Neutral citation number: [2024] UKFTT 00023 (GRC)

Case Reference: EA/2022/0293

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: remotely by video conference
Heard on: 19 December 2023
Decision given on: 15 January 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER KATE GRIMLEY-EVANS

Between

MIKE ROBERTS

Appellant

and

(1) INFORMATION COMMISSIONER
(2) STRATFORD ON AVON DISTRICT COUNCIL

Respondents

Representation:
For the Appellant: in person
For the Respondent: did not attend
For the Second Respondent: Leo Davidson, counsel

Decision: The appeal is Dismissed

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 3 October 2022 (IC-112985-N8X4, the "Decision Notice"). The appeal relates to the application of the Environmental Information Regulations 2004 ("EIR"). It concerns information about communications between Stratford-on-Avon District Council (the "Council") and Littler Investments Limited ("LIL") relating to a Memorandum of Understanding about Wellesbourne Airfield, as requested from the Council.

3. The brief background to this matter is as follows. LIL is the owner of Wellesbourne Airfield and wished to redevelop the site. The Council's core strategy and neighbourhood plan contain provisions about retaining aviation facilities at the airfield. In December 2016, the Council resolved to enter into negotiations with LIL for purchase of the airfield. The Council also resolved to take steps to compulsorily purchase the airfield if agreement could not be reached.

4. The Council and LIL signed a Memorandum of Understanding ("MoU") on 30 August 2019. The Council put compulsory purchase proceedings on hold, and LIL agreed to use reasonable endeavours to maintain the established flying functions of the airfield and work collaboratively on development plans for the site. LIL also agreed to enter into dialogue with the tenants of the airfield and use reasonable endeavours to offer new 12 month tenancies if discussions are constructive.

5. The Appellant runs an aviation company which was (but is no longer) based at Wellesbourne Airfield. The Appellant was a tenant at the airfield and has been engaged in litigation with LIL. The Appellant was not offered a new tenancy with LIL under the MoU.

6. The Appellant has made more than one request on this topic to the Council. The Commissioner's decision relates to the following request, made by the Appellant on 20 April 2021 (the "Request"):

> *"Please provide the communications between SDC [the Council] and LIL with regard to the original MoU agreement. Can you please conduct a search of your Outlook for e-mail communication which meets the remit of this request, in addition to providing us with any letters received or sent by SDC which meets the remit of this request. Although this is similar to a previous request, the remit is wider than previously asked and therefore there may be more information which meets the remit of this request. There is no time frame for this request, so the required response will include communication both before and after the implementation of the MoU - in essence, anything to do with the MoU and any of its aspects. Communication which meets the remit of the request may necessarily include Littler's advisors, so there may be communication with [e-mail address redacted], in addition to [e-mail address redacted]. There may also have been contact with [name and e-mail address redacted] who is the airfield manager."*

7. The Council responded on 17 May 2021. It provided some emails with redactions for personal information but withheld the majority of the information under Regulation 12(5)(b) EIR (the course of justice). The Council maintained this position on internal review.

8. The Appellant initially complained to the Commissioner on 16 June 2021. The Commissioner conducted an investigation, during which the Council changed the exceptions

relied on and clarified how these applied to the withheld material. The Appellant confirmed that he was not challenging redactions of personal information. The full background is set out in the Decision Notice and it is not necessary to repeat it here.

9. The final exceptions relied on by the Council for the purposes of the Decision Notice were the following EIR regulations:

a. 12(4)(d) – information in the course of completion;
b. 12(5)(d) – confidentiality of proceedings;
c. 12(5)(e) – confidentiality of commercial information;
d. 12(5)(f) – interests of the person who provided the information.

10. The Commissioner decided that the Council correctly applied exceptions under the EIR to the withheld information:

a. The Council was correct to handle the request under EIR.

b. Regulation 12(4)(d) was engaged in relation to the following information, and the public interest in maintaining the exception outweighs the public interest in disclosing the information:

i. Draft versions of the MoU exchanged confidentially between lawyers, some of which contain amendments and comments.
ii. Separate emails between lawyers which contain commentary on the evolving draft document.
iii. Discussions around a draft clause in a third party legal document.
iv. A draft note of a confidential meeting and correspondence about that meeting.
v. Negotiations around a draft press release.

c. Regulation 12(5)(d) was engaged in relation to the following information, and the public interest in maintaining the exception outweighs the public interest in disclosing the information: withheld Cabinet papers.

d. Regulation 12(5)(e) was engaged in relation to the following information, and the public interest in maintaining the exception outweighs the public interest in disclosing the information: a breakdown of a third party's legal costs.

e. Regulation 12(5)(f) was engaged in relation to the following information, and the public interest in maintaining the exception outweighs the public interest in disclosing the information:

i. All correspondence from LIL's solicitors (Smith Partnership) to the Council or its solicitors, where LIP or their solicitors have not consented to disclosure.
ii. Communications between LIL's solicitor and the Council's solicitors about the MoU (for specified pages where the other exceptions above do not apply).
iii. A confidential email from a third party to the Council.

The Appeal and Responses

11. The Appellant appealed on 3 October 2022. His grounds of appeal are that the public interest test should override the exceptions relied on. He says the Parish Council have stated that the Council's actions have undermined and breached the statutory authority for the neighbourhood and local plans, and the Council has ignored representations from the Department for Transport and local MP. He alleges that the Council are attempting to hide their wrongdoing and misfeasance in public office.

12. The Commissioner's brief response maintains that the Decision Notice was correct.

13. The Council was joined as a party to the proceedings and has submitted a detailed response. The Council says that the Appellant has failed to identify any error of law in the Commissioner's decision and adopts the Decision Notice's findings. The response explains how the various exceptions are said to apply to the withheld documents, with some documents being covered by more than one exception. The Council also argues that the Tribunal should aggregate the public interests in upholding the exceptions. The Council says that it has released as much information as it can without disproportionately adversely affecting important public interests expressly protected by EIR, and the public interest in matters relating to the airfield is largely served by documents already in the public domain (including the MoU and Council minutes).

14. The Appellant submitted a lengthy reply which sets out the background to the Request and takes the position that all of the withheld information should be disclosed in the public interest. The Appellant says that the Parish Council wrote to the Council stating that the first MoU agreement breached the statutory authority of the core strategy/local plan and the neighbourhood plan, and that the Council has ignored requests from the Parish Council and central government to proceed with the compulsory purchase of the airfield. Disclosure should be made in the public interest as the Council has failed to identify how a breach of the first MoU agreement has not occurred and/or failed to uphold the agreement. The Appellant alleges wrongdoing by the Council and that there has been "*concealment of documents either to hide discrimination, incompetence, or wrong-doing by staff and elected members*". The Appellant's detailed points about the various exceptions are covered in the discussion below.

Applicable law

15. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

> *2(1) …"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*
>
> *(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
> *(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

……

5(1) …a public authority that holds environmental information shall make it available on request.

……

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.

12(2) A public authority shall apply a presumption in favour of disclosure.

……

12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

……

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;

…….

12(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, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

……

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

(f) the interests of the person who provided that information where that person-

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure.

16. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 ("FOIA") in section 39 and must be dealt with under EIR, and it is well established that "environmental information" is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. The Commissioner took the view that developing the physical infrastructure of an airfield is a measure that will affect the environment, and the information constitutes environmental information. We agree and are satisfied that this request falls within EIR.

Issues and evidence

17. The issues are whether was Council entitled to rely on the following regulations to withhold some or all of the requested information:

a. 12(4)(d) - material in the course of completion
b. 12(5)(d) – confidentiality of proceedings
c. 12(5)(e) – confidentiality of commercial information
d. 12(5)(f) – interests of the person who provided the information

18. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

a. An agreed bundle of open documents.
b. A closed bundle of documents containing the withheld information.
c. Some additional documents from the Appellant, including a letter from Wellesbourne & Walton Parish Council to the Council dated 3 October 2019.
d. Open oral submissions from both parties.
e. Closed oral submissions from the Second Respondent.

19. We held a closed session during the hearing to discuss the application of the exceptions to the material contained in the closed bundle. We provided the following gist of the closed hearing to the Appellant:

a. Mr Davidson made submissions about how each of the exceptions applied to the documents, including the correspondence, the draft MoUs and the Cabinet papers.
b. The Tribunal queried the application of the exceptions to various aspects of the information in the closed bundle, and in particular whether it would be possible to redact particular parts of documents so that the rest could be disclosed. Mr Davidson responded that there are broader considerations around the need to preserve confidentiality and a safe space which would apply (even if particular parts of documents are not as directly sensitive as others). He also noted where more than one exception would apply.
c. Mr Davidson submitted that there was little public interest in disclosure on the face of the documents. The Tribunal put various points to Mr Davidson about parts of the information which may be of greater public interest. Mr Davidson disagreed, maintaining that the public interest was limited, given the nature of the information.
d. The Tribunal asked Mr Davidson about aggregation of exceptions in assessing the public interest in withholding the information. Mr Davidson submitted that it was not only permissible but appropriate, given that the various exceptions all arose from the same broad factual matrix, namely the relationship between the Council and a private entity, both of whom have legitimate interests in protecting their respective positions and their joint public position.
e. After breaking for lunch, the Tribunal asked some specific questions about whether the Cabinet papers and other attachments to documents were within scope. Mr Davidson submitted that the Cabinet papers were potentially within scope but other attachments had been deemed not to be by the ICO or the Council.

Discussion and Conclusions

20. We have considered the categories of information and relevant exceptions in turn.

12(4)(d) - material in the course of completion

21. ***Which information this applies to***. Having considered the closed bundle, we agree with the Commissioner that this exception applies to the following information:

a. Draft versions of the MoU exchanged confidentially between lawyers, some of which contain amendments and comments.
b. Separate emails between lawyers which contain commentary on the evolving draft document.
c. Discussions around a draft clause in a third party legal document.
d. A draft note of a confidential meeting and correspondence about that meeting.
e. Negotiations around a draft press release.

22. ***Is the exception engaged?*** This is a class-based exception, meaning it is engaged automatically for information that consists of material in the course of completion without the need to show that disclosure would cause harm. It is still subject to the public interest balancing test. Having considered the information, we find that the exception is engaged for the categories set out above. This is all material that was in the course of completion and/or unfinished documents.

23. The Appellant does not challenge the engagement of this exception but argues that disclosure is in the public interest.

24. ***Public interests in favour of disclosure***. The Appellant's general position is that there is a plausible suspicion of wrongdoing. He says that the first MoU was breached by LIL, as they were required to negotiate with all tenants but refused to deal with his company. He also says that the Cabinet had voted to compulsorily purchase the airfield, but instead the MoU was agreed which went against core strategy and the local plan. We have seen the letter from the Parish Council to the Council dated 3 October 2019 which expresses these concerns. It raises the issue of one shortened runway and the failure to offer the Appellant's company a tenancy, and questions how this enhances or supports the existing aviation related facilities as required by the neighbourhood plan. The Parish Council says that it therefore believes that "*the landlords have already broken the Memorandum of Undertaking negating its legality and this should lead to Stratford District Council pursuing its compulsory purchase order of the site*". This letter clearly shows that there was wider concern about the content of the MoU and whether it had been breached, and this was not purely a personal issue for the Appellant.

25. On the specific issue of the draft documents, the Appellant argues that any document which aims to pause the compulsory purchase process that had been voted for by elected members should be disclosable in the public interest, including the process by which any draft or incomplete document had been amended or diluted so it breaches the local or neighbourhood plan. He says that the original MoU has now been superseded by the second MoU. Given this was made without specialist aviation advice or proper consultation, and its legality has been challenged by the Parish Council, "*the transparency, accountability and public understanding and involvement in the democratic process must warrant full disclosure in the public interest*".

26. Having considered the Appellant's arguments, we agree that there are public interests in favour of disclosure of this information. These interests go further than general transparency due to the specific concerns about the content and breach of the MoU raised by the Appellant

and by the Parish Council. This information engages most closely with the public interests put forward by the Appellant (as compared to the other information discussed below).

27. ***Public interest in favour of withholding the information***. We find that the public interest in favour of withholding this information is strong. Disclosure of draft material under EIR would damage the faith of parties dealing with the Council in their ability to negotiate freely and openly, due to concern that other unfinished material and detail about related negotiations would be disclosed in the same way. This would affect the Council's ability to conduct effective negotiations with third parties.

28. In relation to the Council's relationship with LIL, we note that at the time of the Request the parties were operating under the first MoU and went on to negotiate a second MoU (which was finalised on 25 August 2022). The Council and LIL were in an ongoing relationship. Disclosure of draft materials and negotiations relating to the first MoU at that time would damage trust and jeopardise negotiations for the second MoU. We also note the point made by the Council that the MoU is not a legally binding document and relies on good will. This makes it particularly important that the parties are able to trust each other and continue to cooperate. The final MoU was published and so is a public-facing document which shows the final position agreed between the parties. Public disclosure of drafts and negotiations would undermine the published final position - particularly at a time when the parties were continuing to work together under that MoU and going on to negotiate a second MoU.

29. In summary, it is strongly in the public interest that the ongoing relationship between the Council and LIL is not undermined, as well as ensuring that the Council's general ability to negotiate with third parties is not damaged.

30. ***Public interest balance.*** Having considered the public interest on both sides, we find that the public interest in maintaining the exception outweighs the public interest in disclosing the information. We have done so after taking into account the presumption of disclosure under EIR. This is for the following reasons:

a. As explained above, we find that the public interest in withholding the information is strong due to the effect of disclosure on the Council's ongoing relationship with LIL and ability to negotiate freely with other third parties.

b. We note the allegations that the MoU had been breached. However, it is not necessary for negotiations and drafts of the MoU to be disclosed in order for this point to be investigated. The final MoU is publicly available. The same point applies to the draft press release, the final version of which was published.

c. We asked the Appellant why the drafts were needed when the final MoU has been published. He said that the MoU had "driven a coach and horses" through the local plan in terms of viability of the airfield, and so he questions why the Council allowed this to happen. He says that if the negotiations are put into the public domain it will help the public to understand why the Council decided to downgrade the airfield so it was unviable.

d. We understand the Appellant's point that this information will give transparency on the background to the final MoU. This would be particularly important if there was,

as he suggests, material that would support a "plausible suspicion of wrongdoing" by the Council. However, we have the advantage of having seen the withheld material. There is clearly a lack of trust between the Appellant and LIL, and a lack of trust in the action taken by the Council. However, as submitted by Mr Davidson, we have taken account of the Council's ability to take a broad view of the viability and operation of the airfield, which involved many different factors rather than simply the position with the Appellant's company's tenancy. Although we cannot provide detail about the contents of the withheld material, we can confirm that we have not seen anything in this material that would indicate wrongdoing of the nature suggested by the Appellant.

e. Although we have not seen any evidence of wrongdoing, there is still a public interest in disclosure based on transparency in the particular context of these events. The issue is whether this is outweighed by the public interests relied on by the Council. As the public interest in withholding the information is strong, we find that, in all the circumstances, this outweighs the public interest in disclosure.

12(5)(d) – confidentiality of proceedings

31. ***Which information this applies to.*** The Council relies on this exception in relation to the withheld Cabinet papers. This is on the basis that Council is a principal council and its proceedings are subject to the Local Government Act 1972, which allows a council to decide to exclude the public from a meeting if it is likely that there would be a disclosure of "exempt information".

32. Having considered the content and context of the Cabinet papers, we find that it is not necessary to apply an exception because they fall outside the scope of the Request altogether. The wording of the Request is limited to, "*the communications between SDC [the Council] and LIL with regard to the original MoU agreement*". The Cabinet papers are not a communication between the Council and LIL. In addition, although relevant to the background which led to the MoU, they do not directly address the MoU agreement because they predate those negotiations. It appears that a redacted version of the Cabinet papers was provided to LIL's solicitors as an attachment to correspondence about possible compulsory purchase, and this correspondence is also not within the scope of the Request (and was scoped out by the Commissioner). Looking at the wording of the Request, the Cabinet papers are not "*anything to do with the MoU and any of its aspects"*.

12(5)(e) – confidentiality of commercial information

33. ***Which information this applies to*****.** The Council relies on this exception in relation to breakdowns of third party legal costs, covering both time spent on particular matters and applicable hourly rates.

34. ***Is the exception engaged?*** The information in question must be commercial or industrial. The information must be subject to confidentiality provided by law. An obligation of confidence can be implied, and the three-stage test in ***Coco v A N Clark (Engineers) Ltd*** [1969] RPC 41 applies: (1) the information must have the "necessary quality of confidence", in that it is not publicly accessible and is more than trivial; (2) the information must have been imparted in circumstances that implied an obligation of confidence, whether this is explicitly or implicitly; and (3) disclosure of the information must be unauthorised. The

confidentiality must protect a legitimate economic interest, which would, on the balance of probabilities, be harmed by disclosure. Finally, it must be shown that the disclosure of the information would adversely affect the confidentiality.

35. We are satisfied that all elements of this test are met. This is commercial information about legal costs. A breakdown of legal costs is not publicly accessible, and it was provided to the Council in confidential correspondence. The Appellant makes the point that solicitors' hourly rates may be published on their website, but this is not necessarily the same as rates negotiated with a client for specific work. In these circumstances, disclosure of the information would be unauthorised. The third party has a legitimate economic interest in keeping pricing structures and rates negotiated with clients confidential, and disclosure would harm this interest by damaging the third party's ability to negotiate about costs and giving valuable pricing information to competitors. Disclosure would adversely affect this confidentiality.

36. ***Public interest balance.*** We agree with the Council's position that there is a strong public interest in commercial operators being able to maintain confidentiality around their pricing structures, to avoid distorting the market by giving competitors an unfair advantage, and to avoid prejudicing relationships and negotiations with other clients. As noted by the Commissioner, this information would provide competitors with an insight into costings for a particular piece of work and could be used to tailor bids for similar work – damaging both the third party law firm and the ability of public authorities to obtain the most cost effective package for the taxpayer. In favour of disclosure, there is an interest in transparency. However, this is limited, as the Appellant knows that third party costs were paid. We would expect that the total amount paid would be included in the Council's accounts. We can see only limited additional public interest in disclosure of the breakdown of those costs and the applicable hourly rates. There is no obvious connection to the public interests relied on by the Appellant, as discussed in paragraphs 24 to 26 above. Having considered the public interest on both sides, we find that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(5)(f) – interests of the person who provided the information

37. ***Which information this applies to.*** The Council relies on this exception for all correspondence from LIL's solicitors to the Council/its solicitors which is not already covered by the exceptions above. This includes some correspondence covered by without prejudice privilege. It also includes one confidential email from a third party.

38. ***Is the exception engaged?*** The Commissioner relied on the following four-stage test:

a. This exception only applies where the person providing the information was not under, and could not have been put under, any legal obligation to supply it – meaning the information must have been provided purely voluntarily. Having seen the correspondence, we are satisfied that LIL's solicitors were not under a legal obligation to provide this information to the Council. It relates to legal discussions about proposals for the airfield during negotiations between the parties. The same applies to the email from the third party (who was acting in a professional capacity).

b. Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under

EIR? The Council had confirmed to the Commissioner that it would not be entitled to disclose this information except under EIR, and we have seen nothing to indicate this is incorrect.

c. Has the person supplying the information consented to disclosure? There is no consent. The Council has not sought consent, but we note the Commissioner's guidance that there may be cases where consultation is not necessary. The Council explained to the Commissioner that consent was unlikely to be given in light of the strained relationship between LIL and the Appellant, and the fact there was an express confidentiality agreement between LIL and the Council in relation to the discussions. Similarly, the third party email was expressly sent in confidence.

d. Would disclosure adversely affect the interests of the person who provided the information? We agree with the Commissioner that the effect on the solicitor's client LIL is relevant here. Information was provided by LIL's solicitors in the context of confidential legal discussions, some of which were without prejudice. They reflect confidential discussions given by a client to their solicitor that they would not expect to be made public. The information was provided by LIL through their solicitors, and the solicitors themselves would expect to be able to correspond on behalf of their clients in confidence. This is particularly important where there are potential civil proceedings about a related matter, as in this case (where at the time of the Request there had been proceedings between LIL and the Appellant, and the potential for further proceedings). On the balance of probability, disclosure would adversely affect the interests of both the solicitors themselves, and LIL on whose behalf they were providing the information. A similar analysis applies to the email from the professional third party.

39. ***Public interest balance*.** The relevant public interests in favour of disclosure are the same as those set out at paragraphs 24 to 26 above. As with the draft materials and related negotiations, disclosure of this additional correspondence would give transparency about the process of agreeing the MoU. To be balanced against this is the public interest in maintaining the expectation of confidence held by the solicitors and their client LIL. As with disclosure of draft materials, disclosure of this correspondence to the world at large under EIR would inhibit solicitors and their clients from corresponding candidly with the Council. This would have an impact on the ongoing relationship and negotiations between the Council and LIL. It would also have a wider impact on the willingness of other solicitors and their clients to correspond openly with the Council. Again, a similar analysis applies to the email from the professional third party. We have applied the presumption in favour of disclosure. As with the draft materials, we find that the public interests in favour of withholding the information are strong. Having considered the public interest on both sides, we find that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

40. ***Aggregation of the public interest.*** A number of the withheld documents are potentially covered by more than one exception (including the exception for course of justice (Regulation 12(5)(b)) which we have not analysed as the material is all covered by other exceptions). Where this applies, under EIR we are able to aggregate the public interests in upholding more than one exception when considering the public interest balance. We have not done so explicitly here because we have found the public interests in favour of upholding each individual exception were sufficient to outweigh the public interests in disclosure.

41. We note that paragraph 60 of the Appellant's response says that he is prepared to confirm a duty of confidentiality for the documents requested and so disclosed save for pending legal actions. This is not possible for a request for information under EIR. Disclosure of information under EIR must be to the world at large. This is why we have analysed the effects of disclosure and the public interest balance as explained above.

42. We dismiss the appeal for the reasons set out above.

Signed: Judge Hazel Oliver Date: 11 January 2024