



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

Appeal Reference: EA/2018/0150

**Decided without a hearing
On 10 January 2019
Promulgation date 22nd January 2019**

Before

JUDGE BUCKLEY

JEAN NELSON AND PAUL TAYLOR

Between

COLIN GARDNER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. For the reasons set out below the Tribunal dismisses the appeal.

REASONS

1. The parties have consented to this appeal being determined without an oral hearing.

Factual background

2. This request arises out of the proposed building of a development known as Buckover Garden Village (BGV) near to the town of Thornbury.
3. The Council is working with the other authorities in the West of England to prepare a Joint Spatial Plan (JSP) covering four Unitary Authority areas. Its purpose is to provide a strategic overarching framework and vision to help satisfy the anticipated need for new homes and supporting infrastructure over the next 20 years. The JSP identifies 12 locations for strategic growth, including 5 in South Gloucestershire, one of which is Buckover. Each authority will also produce a Local Plan, in conformity with the JSP and the strategic approach it envisages.
4. The JSP and the Council's Local Plan follow the same statutory preparation procedures. The JSP is going through the following stages:
 - i. **Issues and Options stage: November 2015 - January 2017** Two stage consultation process.
 - ii. **Publication: 22 November 2017 - 10 January 2018** Final draft plan (JSP Policy 7.8) published for 6 weeks consultation.
 - iii. **Public examination: 13 April 2018 - ongoing** Plan submitted to Secretary of State who appoints planning inspector to undertake the examination. All comments made in publication stage and technical evidence and given to inspector. Inspector can invite parties to attend to be questioned. Appellant will be given the opportunity to take part.
 - iv. **Inspector's report and adoption of plan by local authorities: early 2019?**
5. The Council also held further non-statutory community consultation events including on 6 October 2017 in relation to the BGV proposal.

Request, Decision Notice and appeal

6. Mr Gardner made the request which is the subject of this appeal to South Gloucestershire Council ('the Council) on 17 October 2017:

Further to the e-mail from [name redacted] on 12 July 2016 (titled "Expressions of Interest-locally led Garden Villages Towns and Cities - Buckover" _ that outlined transport concerns for the proposed development, I would like to receive all subsequent internal and external emails, letters, documents and correspondence between Officers (including the Council's Transport Team), or between Officers and members of the Cabinet (also known as the Executive), relating to concerns about the suitability of the proposed development from a transport point of view.

I would also like to receive all internal and external emails, letters, documents and correspondence between the same dates relating to concerns expressed by, or between, Officers or members of the Cabinet about the close proximity of the

proposed site of BGV and the town of Thornbury, and specifically any concerns raised about the Council's ability to prevent building on the proposed "green gap" between BGV and Thornbury, such as those put forward by [reference redacted].

7. The Council replied by letter dated 1 December 2017 indicating that it was considering the request as a request for information under the Environmental Information Regulations 2004 (EIR) and refusing the request in reliance on regulation 12(4)(d) (material in the course of completion) on the basis that the information related directly to the on-going preparation of the Joint Spatial Plan (JSP) and the public interest favoured maintaining the exemption. The Council referred the Appellant to some relevant information already in the public domain.
8. The Appellant complained to the Information Commissioner on 11 December 2017 on the basis that the Council had now submitted the JSP to the Secretary of State and the public interest favoured disclosure.
9. The Appellant requested an internal review by email dated 14 December 2017 on the basis that the JSP had already been submitted and therefore the issue was no longer live.
10. The Council upheld its decision on internal review by letter dated 26 January 2018 on the basis that public interest balance favoured withholding the information because the JSP was yet to be subject to an Examination in Public and still had to be adopted by the Council.
11. In response to the ICO investigation, the Council, by letter dated 20 April 2018, disclosed some information that related to the publication of the JSP. These documents were disclosed on the basis that JSP Policy 7.8 had, by that time, been completed and published and therefore they could no longer be withheld under regulation 12(4)(d).
12. The documents disclosed on 20 April 2018 included two emails which related to the development of JSP Policy 7.8. The Council also disclosed the technical in-house assessment of the BGV site.
13. The Council continued to withhold certain documents that fell within the scope of the request. They are listed in the unredacted closed version of a letter to the ICO of 6 April 2018 and copies were provided to the Tribunal in the closed bundle.
14. The rationale for withholding those documents is set out in open correspondence. This information consists of emails relating to negotiations between the proposed developer's transport consultant and council officers over the modelling approach needed to improve the robustness of the transport

model in the Buckover location and the assumed trip rates to be used in the assessment of the impact of BGV. These negotiations are ongoing and relate to the production of a yet to be completed transport assessment which would be drafted by the developer to support a subsequent planning application for BGV. Negotiations of this kind take place because it is the Council's responsibility to ensure that a transport assessment is robust and that the impact of the development is sufficiently mitigated through a period of negotiation. If the information were released there is a risk that the Council's position could be undermined with a consequent reduction in the robustness of the modelling and the mitigation package included in the final transport assessment by the developer.

15. In a decision notice dated 18 July 2018 the Commissioner decided that regulation 12(4)(d) was engaged and that the public interest favoured withholding the information. She determined that the Council had breached regulations 5(2) (time for compliance) and 14(3) (refusal to disclose information). The Council were not required to take any steps.
16. She determined that the withheld information related to the production of a transport model and trip rate assumptions and that these issues were still live at the time of the request. Therefore, the information related to material which was still in the course of completion at the relevant time.
17. The Commissioner accepted the general public interest in disclosing environmental information and the public interest in informing public debate and in transparency and accountability. In favour of withholding the information, the Commissioner accepted the need for a 'safe space' and a realistic prospect of a chilling effect. The statutory process provides for disclosure of information and input from interested parties and should not be undermined. She concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure.
18. The Appellant's notice of appeal challenges the Commissioner's decision notice on the grounds that the public interest favours disclosure, in particular because:
 - i. There is an overwhelming public interest in understanding the Council's transport team's unexpurgated assessment of the impact of the proposed development.
 - ii. If the withheld information impacts the viability of the proposed development it is in the public interest for it to be disclosed.
 - iii. The Council has a culture of concealment and will eventually publish a Transport Assessment selected to be sympathetic to their cause, without disclosing documented concerns expressed by Transport Officers.
 - iv. Failure to disclose the information will undermine public confidence in any final transport assessment.

Legal framework

19. The relevant parts of regulation 12 EIR provide that a public authority may refuse to disclose environmental information requested if an exception to disclosure applies under regulation 12(4) and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) a public authority must apply a presumption in favour of disclosure.
20. Regulation 12(4)(d) provides that 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;
21. We are not bound by the Commissioner’s guidance or previous Tribunal decisions, but in the absence of any higher authority we have found the following helpful.
22. The recent Tribunal decision of **Manisty v Information Commissioner and Highways England** (EA/2017/0155), cites the United Nations Economic Commission for Europe’s interpretative guidance on the Aarhus Convention:

... the expression ‘in the course of completion’ relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared ...
23. In **Manisty** the Tribunal accepted, as did the Tribunal in **Ames v Information Commissioner & Department for Transport** (EA/2015/0283), that a particular document that has itself been finished, may still be part of “material which is still in the course of completion”, stating:

Whether it is...depends, in our view, on the facts of the individual case, and the terms of the request.
24. The Commissioner’s Guidance Note from May 2016 on ‘Material in the course of completion, unfinished documents and incomplete data (regulation 12(4)(d))’ states:

While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.
25. In the Tribunal’s decision in **Ames v Information Commissioner & Department for Transport** (EA/2015/0283) the Tribunal considered whether information

relating to an ongoing policy process engaged the Reg.12(4)(d) exception. The request in Ames was for proposals relating to the terms of reference (“ToR”), of the Independent Airports Commission. Those terms of reference were complete. The Tribunal accepted the general proposition that while a particular document (such as the terms of reference) may be finished, it may be part of ‘material’ which is still in the course of completion, but the Tribunal stated at paragraph 38 that:

“...it is artificial on the facts of this case to regard information on finalising the ToR as information relating to material which was still in the course of completion. The request did not relate to government aviation policy material; it related to the particular matter of the formulation of the ToR, and the disputed information concerns that topic. An ongoing policy process is not in and of itself ‘material’ within the meaning of reg 12(4)(d).

26. The tribunal notes that the Commissioner at paragraphs 25 and 32 of her decision notice and, to some extent, the Tribunal in **Ames** have misstated the test in asking if the *information* relates to material which is still in the course of completion. The test is narrower than this. It is whether the *request* relates to material which is still in the course of completion. This means that the information requested must itself *form part of* material still in the course of completion, it is not enough for it simply to relate to material in the course of completion. This is reflected accurately in the Commissioner’s Guidance cited above.

The Task of the Tribunal

27. 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

28. The issues we have to determine are:
- 28.1 Is regulation 12(4)(d) engaged, i.e. does the request relate to material which is still in the course of completion or to unfinished documents? The Council relies only on these two limbs.
 - 28.2 Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

Evidence and submissions

29. We have read and were referred to a bundle of documents, and have taken into account the evidence and submissions of the parties, including the Commissioner's reply and the Appellant's response.

Discussion and conclusions

Is the exemption engaged, i.e. does the request relate to material which is still in the course of completion or to unfinished documents?

30. In the Tribunal's view it would be too wide an interpretation of regulation 12(4)(d) to say that any material related to the ongoing JSP process would engage the exemption. We note that the Council has not put forward such an interpretation and disclosed information relating to the JSP once it reached publication stage.
31. As to the remaining withheld documents we accept that this is a case where the documents themselves are complete but form part of material that is still in the course of completion. We find that the phrase 'material still in the course of completion' is wide enough to include email negotiations about the content and methodology of the transport assessment, which had not been completed at the relevant time. These emails form part of the process of the preparation of the document.
32. On this basis we conclude that the request relates to material which is still in the course of completion and the exemption is engaged. Once the transport assessment has been completed, this exemption would be unlikely to apply to any future request.
33. We do not need to consider the other limb of regulation 12(4)(d).

Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

34. We accept that the JSP and the BGV development will have a significant impact on a large number of people and that there have been a significant number of objections to the BGV development. There is therefore a strong public interest in a transparent and accountable process that is open to scrutiny. However, the Tribunal notes that the statutory process includes scrutiny, transparency and release of information at the appropriate stages. We note the description of the steps taken by the inspector outlined at paragraphs 7-9 of the Appellant's response which suggest robust, independent scrutiny. Further, the process allows for the participation and input of interested parties including the Appellant.
35. The Tribunal accepts that disclosure of the withheld information would contribute to some extent to public debate. Having read the withheld

information the Tribunal takes the view that its potential to contribute to the public debate or to the ongoing statutory process at this stage is minimal, given that it forms part of an unfinished negotiating process.

36. The Tribunal does not accept that there is a heightened public interest in disclosure at this stage as a result of any intention on the Council to publish a transport assessment that is selected to be sympathetic to their cause. There is no evidence that the Council has such an intention. The Tribunal notes that the email of 12 July 2016 was disclosed rather than withheld by the Council in response to a previous FOI request, which suggests a willingness to disclose information revealing concerns expressed by transport officers rather than the opposite. Further the Council disclosed additional information once the JSP was submitted. The Tribunal notes the Appellant's and his MP's concerns about public confidence but the Council is unlikely to be able to rely on the regulation 12(4)(d) exception once the transport assessment is completed and it would be open to the Appellant to make a further FOI request at that stage if the information is still withheld.
37. The withheld information has been produced as part of an ongoing process that is subject to a specific statutory procedure. BGV is only one of a number of proposed developments falling within the JSP. Consultation and release of information at specific stages is built into that process, as is scrutiny by a planning inspector appointed by the Secretary of State. The inspector can request and has requested further information from the relevant authorities. We find that there is a strong public interest in not undermining that process by releasing information on a piecemeal basis through an alternative process while the statutory procedure is in progress.
38. The Council has a responsibility to ensure that a transport assessment is based on robust modelling and that the impact of any proposed development is mitigated. As part of this it undertakes negotiations with a proposed developer before a transport assessment is submitted as part of a planning application. Disclosure of these emails while negotiations were ongoing might put at risk the Council's negotiating position. We accept the Council's argument that this could lead to a less robust transport proposal, which, if permission were granted, would impact on the local community. The Tribunal also considers this to be a strong factor in the public interest.
39. The Tribunal finds that the Council is entitled to a safe space to carry out these negotiations without the premature disclosure of the details of its negotiating position and tactics to this developer, other potential developers or other interested parties. The Tribunal considers that the need for a safe space will diminish once the transport assessment is completed, but that this is a strong factor in the public interest at the relevant time when negotiations were ongoing.

40. Taking all the above into account we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Signed

Judge of the First-tier Tribunal

Date: 21 January 2019