulated that the information should not be disclosed.
12. The Commissioner accepted that the prejudice to the commercial interests of the Council and Homes England would be more likely than not to result from disclosure and on that basis s 43(2) was engaged.

13. In relation to the public interest balance, the Commissioner agreed that there was a general public interest in promoting accountability, transparency, public understanding and involvement in how both the Council and Homes England undertakes its work and how it spends public money. She recognised that there was a significant public interest in disclosure of information concerning housing and road infrastructure works and in the details of the grant awarded for this development.
14. The Commissioner noted that the Council had published a public report which sets out the principles of the funding agreement and what the funds can be used for. She accepted the Council's argument that public understanding does not depend on a detailed review of the terms and conditions of the grant funding agreement.
15. The Commissioner recognised the public interest in preventing prejudice to the commercial interests of the Council. She accepted that disclosure could compromise the relationship with Homes England and that there was a presumption that information would impact upon ongoing negotiations will be kept confidential until the project is finalised. She recognised the public interest in protecting the safe space in which projects like this are initially developed. Disclosure potentially places the delivery of the project at a greater risk.
16. Given the likelihood that commercial harm would occur should the information be disclosed, the Commissioner concluded that the public interest favoured maintaining the exemption.

Grounds of Appeal

17. The Grounds of Appeal raise a number of issues that are outside the remit of the tribunal. The remaining grounds are, in essence, that:
 - 17.1. The information is not likely to prejudice the commercial interests of the Council or Homes England.
 - 17.2. The public interest balance favours disclosure.

The Commissioner's response

FOIA or EIR

18. The Commissioner submits that FOIA is the applicable regime because the withheld information is not environmental information.

Engagement of the exemption

19. The Council is required to demonstrate a causal link between the disclosure and the prejudice. It must be able to show how the disclosure of the withheld information would be likely to lead to the prejudice. The prejudice test relates

to something that may happen in the future if the information were disclosed. It is not usually possible to provide concrete evidence that disclosure would be likely to lead to prejudice. The Commissioner maintains that the Council has demonstrated a logical connection between the disclosure and the prejudice.

20. The Commissioner was correct to give weight to the fact that the Council was in negotiations with developers with land owning interests to make the development of the area with a number of homes with accompanying infrastructure. It was reasonable to take account of the argument from the Council that disclosure of the withheld information would risk providing information to a party or parties that control land that may have an interest in frustrating the homes delivery process in order to maximise longer term financial returns. This would expose the Council to additional costs and expense and could potentially put at risk the HIF funding which would risk significant delay in homes delivery.
21. In addition Homes England advised that disclosure of the withheld information would be likely to damage its relationship with partners and put these potential funding allocations at risk and compromise the future bidding process. The Commissioner highlighted that there were further arguments by the Council set out in the closed bundle.
22. Having seen the withheld information the Commissioner remained satisfied that there is more than a 50% chance that disclosure would cause prejudice to the negotiations between the parties and therefore their commercial interests. considered that some parts of the withheld email chain do not so clearly engage the exemption and invited the Tribunal to join the Council or invite submissions on each of the withheld documents.

Public interest

23. The Commissioner accepts that there is a general public interest in disclosure to enable the public to understand and challenge the decisions and actions taken by public authorities, facilitate accountability and transparency in the spending of public money, and ensure that public authorities are providing value for money. The Commissioner further accepts, on the particular facts of this case that there is a public interest in the housing and road infrastructure works and in the details of the grant awarded for this development.
24. The Commissioner reasonably gave weight to the public interest factors which favour withholding the information:
 - (i) That the Council has been transparent about its development plans and the funding agreement;
 - ii) Public understanding does not depend on a detailed review of the terms and conditions of the funding agreement;

- iii) A presumption that information which would impact upon ongoing negotiations will be kept confidential until the project is formalised;
- iv) There is a public interest in protecting the ability of the Council and Homes England to discuss and negotiate the delivery of the project within a competitive market; and
- v) The likelihood that disclosure of the agreement terms would put at greater risk the aims and objectives of the project and the interest of the parties within that project.

25. The public interest factors advanced by Mr. Courtney were insufficient to outweigh the public interest in maintaining the exemption on the facts.

Evidence

26. We have read an open and a closed bundle of documents, which we have taken account of where relevant. The closed bundle contains an unredacted version of the letter to the Commissioner from the Council which appears at pC78 – C88 of the open bundle. Where this evidence has formed part of our reasoning we have provided information on the closed evidence upon which we have relied below, save where it was necessary to withhold that information in order not to defeat the purpose of these proceedings. Some of our reasoning is set out in the closed annex.

Legal framework

S 43 – Commercial interests

27. Section 43(2) provides

Information is exempt information if its disclosure under this Act, would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it)

28. ‘Commercial interests’ should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person’s ability to participate competitively in a commercial activity.

29. The exemption is prejudice based. ‘Would or would be likely to’ means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

30. S 43 is a qualified exemption, so that the public interest test has to be applied.

The Task of the Tribunal

31. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

32. The issues we have to determine are as follows:

Commercial interests

1. Are the relevant interests 'commercial interests'?
2. Is the prejudice to commercial interests claimed by the Council real, actual or of substance?
3. Has the Council shown that there is some causative link between disclosure and the claimed prejudice?
4. Has the Council shown that the occurrence of prejudice is more probable than not or, if not, that there is a real and significant risk of the occurrence of that prejudice?
5. If so, does the public interest favour maintaining the exemption?

Matters raised in the appeal but outside our remit

33. The public authority is entitled to raise new exemptions, and therefore neither the tribunal nor the commissioner need to consider its reasons for changing its reasoning during the process.
34. We accept that there has been delay in providing a substantive response, and that Mr. Courtney was to some extent 'fobbed off' while, for example the agreement was finalised and while elections were ongoing. This does not affect the issues that we have to determine.
35. The previous decision notices and guidance to which the Commissioner provided links during the course of its investigation are not relevant to our consideration of the decision notice.

Discussion and conclusions

36. None of the parties suggest that the EIR was the appropriate regime. We adopt the reasoning of the Commissioner set out in her response and conclude that the request was not for environmental information and FOIA applies.
37. We note Mr. Courtney's concern about a lack of evidence. However when considering whether the Council has established a causative link or that the occurrence of prejudice is more probable than not, we have to take account of

the fact that disclosure has not yet happened. It is a hypothetical, future event. There is therefore unlikely to be concrete or direct evidence of the specific effect of this particular disclosure. In this case the Council has provided some evidence in support of its arguments, including evidence of the concerns of Homes England, extracts from a key developers' response, links to related reports and documents and a letter, in the closed bundle, from an individual developer.

38. The prejudice relied on by the Council is set out in detail in their letter to the Commissioner dated 16 March 2020:

39. We find that the prejudice relied on by the Council (discussed in more detail below) would be to commercial interests which is real, actual and of substance. 'Commercial interests' has a wide definition and in our view includes, for example, prejudice to the competitive process of bidding for HIF funding, and prejudice to the negotiating positions of various parties involved in the PREA. We accept that the claimed prejudice amounts to prejudice to commercial interests.

40. Although some of the prejudice relates to the effect on the process of awarding grants by Homes England, we accept that the competitive element in the bidding process and the fact that the grant is intrinsically linked to commercial projects involving the building of infrastructure and houses brings it within the definition of commercial interests.

41. We have not been provided with a copy of the letter from Homes England. However we accept the Commissioner's summary of the contents of that letter as follows:

Homes England explained its reasons why it considered that disclosure of the requested information would be likely to prejudice its commercial interests and these were similar to the Council's reasons detailed within this notice. Specifically, Homes England said that the consequences of releasing the information could damage its relationships with partners and put these potential funding allocations at risk. Releasing information that forms part of a competitive process would be likely to compromise the future of the bidding process. It could also reveal financial information which may in turn affect their commercial interests. Homes England is of the view that disclosing information in relation to one party in a competitive market, would be likely to distort competition, making it a less competitive process.

42. The Council also submits that interested parties may be less likely to provide the detailed information requested because of fear of disclosure, which would distort the competitive process.

43. Having reviewed the contents of the withheld information we accept, as a matter of common sense, that there is a clear causative link between releasing the specific and standard terms and conditions of the funding agreement and the risks set out in the above paragraphs by Homes England and the Council.

We accept that there is a real and significant risk that this prejudice will occur, on the basis of the level of detail provided in the agreement and attached documents. We have set out some more detail on this reasoning in the closed annex.

44. Further the Council has provided evidence to support its concerns that disclosing the information risks providing information to a party or parties that control land that may have an interest in frustrating the homes delivery process in order to maximise longer term financial returns. We accept, on the basis of this evidence, and for the following reasons, that there is a real and significant risk that this would expose the Council to additional costs and expense and potentially could put at risk the HIF funding, which would result in significant delay in homes delivery.
45. The Council asserts in its letter dated 16 March 2020 that, 'developers... are challenging the physical and community infrastructure funding requirements and questioning the ability of the development to provide these on the grounds that these may undermine the viability of the development'. It refers to an extract from the key developers' response which supports this. It provides evidence of the viability of the project and issues with additional costs and cashflow. It highlights that the interests of the developers and the Council and Homes England are not the same and that there is no formal collaboration agreement between the five principal PREA developers. It provides closed evidence in relation to the individual interests and past actions of particular individual developers.
46. On the basis of this evidence we accept that the Council has established the necessary causal link, and that there is a real and significant risk of the information being used to undermine the overall delivery of the PREA. This amounts, in our view to likely prejudice to the Council's commercial interests in terms of the impact on negotiations with developers, the likelihood for additional costs and the potential risk to HIF funding. Further detail of our reasoning on this point is set out in the closed annex.
47. Looking at the public interest balance, we accept on the basis of the evidence provided by Mr. Courtney both in the grounds of appeal and earlier in the process, that there is a strong public interest in the viability of these proposals for housing and road infrastructure works and in the award of significant grant of public money to facilitate this development.
48. In reaching this conclusion we take into account the fact that concerns have been raised about the viability of the proposals and that a significant proportion of the affected public have expressed their opposition to the proposals. We take account of the concerns raised by other parties such as Highways England, developers, residents associations and network rail.

49. We agree with the Commissioner that there is also a general public interest in disclosure to enable the public to understand and challenge the decisions and actions taken by public authorities, facilitate accountability and transparency in the spending of public money, and ensure that public authorities are providing value for money.
50. In performing the balance of public interest we have considered to what extent the specific information withheld will contribute to the particular public interest. Although it will contribute to some extent to the identified public interest because it will provide detail of the preconditions to the grant and, for example, the intended milestones, there is very little in the specific terms and conditions of the funding agreement which will help to increase public understanding. In particular, we find that its contribution to the particular public interest in the viability of the development is fairly limited.
51. Further we take account of the fact that the Council has already put some information in the public domain about the agreement which satisfies, to some extent, the public interest in transparency.
52. We have found that there is a real and significant risk of the delivery of the entire project being undermined, and we find that this weighs heavily in the balance. Further, we think that there is a strong public interest in not undermining the competitive process for applying for HIF grants from Homes England.
53. On balance and taking all the above matters into account we find that the public interest balance is in favour of maintaining the exemption.

Conclusion

54. For the reasons set out above the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 18 December 2020

Promulgated Date: 22 December 2020