



FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference: EA/2014/0122
Appellant: Royal Borough of Greenwich
Respondent: The Information Commissioner
Second Respondent: Shane Brownie
Judge: NJ Warren
Member: Andrew Whetnall
Member: David Wilkinson
Hearing Date: 7 October 2014, 27 and 28 November
Decision Date: 30 January 2015

DECISION NOTICE

1. The Royal Borough of Greenwich (“Greenwich”) appeals against a decision notice of the Information Commissioner (“ICO”) dated 23 April 2014 concerning its handling of an information request from Mr Shane Brownie who is a member of the Greenwich Peninsula Residents Group.
2. The hearing of this appeal concluded in November 2014. Greenwich was represented by Mr Knight; the ICO by Mr Facenna; and Mr Brownie by Mr Armitage. We express our thanks to all three of them for their submissions.
3. It is convenient to start with a deed of planning obligation dated 23 February 2004 concerning the development of the Greenwich Peninsula. This was at the start of a huge project intended to last 20-25 years. It included the building of just over

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10,000 homes. Amongst the many commitments entered into by the developers was that 38% of these homes would be “affordable”.

4. Most of the land is owned by the Greater London Authority. We need refer only to the more recent history of ownership of the planning rights. Before 2012 the rights and obligations relating to development of the land were held jointly by two companies known as Lease Lend and Quintain. Then a company known as Knight Dragon acquired a majority share in a split of 60%/40% with Quintain. Since then, Knight Dragon has bought out Quintain. Following the 2008 financial crisis work on the development had stalled. In 2012 there was a risk of losing a housing grant of £50 million which had been allocated to the site.
5. The developers approached Greenwich asking to be released from some of their promises to build affordable homes. The revised proposal, which related to just eleven of the plots, moved some of the affordable homes away from the more attractive areas of the site which have river views; it also seems to have reduced the overall number of affordable homes by about 500.
6. Quintain commissioned an “economic viability report” from BNP Paribas Real Estate which reassessed the “viability” of some of the development. The report is dated January 2013 and states on the cover:-

“FOIA exemption Sections 41 and 43(2) Private and Confidential”.

Para 1.4 of the report reads:-

“Confidentiality, this report is provided to the Royal Borough of Greenwich (“the Council”) on a confidential basis. We request that the report not be disclosed to any third parties under the Freedom of Information Act (Sections 41 and Section 43(2)).”

7. These exemptions deal with information provided in confidence and information whose disclosure would be likely to prejudice commercial interests. The reference in the report to the Freedom of Information Act (“FOIA”) demonstrates, in our view that BNP Paribas know that dealings with public authorities take place subject

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to the freedom of information regimes set out in FOIA and in the Environmental Information Regulations (“EIR”). Companies can ask for exemptions or exceptions to be considered; but they are not decision makers in relation to freedom of information. That task falls to the Public Authority, the ICO and, sometimes, the Tribunal.

8. Greenwich asked a firm called Christopher Marsh and Co. Ltd. to review the BNP Paribas report and they did so in a letter dated 15 February 2013 which they headed “private and confidential”. We cannot think that Christopher Marsh and Co is any less aware than BNP Paribas of the freedom of information regimes and we read that marking accordingly. On 28 February 2013 Greenwich’s planning board approved the proposed variation to the deed of planning obligation. A couple of months later, Knight Dragon returned to Greenwich again for the variation itself to be varied. The planning board approved this on 25 June 2013.
9. Meanwhile on 12 June 2013 Mr Brownie sent an email to Greenwich which contained the following:-

“I would like to make a request under the Freedom of Information Act to obtain a copy of financial viability report that was commissioned and undertaken to inform the variation to the Section 106 agreement over the eleven plots in question across Greenwich Peninsula that was agreed at the Council’s planning board of the 28 February 2013”.

We have ruled that the request applies to both the BNP Paribas report and to the Christopher Marsh and Co. Ltd. letter. Both have been disclosed by Greenwich, subject to redactions which are summarised in the Appendix. These redactions are the remaining disputed information in this case.

10. All parties are agreed that the appropriate freedom of information regime is EIR, not FOIA. We accept that concession because of the size of the whole development and its effect on the state of the landscape. The parties also agree that the exception

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in Regulation 12(5)(e) is engaged; and that this is the only exception we need consider.

11. Regulation 12(5)(e) reads materially as follows:-

“(5)... 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.”

12. The exception applies only if in all the circumstances of the case, the public interest in maintaining it outweighs the public interest in disclosing the information. There is a presumption in favour of disclosure. We have considered the balance of the public interest accordingly looking at the facts as they were in Summer/Autumn 2013, the period during which Greenwich would have been considering the request.
13. We took into account the large amount of written evidence supplied to us by the parties. We also heard oral evidence from Mr Parker, for Greenwich, Mr Atkins, who works for Knight Dragon and provided two witness statements, Mr Brownie and Dr Colenutt who gave evidence in support of Mr Brownie’s case.
14. For Greenwich, Mr Knight relied first on a general public interest in the maintenance of confidentiality. We were unable to accept that this added any significant weight against disclosure. As we have indicated, the basis of the confidentiality in this case cannot be the absolute keeping of confidences. The basis of the confidentiality is that those supplying the information to Greenwich recognised that the information would be subject to a freedom of information regime. The obverse of a general public interest in the maintenance of confidentiality is a general public interest against disclosure. This cannot form part of the public interest balancing exercise.

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15. In our judgement Mr Knight was on much stronger ground when stating that there is a public interest in the prevention of harm to economic interests. Indeed, regulation 12(5)(e) is directed specifically to commercial or industrial information protected by law. Within this, there is a strong public interest in protecting commercially sensitive decisions about price. There is also a specific public interest in preventing others obtaining a developer's expertise, or expertise which a developer has paid for, for free.
16. We also accept Mr Knight's submission that developers who engage with public authorities should not be disadvantaged as against their competitors who do not; although again, this point has its limits. Those who engage with public authorities know that the legislature has enacted terms in relation to freedom of information on which that engagement takes place.
17. Turning specifically to the planning process, Mr Parker, supported by Mr Atkins, feared that developers might be reluctant to exchange anything above the bare minimum of information in negotiations with the council if the present so called "open book" appraisals were also publicly available. Both accepted that it would be unlikely that developers would not engage at all with Councils on major development opportunities. The suggestion that disclosure might lead developers in future to give only the bare minimum of information seems to us to be of lesser force in this case which concerns, not an original application for planning permission, but a request to be released from an obligation. Just as Councils might face a choice between development or no development, and so have an incentive to consider variations, developers are likely to have an incentive to make the most persuasive case available to them if they felt that existing commitments had to be varied. It is difficult to conceive how developers could make a convincing viability argument without using such quantified information, and we accordingly take a doubtful view of arguments that the information would have to be dragged point by point out of those proposing a variation.
18. We find it particularly hard to accept that the pricing and other assumptions embedded in a viability appraisal are none of the public's business. They are the

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central facts determining the difference between viability and non viability. Public understanding of the issues fails at the starting line if such information is concealed, and discussion of the “point in time” nature of the viability models is frustrated.

19. Two other points relied on by Mr Knight were, in our judgement, of comparatively minor importance. It was said that rivals might be able to undercut a developer if more information were freely available. It is by no means clear to us why such market forces are contrary to the public interest – although the important larger point about Knight Dragon’s commercial interests still applies. When pressed, Mr Atkins for Knight Dragon argued that the commercial disadvantage that his firm would suffer from the release of the redacted figures was exactly analogous to that of an apple seller whose purchase price was made known to a potential buyer. However, he had no answer to the question of how the seller gave anything away to the buyer in terms of his bargaining position if all that he was actually revealing was the price at which he bought or would have sold his apple at a particular point in time. The market price for an asset at a later point is more likely to be determined by a purchaser’s estimate of the value of the asset, and the number and purchasing power of potential buyers, than any information on the price paid or the expectations as to price or ambitions for profit levels of the vendor.
20. It was also suggested that disclosure might undermine Greenwich’s ability to conduct future negotiations with other developers who might be in a better position to structure their own offers or insist on a comparable reduction in their own levels of affordable housing. We are more doubtful of this. Greenwich’s planning board made plain that no precedent was being set, and officers drew attention in this particular case to the potential loss of grant if developers did not bring forward plot disposals by certain deadlines. There is no reason why scrutiny of developers’ proposals should become less rigorous, or why councils should be helpless when earlier information or information relevant only to a different site is quoted to them.
21. In our judgement Greenwich’s case is strengthened by the community’s reliance on public/private sector partnerships to deliver affordable housing. There is a strong public interest in these developments succeeding and not being undermined, if

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indeed disclosure would undermine them given the interest of the developer in realising the value of assets.

22. That said, in the circumstances of this case, it seems to us that there are a number of factors which considerably dilute the potential harm that might result from disclosure. First, as we have indicated, eventual sales prices will always, it seems to us, be dictated far more by the market at time of disposal than by any assumptions recorded in the disputed information. This would apply not just, as is conceded, to private house sales but to, for example, the amount which insurance companies or other investors would pay for the right to receive ground rents or the potential for other developers to take over provision on particular plots or social housing providers to take on affordable housing. All such purchasers will have their own idea of what the market worth of an asset is to them. This will be influenced more by competition than by knowledge of the vendor's negotiating position. Second, we should not overlook the amount which competitors will already know. They can make their own assumptions about the market and costs – and may be thought likely to regard their own judgements as more accurate than a competitor's. The disputed information does not involve any "trade secrets"; rather it consists of conclusions drawn from information much of which is widely available. In similar vein Mr Facenna made the telling point that the size of proposed dwellings, stated to be very sensitive because of the consequences of disclosure, could be deduced from drawings routinely submitted with the planning applications. Finally, the value of the information to any competitor diminishes over time. In summer/autumn 2013 BNP Paribas figures about, for example, the housing market were compiled in late 2012 and were therefore almost 12 months old. Their value by then can have been little more than historic. As more time passes this effect will increase, but the impact of the variation in terms of the amount and distribution of social housing across the peninsula, as agreed in the variation, will be relatively permanent. Disclosure will serve as a benchmark for the wisdom of the variation decision, which will tend to be exposed more effectively to the cruel tests of hindsight if appraisal values, and in particular projected sale value and final profitability, are disclosed from the outset.

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23. Turning to the elements of the public interest favouring disclosure, Mr Armitage was right to remind us of the importance of rights to environmental information. As the preamble to directive 2003/4 puts it:-

“Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision making and, eventually, to a better environment.”

24. We also accept Mr Armitage’s submission that that, once it is accepted that the EIR apply, it is necessary to apply them in their full rigour. There is no room for an “EIR lite” approach on the basis that, viewed in isolation, the disputed information does not have an obvious environmental look about it. It is important that we do not take for granted the public interest in transparency and accountability which flows from the disclosure of information covered by the EIR.
25. It is right for us to take into account, as Mr Knight submitted that we should, that Greenwich has made available the officers’ reports to the planning board meetings, redacted versions of the reports, and the minutes of the planning boards.
26. Two factors, in our judgement, tell particularly in favour full disclosure.
27. First, the number of affordable homes to be provided on this enormous development, as well as their location, is an important local issue on which reasonable views are held strongly on both sides. Second, this is a case where a company, robust enough to take on the development of a huge site over a period of 20 years, acquiring its interest in 2012 and increasing its share in 2013, immediately asks to be relieved of a planning obligation freely negotiated by its predecessor. It justifies this change on the basis of a downturn in house prices it knew about at the time of purchase, using a valuation model that looks at current values only and does not allow for change in the many factors that may affect a valuation over time. It seems to us that in those circumstances the public interest in openness about the figures is very strong.

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28. We were referred to another report commissioned by Greenwich, this time, from Christopher Marsh and Co. Ltd. and BNP Paribas jointly. The updated December 2012 version recommended that Greenwich adopt a requirement of at least 35% affordable housing with 50% or 60% deliverable in some circumstances. The sense of a reviving housing market in the borough wide appraisal contrast strongly with the static and single figures in the BNP report and the Marsh review. We accept that the latter two are based on the specifics of the Greenwich peninsula site, the borough's largest development site with its particular infrastructure preparation scenario and prior history, and the Borough wide conclusions of the joint December 2012 report do not necessarily read across. We regard this not so much as an additional factor favouring disclosure but as an example of the confusion which can be created by a lack of transparency in relation to Knight Dragon's application to vary the s106 agreement, with the openness of the borough wide assessment contrasting with the essentially closed particulars of the BNP Paribas validity appraisal and Christopher Marsh review.
29. Having weighed all the evidence and arguments, in our judgement the admittedly important public interests in maintaining the regulation 12(5)(e) exception in this case do not outweigh the public interest in disclosing the information.
30. We are bound by the Court of Appeal decision in Veolia ES Nottinghamshire Ltd. v Nottinghamshire County Council (2010) EWCA Civ 1214 to approach the case on the basis that Knight Dragon's rights to property under ECHR are engaged. It seems to us to be very doubtful whether a balancing exercise under EIR which gives proper weight to the significant general public interest in the protection and maintenance of confidential commercial information would result in a breach of ECHR. We are satisfied that the decision we have taken is not in breach of the Human Rights Act 1998.
31. We were also referred to a decision of Patterson J on Friday 24 October 2014 in the case of The Queen (on the application of Nicholas Perry) and London Borough of Hackney. In that case Patterson J reviewed the approach taken by a local authority when dealing with an application for planning permission which involved a

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confidential viability assessment. Patterson J scrupulously avoided dealing with the impact of EIR (see para 106), as we must be scrupulous in avoiding comment on the merits or procedure of Greenwich's decision. There is in our judgement no principle of law contained in the High Court's decision which is binding on our evaluation of the public interest in this case.

32. We accept that some of the categories of redacted information are more sensitive than others. In this connection, Mr Knight drew our particular attention to residual land value figures which Knight Dragon's witness described. We are satisfied, however, that our reasoning and conclusion on the public interest balance applies to all the categories of redacted information.
33. We conclude with some further observations about issues arising on cross examination and questioning of witnesses:
34. One argument against disclosure of the redacted information was that those receiving it would be unlikely to understand it. In our experience this is never a useful objection to disclosure under FOIA or EIR. It is increasingly open to question whether the public should be expected to accept the "expert view" without opportunity to see the supporting factual evidence.
35. In this case the response on behalf of the requester was that he could have commissioned expert advice which would, according to their expert witness, be likely to expose the weakness, susceptibility to change over time, or other uncertainties applying to assumptions and values. This could be achieved in part through comparison with other models or information in the public domain. This might have supported the contention that the scrutiny of the BNP Paribas appraisal in the Marsh Report should have emphasised uncertainties and said that values might better have been presented as a point within a range of possible outcomes. We are not in a position to make such an analysis, but in our view further disclosure of detail would enrich the debate taking place on an issue agreed by all parties to be of considerable public importance.

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36. Another implication which appeared to be suggested in cross examination of Mr Brownie was that the residents he represented took a “NIMBY” view of increased provision of affordable housing on plots near their own homes. We understood their concerns to be more about the reduction of the overall level of social housing and the polarising effect of there being no social housing on some sites and higher than expected proportions on others. They were also concerned whether social infrastructure provision was likely to catch up with the higher potential concentrations (up to 60% on some plots) of affordable homes
37. A third implication was that as residents had the same information as Councillors at the relevant planning board meeting, they were not disadvantaged in respect of the decision. The premise was that there was no need to consult and no statutory obligation to consult on the s106 variation, and the appropriate way of testing the validity of the appraisal was to commission expert review on confidential terms. It is not for us to say what depth of information Councillors should have expected or asked for, although we note that at least one Councillor would have preferred more detail about the appraisal. The objective of the EIR is to allow the public and in this case the affected community to have relevant factual information in time for them to participate effectively in environmental decision making. That intention is served by exposure of sufficient information to allow a fully informed interrogation of the recommendation.

NJ Warren**Chamber President****Dated 30 January 2015****Promulgation Date 2 February 2015**

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THE APPENDIX

1. Anticipated sales values of residential property, otherwise known as unit pricing information.
2. Anticipated sales values of affordable housing property, inclusive of grant.
3. Yield price of ground rents.
4. Costs of construction, or build costs.
5. Common costs, or infrastructure costs allocated to plots.
6. Residual land value figure, with and without benchmark applied.
7. Anticipated sales values of car parking facilities.
8. Specific types of cost figure where percentage given.
9. Specific profit figures where percentage given.
10. Totals or sub-totals: BNP, pp.904