

EIR: EIR reg 12(4)(e) – internal communications exception – whether engaged in respect of reports by outside consultants
EIR reg 12(5)(e) – commercial confidentiality exception – whether confidentiality “provided by law” – whether provided to protect a legitimate economic interest
EIR reg 12(1)(b) – public interest balance – aggregation of public interests in maintaining exceptions

SOUTH GLOUCESTERSHIRE COUNCIL v INFORMATION COMMISSIONER and BOVIS HOMES LTD

Case Number: EA/2009/0032
20 October 2009

Cases:

North Western and North Wales Sea Fisheries Committee v Information Commissioner EA/2007/0133

Office of Communications v Information Commissioner EA/2006/0078 and [2009] EWCA Civ 90

Secretary of State for Transport v Information Commissioner EA/2008/0052

Student Loans Company Ltd v Information Commissioner EA/2008/0092

Facts

In 2003 Bovis made two planning applications to the Council for a mixed use development of a large site known as North Field Filton. There followed negotiations between Bovis and the Council with a view to reaching a s106 agreement. (A s106 agreement is an agreement between a developer and a local planning authority for additional works to be carried out and/or financial contributions to be made for public works, in order to make the proposed development acceptable in planning terms, by mitigating or compensating for what would otherwise be negative impacts of the development.)

Bovis became aware that the Council’s position in the negotiations was informed by an independent development appraisal that had been carried out for the Council by consultants. In January 2006 Bovis requested a copy of the appraisal under EIR. The Council refused on the basis that the exceptions for internal communications and confidentiality applied, and that the public interest in maintaining the exceptions outweighed the public interest in disclosure.

The Commissioner adjudged that the information was environmental information, falling within the EIR. He considered that neither of the exceptions relied upon by the Council was engaged; and so he did not need to consider the application of the public interest test. He required the Council to disclose the information.

Findings

On appeal, the issues were-

- a. Did the request involve the disclosure of internal communications, so as to engage the exception in EIR regulation 12(4)(e)?

- b. Did the request engage the exception in EIR regulation 12(5)(e), or was the Commissioner right in one or more of his contentions that the exception did not apply because
- i. the information's confidentiality was not provided by law,
 - ii. the confidentiality was not to protect a legitimate economic interest?
- c. If either or both of the relevant exceptions was engaged, in all the circumstances of the case did the public interest in maintaining any such exception outweigh the public interest in disclosure?

Those questions fell to be considered as at the time when the Council dealt with the requests.

The engagement of the consultants was made in the ordinary way by means of contracts for the provision of expert services to the Council, which contained appropriate confidentiality clauses which bound the consultants.

The Tribunal found that there was a substantial imbalance of power in negotiations between the Council and Bovis. The reports greatly enhanced the Council's ability to conduct the negotiations effectively. Disclosure of the reports would have been likely to produce a less favourable result for the Council and its taxpayers.

Exception 12(4)(e) – internal communications

The Tribunal referred to the Aarhus Convention, the Commission proposal 29 June 2000 (which referred to private thinking space), Directive 2003/4/EC, article 4.1(e) (internal communication), recital (16) and article 4.2 (the requirement to interpret exceptions restrictively), paragraph 7.4.5.2 of the DEFRA Guidance to the EIR, and *Secretary of State for Transport v Information Commissioner* EA/2008/0052 para 94: "We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external communication, for example, by reference to the nature of the communication or its audience. It will depend on the context and facts in each situation."

The consultants were not integrated into the Council in a relevant sense. Moreover, it was not the relationship between the Council and the consultants but the communications themselves on which the Tribunal had to make a judgment. Paying attention both to form and to substance, and to the particular circumstances and nature of the communications in question, the Tribunal was not satisfied that the consultants' reports could properly be characterised as internal communications of the Council. The exception was not engaged.

Exception 12(5)(e) – commercial confidentiality

This exception contained three elements- (1) the confidentiality of the commercial or industrial information; (2) the confidentiality was provided by law to protect a legitimate economic interest; (3) disclosure would adversely affect the confidentiality.

There was in the end no dispute between the parties that the reports constituted confidential commercial information, and that disclosure would adversely affect such confidentiality (since it would destroy it). The Commissioner contended that the confidentiality was not provided to protect a legitimate economic interest but, looked at overall, was for enabling the Council to exercise its statutory planning functions. This

argument was rejected. The Council's duty to define appropriate s106 obligations could not sensibly be separated from the purposes of those obligations, which included securing economic advantages and avoiding economic detriments.

The Commissioner argued, in reliance on paragraph 64 of the Tribunal's decision in *Office of Communications v Information Commissioner EA/2006/0078*, that the words "provided by law" should be read as meaning "imposed on the public authority by law".

In the Tribunal's view there was no justification, either in the express words of exception 12(5)(e) or in the policy of the exception, for the contention that the exception applied only where a confidentiality obligation was owed by the public authority and not where a confidentiality obligation was owed to the public authority. Wherever, because of the sensitive nature of the information, the law recognises the confidentiality of the information as deserving of legal protection, the confidentiality is provided by law. In the present case the confidentiality was provided by law to protect legitimate economic interests, within the meaning of exception 12(5)(e). Disclosure would adversely affect that confidentiality and damage the identified economic interests. The exception was engaged.

The public interest test

Given the large amount of information already published by the Council and the likelihood of loss to the public purse if the s106 negotiations were not handled effectively, the public interest in disclosure was strongly outweighed by the public interest in maintaining the exception.

Aggregation of exceptions

As a result of the findings that only one exception applied, and that the public interest in maintaining that exception outweighed the public interest in disclosure, it was not necessary to consider aggregation of exceptions for the purposes of the public interest test, as directed by the Court of Appeal in *Office of Communications v Information Commissioner* [2009] EWCA Civ 90, paragraphs 34-43. The Tribunal nevertheless explained its difficulty in understanding how in practice the Court of Appeal's concept of aggregating exceptions when applying the public interest test could produce different results from considering exceptions singly. Where in the circumstances of the case the public interest in maintaining a particular exception was outweighed by the strength of the public interest in disclosure, the Tribunal was unable to appreciate how the balance could be reversed by highlighting the existence of other exceptions which were also outweighed by the strength of the public interest in disclosure.

Conclusion

The confidentiality exception in regulation 12(5)(e) was engaged and the public interest in maintaining the exception outweighed the public interest in disclosure. The Council was justified in not disclosing the disputed information. The Information Commissioner's decision to the contrary was not in accordance with law. Appeal allowed.