



Appeal number: EA/2020/0033P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

PETER ROBINSON

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL PANEL: JUDGE ALEXANDRA MARKS CBE
TRIBUNAL MEMBER JEAN NELSON
TRIBUNAL MEMBER DAVE SIVERS**

- I. Pursuant to Rule 32(1) of the First-tier Tribunal (General Regulatory Chamber) Rules and by consent of the parties, this matter was determined on the papers because the Tribunal is satisfied it can properly determine the issues without a hearing.
- II. The documents which the Panel considered are in an Open bundle comprising an Index, XX sections and a total of XX pages, and a Supplementary Bundle of XX pages (including front sheet and index). The Panel, but neither Mr Robinson nor the public, were also referred to a Closed Bundle of xx pages (including index). The Panel noted the contents of all these bundles.
- III. The outcome of the appeal is stated at both the start and the end of this Decision.

Mr Robinson was unrepresented

The Commissioner was represented by Ms Elizabeth Kelsey of Counsel and Ms Sonia Taylor, Solicitor

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. The Appellant, Mr Robinson, made a request on 20 November 2018 to East Riding of Yorkshire Council (the 'Council') for information about the proposed sale of Belvedere Golf Course in Bridlington. In summary, he asked for:

'details of disposal [and] also the proposed disposal and...any documents, letters, emails, meeting and telephone call notes held by [the Council] referring to the Belvedere Golf Club, or any developer or developer's agent...'

2. The Council responded to Mr Robinson's request for information on 12 December 2018. The Council said it held the information but that it was withholding it under section 43(2) Freedom of Information Act 2000 ('FOIA'), the exemption for 'prejudice to commercial interests'. The Council explained that the property had not yet been sold, it was an ongoing matter and therefore remained commercially sensitive and confidential.

3. However, the Council confirmed that the Council had exchanged conditional contracts on 30 November 2018 with the Trustees of Bridlington Golf Club ('the Club') for the sale to them of the Belvedere Golf Course in Bridlington ('the Course').

4. On 16 December 2018, Mr Robinson asked for an internal review of the Council's decision to withhold the requested information. He said that as early as 2014, the Leader of the Council had approached the Club, suggesting sale to them of the Course which would enable them to sell-on the 3.5 acre sea-front land (the 'development land'). Mr Robinson said that in 2016 planning permission had been granted for 22 four-bedroomed houses on the basis of an application made behalf of Ashcourt Contracts ('Ashcourt'), a property developer.

5. Mr Robinson says that Ashcourt would not have 'invested tens of thousands of pounds' to prepare this planning application in 2014-15 had the deal to sell the Course not been 'set in concrete'. Mr Robinson said the matter could, however, be sensitive to the Leader of the Council who had already announced he was stepping down from the Council. Mr Robinson said this followed accusations of corruption and criminal activities, and suggested this was 'the more likely reason that this information is being withheld'.

6. Having received no response from the Council to his request for an internal review, Mr Robinson complained to the Information Commissioner (the

‘Commissioner’) on 19 January 2019, and again on 28 February 2019 about the Council’s handling of his request. The Commissioner decided to accept Mr Robinson’s complaint for investigation.

7. The Council wrote to the Commissioner on 26 July 2019 submitting that the requested information fell within the Environmental Information Regulations (EIR) rather than FOIA. The Council said it was holding the information in its Legal File and in its Valuation & Estates File. However, the Council explained to the Commissioner that it was withholding the information in both files under the exceptions in regulations 12(5)(b) (the course of justice) and 12(5)(e) (commercial confidentiality).

8. On 2 January 2020, the Commissioner issued Decision Notice FS50809262 upholding the Council’s decision to apply regulations 12(5)(b) and 12(5)(e) and therefore to withhold the requested information. In making this decision, the Commissioner balanced the competing public interests in disclosing the information on the one hand and withholding it on the other.

9. On 7 January 2020, Mr Robinson wrote to the Commissioner, challenging the decision notice as ‘confusing and...illogical’. He said that when he had made his request, information in the public domain was that the sale of the Course had already taken place.

10. Mr Robinson said the agreement to sell the Course was made four years ago. His concern was that the Leader of the Council had secretly negotiated the sale at a low price whilst being involved with the ‘preferred builder’ for the development land. He disputed the Council’s statement that disclosure of the Legal File would ‘prejudice its ability to negotiate land deals on an equitable basis’ because equity requires natural justice and fair conduct, not deceit and secrecy.

11. Mr Robinson also said that he accepted that ‘certain professional advice may well fall into the exempt category’. He says the approach to sell the Course to the Club was made in 2014 but the Council told the Commissioner that in February 2018 ‘the transaction may not have proceeded’. Mr Robinson said it was his ‘belief that these files were designed to hide the true situation’.

12. Mr Robinson agrees with the principle cited in the decision notice that ‘it is not in the public interest for the Council to be hampered in its ability to reach a good deal’. However, he said this was not such a deal but instead a secret conspiracy ‘with friends and associates...[not] to obtain anything resembling a ‘best price’ as the law demands for this public asset [but] resulting in a hugely significant loss...’ to the local population.

13. On 17 January 2020, Mr Robinson sent a Notice of Appeal to the Tribunal.

Appeal to the Tribunal

14. Mr Robinson's ground of appeal is that disclosure of the requested information would outweigh the public interest in withholding it because it 'would undoubtable support' the accusation that the now ex Leader of the Council had conspired with friends and associates to sell the publicly owned Course at 'a bargain basement price' together with the valuable development land.

15. The Commissioner's Response dated 16 March 2020 maintained the analysis set out in the decision notice.

16. The parties consented to this matter being dealt with on the papers rather than at an oral hearing.

17. The papers available to Panel and the parties are set out in paragraph 24 of this decision.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

18. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'1 (1) Any person making a request to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if this is the case, to have that information communicated to him.'

Regulation 5 EIR: access to environmental information held by public authorities

19. Regulation 5 EIR sets out a specific duty by public authorities to make environmental information available on request.

20. There are exceptions to this duty. Those pertinent to this appeal are set out in Regulation 12, the relevant parts of which provide:

'12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

...

(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 –

...

(b) the course of justice ...

...

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

21. A public authority is permitted to withhold the requested information under the exceptions in regulation 12(5) *only* if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The powers of the Tribunal

22. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of EIR are set out in FOIA, as follows:

's.57 Appeal against notices ...

(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice ...

s.58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.'

The burden of proof

23. The burden of proof rests with Mr Robinson in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion.

Evidence

24. Before the hearing, both parties had submitted written evidence. This comprised one Open Bundle of 163 pages (and an Index); an Additional Bundle of Case Management Directions; Mr Robinson's final submissions dated 21 February 2021 (comprising 5 pages); and a Closed Bundle of 822 pages (including an Index).

Submissions

Submissions by Mr Robinson

25. Mr Robinson does not suggest that the Commissioner's decision was wrong in law: his complaint is that the Commissioner inappropriately exercised her discretion when she concluded that the public interest in withholding the requested information outweighed the public interest in disclosing it. Mr Robinson puts his case in the following way:

- (1) All parties involved in the transaction had very close links to each other.
- (2) The Course was not sold on the open market but secretly between friends and associates with no open negotiations.
- (3) The sale price for the Course, given its acreage and location, is too low.
- (4) Certain Councillors involved in the matter did not declare an interest - and misled the Council by indicating the initiative came from the Club when it did not.
- (5) Unbeknownst to other Councillors, the deal to sell the Course had already been agreed in 2014.
- (6) There should have been a competitive tender for the development works rather than the appointment of a 'preferred builder'.
- (7) It was untrue to say that only the Club, as sitting tenants of the Course, could have bought the freehold: had it been offered for sale openly, anyone could have bought the Course as an investment with the benefit of the Club's tenancy.
- (8) The Council's in-house legal department did not take seriously breach of the Councillor's Code of Conduct.
- (9) Months before the Council and the Club knew anything about a planned sale or development possibilities a Business Plan was produced in January 2014 for sale of the development land, a fraction of the total site area of the Course, for more than the price of the whole site.
- (10) The above timing of the Business Plan suggests manipulation of dates – as does the Council's statement on 11 November 2019 that the land had been transferred but not saying precisely when the transfer had taken place.

(11) The statement in 2018 that the sale might not have gone ahead seems unlikely as building works had started – and in 2017, the Club’s website posted news that the freehold had been transferred to it (though that entry was soon deleted).

(12) There is a huge public interest in disclosing the requested information to ensure the best available price was obtained for this public asset.

(13) Contrary to the Commissioner’s decision notice, the public interest in maintaining the exemption is significantly outweighed by the public interest in disclosure, given the quantity of evidence of suspicion.

Submissions on behalf of the Commissioner

26. In response on behalf of the Commissioner, Ms Kelsey of Counsel submits that:

(1) There is a public interest in the disclosure of information, not just for transparency and accountability but also for casting light on a public authority’s decision-making where there are concerns that it is flawed. Even where such concerns are unfounded, disclosure of information can show how decisions have been reached, reassuring the public about the authority’s conduct. Disclosure can also inform - and therefore benefit - public debate, of particular importance where the merits of a decision are disputed.

(2) However, this public interest must be balanced against the interests which the exceptions in the EIR protect. In this case, the Council’s Legal File to which regulation 12(5)(b) has been applied, includes interests protected by legal professional privilege. The purpose of LPP is to ensure lawyers and clients can exchange information freely, and lawyers can give their clients full and frank legal advice. The Tribunal has previously recognised the strong public interest in legal professional privilege, which to be overridden will require equally strong counter-vailing considerations: *Bellamy v. ICO & Secretary of State for Trade & Industry EA/2005/0023*.

(3) In respect of the Council’s Valuation and Estates file, to which regulation 12(5)(e) has been applied, the public interest in favour of disclosure must be weighed against the public interest in protecting the economic interests of the Club and the Council. There is a public interest in protecting information provided to public authorities in confidence, in this case in ensuring the Club’s competitive position in the market is not undermined. There is also a public interest in ensuring the Council can secure the best value for public resources, which would be undermined if details about its valuation process were available to potential bidders.

(4) Mr Robinson has raised concerns about the Council’s conduct in transferring the Course – but this transaction does not involve large scale use of public funds, nor is it likely to affect a large number of people, yet these are factors which are normally required to outweigh the inherent strength of public interest in maintaining the principle of legal professional privilege.

(5) The basis of concern is allegations of wrongdoing in relation to the sale of the Course. However, these allegations have largely been made by Mr Robinson himself and are in certain respects misleading. For example:

(a) Allegations that the then Leader of the Council conspired with friends and associates to sell the Course at less than best value is not supported by the evidence. No evidence has been provided of alleged connections between the Leader and other persons named, nor is there any evidence of their involvement in the negotiations. The negotiations in this case were carried out by Council officers, taking into account advice from the valuation office, not the Leader of the Council.

(b) It is suggested that the Leader did not defend his actions, but the decision to sell the Course was made by the Council Cabinet, not the Leader personally.

(c) It is not the case that the Leader resigned as a result of the allegations against him as has been implied.

(d) It is said that information in the public domain indicates that the Course had already been sold when the request for information was made. The papers provided to the Tribunal on a 'closed' basis show this was not the case.

(e) It is suggested that Councillors, including the Ward Councillor and audit committee, were refused access to the details of the sale. The reason for this was commercial confidentiality. At the time, the deal had not been completed and disclosure of the valuation would provide a competitive advantage to any future prospective purchaser.

(f) Other allegations of wrongdoing - such as non-declarations of interest - do not relate to this deal. The suggestion that this was a secret negotiation for the sale of the Course to the Club at a low price is contrary to the evidence provided on a 'closed' basis to the Tribunal.

(g) The suggestion that the Club had been given assurances that the deal would go ahead – apparently many years before it actually did – is contradicted by the evidence in the Legal File provided to the Tribunal on a 'closed' basis. The allegation that the information has been manipulated or fabricated is denied.

(h) The evidence does not demonstrate widespread public concern, nor support allegations of wrongdoing.

(i) The calculations of much higher land values mooted by Mr Robinson apparently assume that the entire Course was to be sold for residential development. This was not the case, nor is it evidence of wrongdoing.

(j) The Commissioner's guidance about the public interest where there is suspicion of wrongdoing by the public authority requires more than mere allegations. In this case, the allegations made are not supported by any external evidence.

Discussion

27. The Tribunal first considered the possible unfairness of withholding certain materials from Mr Robinson.

Possible unfairness of materials being withheld from Mr Robinson

28. The Panel considered carefully whether it was unfair to Mr Robinson to withhold certain materials from him when pursuing this case. He had been provided with only redacted versions of certain documents, and virtually no material at all from the Council's Legal File and its Valuation and Estates file. However, as mentioned above, the Panel was provided with these files on a 'closed' basis.

29. The Panel considered the Tribunal's Practice Note on Closed Material. This explains that, where disclosure of the disputed information - and/or supporting evidence - would defeat the object of the exercise, the law permits the Tribunal to deviate from the normal rule about all material seen by the Tribunal being available to all parties. However, such deviation is permissible only so far as is necessary to ensure that the purpose of the proceedings is not defeated.

30. The Panel accepts that there is inevitably *some* prejudice in material being withheld from a party requesting it, but considers that this prejudice is mitigated by:

- (a) The Tribunal's expertise, and exercise of an investigatory rather than adversarial function;
- (b) The Commissioner being an independent, expert regulator who does not take sides. On the contrary, the Commissioner's role is to point out the strengths and weaknesses of both parties' cases in assessing the correct application of the law and regulations;
- (c) Informing parties excluded from 'closed' session as much as possible with maximum possible candour in the written reasoned decision;
- (d) In this case, information in both the Open Bundle and the public domain (such as the Council's planning register, and HM Land Registry) provide insights into the sale of the Course and various related matters. For example:
 - on page 90 of the Open Bundle, the Council's letter on 12 December 2018 to Mr Robinson says that the Council had on 30 November 2018 exchanged conditional contracts for sale of the Course to the Club – but that the property sale had not yet been completed;
 - the Council's response on 26 July 2019 to the Commissioner's enquiries states:
 - on page 119 of the Open Bundle that 'the sale of the land is subject to a conditional contract. The conditions have

to be met by the end of October although they may be met sooner’;

- on page 120, that the Club’s letter of 6 January 2014 to the Council included ‘the terms on which the club wished to buy the freehold reversion to the site’.
- the Council’s response on 11 November 2019 to the Commissioner’s enquiries states:
 - on page 148 of the Open Bundle, ‘the transfer of land from the Council to the Club has now taken place. This means that certain information such as the price paid for the land will be in the public domain...’ once the transaction has been registered with HM Land Registry;
 - also on page 148, at certain points of the negotiations, ‘the transaction may not have proceeded due to disagreements over matters such as the overage provisions’.

31. Having considered all these matters, the Panel is satisfied that the withholding of the requested information was necessary to ensure the purpose of the proceedings was not defeated. Moreover, the prejudice to Mr Robinson’s case - mitigated as described above - was justified in the interests of justice overall.

Balancing the public interest

32. Mr Robinson does not challenge the Commissioner’s decision that the exceptions in regulations 12(5)(b) and 12(5)(e) are engaged in this case. No error of law on the Commissioner’s part is suggested.

33. The Panel’s task in this case is therefore to consider whether the Commissioner applied her discretion inappropriately, in other words whether she wrongly balanced the public interest - in accordance with regulation 12(1)(b) – in concluding that the public interest in favour of withholding the information hand outweighed the public interest in disclosing it. The Panel notes that, in this case, more than one EIR exception applies so it is possible to combine the public interest factors relevant to each exception when considering the public interest test.

34. The Panel notes the explicit presumption in the EIR in favour of disclosure. We accept that there is a public interest in disclosing the environmental activities of local authorities, including the sale of public assets such as freehold land within their ownership. We also accept that there is a public interest in understanding the terms on which public authorities agree to sell public assets, as well as public interest in understanding how such authorities make their decisions. This not only enhances trust in public authorities but may allow greater public participation in the decision-making process as well as enhancing public understanding of environmental matters. The Panel also notes the Commissioner’s own guidance that respect for confidentiality in favour of public authorities themselves is likely to carry little weight because they

should expect such information may need to be disclosed under EIR, even if they would prefer to keep it confidential.

35. On the other hand, the Panel notes that the Council when negotiating the sale of land has a duty to achieve best value for it. To ensure this in this case, the Council obtained valuation reports for the Course – which it required to be updated as the negotiations became protracted – and set out the terms on which it was prepared to sell. In the Panel’s view, this information is clearly confidential and would provide a competitive advantage should the deal with the Club not complete, given that the sale agreement was only conditional. Any competitive advantage gained by another prospective purchaser – or even the Club itself while negotiations were ongoing – would obviously hinder the Council in achieving best value, contrary not only to the Council’s duties but also the economic interests of local taxpayers.

36. Likewise, the Panel considers that disclosure of information in the Council’s Legal File would not only undermine the general principles of legal professional privilege but would also have an adverse effect on the ability of the Council to negotiate land deals in the future. It would even, in this case, have prejudiced the ongoing negotiations between the Council and the Club as the sale agreement was only conditional – and the Council was therefore obtaining continuing legal advice about its position during the conditional period.

37. As the Council graphically explained in its 11 November 2019 response to the Commissioner at page 149 of the Open Bundle, were disclosure required,

‘this would drive a coach and horses through the ability of public organisations to negotiate land deals on an equitable basis as at any point the other party to the transaction could make a request for sight of all legal advice on the matter from the public authority. In such a scenario, the public authority would be seriously hampered in being able to negotiate a good deal and it would potentially have to disclose the legal advice it had received as to the strength of the stance it was taking with the other side [who] would have the upper hand at all stages in the negotiation process. This clearly would not be in the public interest.’

The Panel agrees.

38. As for the Club, the Panel notes that it operates in a commercially competitive environment where it competes with other golf clubs in the area for income from both Club members and the public. The requested information includes in the Council’s Valuation & Estates file a letter dated 6 January 2014 to the Council from the Club attaching its business plan with information about its profit and loss as well as the costs it would incur in carrying out alterations to the Course. The plan also sets out ways in which the Club hope to market themselves in the future, and the facilities they will offer to visitors. The Panel considers that all this information would clearly provide a competitive advantage to any other nearby golf club. There is, in the Panel’s view, little public interest in the disclosure of this information as the Club is a small private business, operating only in Bridlington, and does not call on public funds.

39. The Panel also considers that the Club would have had no expectation that information it had provided to the Council in the context of a commercial transaction would be made public. This information has the quality of confidence as it was neither trivial in nature nor in the public domain. Breaching this confidence would, in the Panel's view, have a detrimental impact on the Council's ability to negotiate with commercial entities in future if it were unable to keep details of such deals confidential. This, in turn, would directly and adversely affect the Council's ability to reduce the financial burden on taxpayers in the East Riding of Yorkshire by entering into commercial arrangements – such as the sale of land – at the best value. This would not be in the public interest.

40. We are not persuaded by Mr Robinson's implication that a better deal could have been achieved had the Course been openly marketed. First, the Club the tenant of the Course under two 99 year leases with over 80 years unexpired at the time of the sale. Its interest in purchasing the freehold reversion put it in a strong position to negotiate various possible development opportunities for parts of the site. Secondly, the Club's primary activity was not profit-making but operating and enhancing a sporting facility and thus providing a community amenity to the local population which the Council would have a legitimate interest in protecting.

41. However, we take seriously Mr Robinson's grave concerns about wrongdoing on the part of certain Councillors he says were involved in the sale of the Course to the Club. Mr Robinson describes the sale as 'deceitful and secret' and suggests some corrupt motivation on the part of the Council and/or certain Councillors. The Panel is mindful of the Commissioner's guidance that suspicion of wrongdoing on the part of the public authority can give rise to a public interest in disclosure. It appears in this case that Mr Robinson considers that the information requested would shed light on his allegations that the Council has committed some form of wrongdoing.

42. According to the Commissioner's guidance on this topic:

- (a) Disclosure must serve the wider public interest and go beyond the requester's private interests; and
- (b) The suspicion of wrongdoing must amount to more than a mere allegation – there must be a plausible basis for the suspicion, even if it is not proven.

43. In considering whether this plausible basis exists, the Panel has carefully considered various sources of evidence, including the content of the requested information. Having conducted this examination of the evidence, the Panel considers that of Mr Robinson's allegations listed in paragraph 27 above:

- (a) there is either little or no reliable evidence; or
- (b) they are not pertinent to this particular matter; or
- (c) they are contradicted by reliable information in the 'closed' bundle.

44. The Panel therefore considers that disclosing the information requested by Mr Robinson would not indicate that the suspicions are justified. It is also important to

remember that (a) certain highly pertinent information about the sale of the Course will in due course enter the public domain when it is registered by HM Land Registry; and (b) the timing of the public interest balancing exercise is when the public authority responds to the original request (in this case when the sale agreement was still conditional, and may not have proceeded), not when either the Commissioner or an appellate body such as this Tribunal considers it.

45. Overall, Mr Robinson has not satisfied us that the Commissioner should have exercised her discretion differently when balancing the competing public interests. We agree with the Commissioner that in all the circumstances of the case, on balance the public interest favours the protection of the legal professional privilege of legal advice to the Council, and the confidentiality of commercial information of the Club, both of which would be adversely affected by disclosure.

46. Accordingly, we find that the Commissioner correctly decided that the public interest favours withholding the information sought by Mr Robinson and maintaining the exception from disclosure in regulations 12(5)(b) and 12(5)(e).

Conclusion

47. For the above reasons, we uphold the Commissioner's decision notice and dismiss the appeal.

ALEXANDRA MARKS CBE
(First Tier Tribunal Judge)

DATE of DECISION: 12 April 2021
DATE PROMULGATED: 16 April 2021