



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

EA/2012/0078

B E T W E E N:-

JOHN PIM

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

DOWN DISTRICT COUNCIL

Second Respondent

Tribunal

Judge Kennedy QC

Paul Taylor

Mike Jones

Hearing: 15th August 2012.

Location: Field House, London.

Decision: Appeal Refused.

Subject matter: Section 57 of the Freedom of Information Act – Request for disclosure of Business Plans.

DECISION OF THE FIRST-TIER TRIBUNAL:

The Tribunal unanimously refuse the appeal.

REASONS

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”), as incorporated by section 18 of the Environmental Information Regulations (“**the Regulations**”). The appeal is against the decision of the Information Commissioner (“**the First Respondent**”) contained in a Decision Notice (“**the Decision Notice**”) dated 6 March 2012 (reference FS50409923).

Factual Background to this Appeal:

2. Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated in full detail herein.
3. In brief summary, the appeal concerns a request made by the Appellant to the Second Respondent concerning a Business Plan. The Appellant made the request on 20 June 2011 to the Down District Council (“**the Second Respondent**”). The request was as follows:

“I wish to request, under the Freedom of Information Act 2000, a copy of the Business Plan submitted by the Magnus Viking Association (“**the MVA**”) in respect of their proposed Viking re-enactment centre. The submission of this Business Plan was reported in the Down Recorder of 15 June 2011. I would also like copies of associated correspondence on this Business Plan between MVA and the Council”.

4. The Second Respondent replied on 8 July 2011, stating that it was refusing to disclose the requested information as it was information provided to the Council in confidence, as per the exemption set out in section 41 of the FOIA. The Second Respondent carried out a further internal review on 29 July 2011, and upheld the original decision.

5. The Appellant contacted the First Respondent to complain about the way the request for information had been handled. The First respondent found that the requested information fell under the provisions of Regulation 2(1)(c) of the Environmental Information Regulations 2004 (“**the EIR**”) and asked the Second Respondent to reconsider the request under the EIR. The Second Respondent did so, and decided that regulation 12(5)(e) of the EIR applied to the requested information. The First Respondent accepted that regulation 12(5)(e) of the EIR was engaged in respect of the requested information.

The Commissioner’s Decision:

6. The First Respondent served the Decision Notice which deals in detail with the relevant legislation and legal issues, and same is not repeated herein. However, in summary, the issue concerns regulation 12(5)(e) of the EIR which states as follows:

“(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

7. The First Respondent sets out, that in considering whether the exception of regulation 12(5)(e) of the EIR applies, this can be broken down into four elements, all of which are required in order for the exception to be engaged. The four elements set out are as follows:

- Is the information commercial or industrial in nature?

- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would confidentiality be adversely affected by disclosure?

8. The First Respondent sets out in detail in its decision notice, the relevant facts and its conclusion in relation to each of the above headings. It also includes further sub-headings to those set out above. Therefore, in full the First Respondent considers in detail the following questions:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Does the information possess the necessary quality of confidence?
- Was the information imparted in circumstances importing an obligation of confidence?
- Is confidentiality provided to protect a legitimate economic interest?
- Would confidentiality be adversely affected by disclosure?

And discusses in detail the following matters:

- Public interest arguments in favour of disclosing the information;
- Public interest arguments in favour of maintaining the exception;
- Balance of the public interest arguments.

9. It is on the basis of the conclusions to some of the above headings that the Appellant has based their appeal.

The Notice of Appeal - Grounds and Submissions:

10. The Appellant appealed by way of a notice of appeal dated 14 March 2012. The Appellant has set out four main grounds of appeal.

Ground One

11. The first ground of appeal comes under the heading: *“Is confidentiality provided to protect a legitimate economic interest?”*
12. The First Respondent, in the Decision Notice found that the requested information, if disclosed, may be used to competitive advantage by any party competing against the MVA. The Tribunal have studied the business plan which is a detailed analysis of financial calculations and business projections, specific to detailed workings and financial projections of the project. We are satisfied that confidentiality should be provided to protect a legitimate economic interest. This information would be of use to any business of a similar nature in the UK or Ireland.
13. The Appellant has appealed on this ground, claiming that *“there are no competitors for a true Viking Re-enactment Centre”*.
14. Both the submissions of the First and Second Respondent have accepted the fact that there have not been, nor is it likely that there would be, proposals from other bodies to develop alternative Viking centres in the Delamont Park area. However, both Respondents emphasised that there may be potential competitors who may propose to develop other Viking attractions and sites across the UK and the Republic of Ireland.
15. Further to the above, both parties specifically referred to the fact that this is a developing area, highlighting particular similar sites which have been successful to date, and also highlighting the potential for competitive advantage of any such competitors who could commercially benefit from

their Business Plan. The Second Respondent referred to a specific comparable Council scheme in the Republic of Ireland which it believed could commercially benefit from their business plan.

16. Importantly, both Respondents consider the fact, and believe that:

“the information contained in the Business Plan is based on very specialist knowledge and information. It is further recognised that the information contained within the Business Plan is not information which is generally available in the public domain. On this point (they - the Second Respondent) have been advised by the MVA that the information in question was formulated as the result of extensive research, consultation and analysis on the part of the MVA. In light of the above and the nature and content of the Business Plan the Council are satisfied that the Plan is of significant commercial value”. The Tribunal have examined the Business Plan and accept the above assertions by the Respondents. This clearly is based on specialist knowledge and information and would be of advantage to others who may compete with those who have carried out the obvious extensive research, consultation and analysis.

Ground Two

17. Ground Two of the appeal comes under the heading: *“Public interest arguments in favour of maintaining the exception (the exception being against the public interest arguments in favour of disclosing information).*
18. The Second Respondent believes that there is a legitimate economic interest in protecting the relationship between the MVA and the Second Respondent. The Second Respondent states that the MVA has advised them that the sharing of the Business Plan would leave *“a pronounced question mark over any future dealings that (the MVA) might potentially have with them (the Second Respondent).* Therefore the Second Respondent argues that there

is a strong public interest in maintaining trust with a party with whom the Second Respondent has an ongoing commercial relationship.

19. The Appellant argues that both the First and Second Respondent “*are gravely at fault in giving weight to such threats*”.
20. The First Respondent argues that it is correct and obligatory to take this factor into account. Further he argues that Regulation 12(5)(e) of the EIR exists to protect commercial or industrial information where such confidentiality is required to protect a legitimate economic interest. The Tribunal agree and acknowledge there is a strong public interest in treating the Business Plan as confidential thereby maintaining trust between the parties engaged in this commercial relationship.

Ground Three

21. The third ground of appeal comes under the heading: “*Balance of the public interest arguments*”.
22. The First Respondent accepts that “*the proposed centre is a matter of significant local concern and that there is a strong public interest in disclosure*”. However, he also takes into account that “*the actual building of the centre was subject to planning approval, which was granted, and that the environmental impact of the proposal was assessed as part of that process.*”
23. The Appellant argues that “*the requisite environmental surveys were not carried out independently*” and states that “*planning approval for this AONB site should never have been allowed*”.
24. The second respondent considers that the existence of this argument – goes to reduce, to some extent - the public interest in disclosure of the withheld information in this case which focuses on the financial implications of the proposed development. Again the Tribunal agree with the Respondents argument. Planning matters are not at issue here and the Tribunal are firmly

of the view that the Public Interest is best served by non disclosure of this sensitive commercial information.

Ground Four

25. The Appellants fourth ground of appeal relies on the basis that: *“There should be a presumption in favour of disclosure” in the public interest.*
26. Both Respondents are aware of, and have accepted that, regulation 12(2) of the Regulations requires a public authority to apply a presumption in favour of disclosure. However, there may be other factors which outweigh that presumption, and permit non-disclosure of information where one of the exceptions prescribed by the Regulations. Applies.
27. The Appellant has submitted that there is strong public interest in the disclosure of the information, due to significant local concern regarding the MVA’s business proposals. The Appellant highlights that the Second Respondent purchased the Delamont Estate with public funds and turned it into a popular country park. The Appellant highlights concerns that the public could be left with a “costly eyesore”.
28. The Second Respondent has emphasised that it is not and does not intend to be a Funder of the MVA or its project, therefore public funds are not at issue in this particular case. The Second Respondent does accept that there is always a public interest in public authorities being open and transparent regarding their activities. It also accepts that the nature of the proposed business and possible repercussions to the surrounding area would be in favour of a strong public interest.
29. However, both Respondents are of the view that the above factors are outweighed by the exception, being that there is a strong public interest in maintaining trust with a party with whom the Council intend to have an ongoing commercial relationship. The First Respondent also re-iterated that this matter concerns a Business Plan containing financial projections,

business proposals and targets. The Tribunal also recognises the presumption in favour of disclosure, however we accept the reasoning set out herein by the Respondents and for the reasons set out above the Tribunal repeat the Public Interest is best served by preserving the confidential information contained within the disputed material in the Business Plan.

Conclusion:

30. Having read carefully the material in the Business Plan described above the Tribunal is unanimously of the view that the Public Interest in non disclosure outweighs any public interest in disclosure and therefore refuses this appeal.

Brian Kennedy QC
Tribunal Chairman
26th September 2012.