



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2009/0032
Information Commissioner's Ref: FER0127659

Heard at Park Crescent, London, W1
On 14-15 October 2009

Decision Promulgated
20 October 2009

BEFORE

CHAIRMAN

ANDREW BARTLETT QC

and

LAY MEMBERS

HENRY FITZHUGH
ROSALIND TATAM

Between

SOUTH GLOUCESTERSHIRE COUNCIL

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

BOVIS HOMES LIMITED

Additional Party

Subject matter:

EIR reg 12(4)(e) – internal communications exception – whether engaged in respect of reports by outside consultants

EIR reg 12(5)(e) – commercial confidentiality exception – whether confidentiality “provided by law” – whether provided to protect a legitimate economic interest

EIR reg 12(1)(b) – public interest balance – aggregation of public interests in maintaining exceptions

Cases:

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

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

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

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

Representation:

For the Appellant: Anya Proops

For the Respondent: Timothy Pitt-Payne

The Additional Party did not appear at the hearing.

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 23 March 2009.

Information Tribunal

Appeal Number: EA/2009/0032

SUBSTITUTED DECISION NOTICE

Dated 20 October 2009

Public authority: South Gloucestershire Council

Address of Public authority: The Council Offices, Castle St, Thornbury, South Gloucestershire, BS35 1HF

Name of Complainant: Bovis Homes Limited

The Substituted Decision

The “disputed information” consists of the following three documents except for those sections of the 2003 report which have already been disclosed by the Council:

The North Field, Filton Aerodrome Final Report dated April 2003 by Chesterton Planning and Development

Development Appraisal dated 30 August 2005 by Carter Jonas LLP

Development Appraisal dated 24 March 2006 by Carter Jonas LLP.

For the reasons set out in the Tribunal’s determination, the substituted decision is that the Environmental Information Regulations did not require the Council to disclose the disputed information.

This substituted decision does not affect paragraphs 52 and 53 of the Commissioner's Decision Notice, concerning procedural breaches by the Council. Nor does it affect the recommendation made by the Commissioner in paragraph 56 concerning the Council's internal review procedure.

Action Required

No action is required by the Council in response to this decision.

Dated this 20th day of October 2009

Signed

Andrew Bartlett QC
Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This appeal is concerned with the scope and application of two exceptions in the freedom of information regime in the Environmental Information Regulations 2004 (“EIR”). The exceptions are concerned with internal communications of the public authority and the confidentiality of commercial information. The information in question consists of development appraisals held by a local planning authority.

The requests for information

2. On 3 October 2003 the additional party (“Bovis”) made two planning applications to the appellant (“the Council”) for a mixed use development of a large site known as North Field Filton. There followed negotiations between Bovis and the Council with a view to reaching a s106 agreement. A s106 agreement¹ is an agreement between a developer and a local planning authority for additional works to be carried out and/or financial contributions to be made for public works, in order to make the proposed development acceptable in planning terms, by mitigating or compensating for what would otherwise be negative impacts of the development.
3. Bovis became aware that the Council’s position in the negotiations was informed by an independent development appraisal that had been carried out for the Council by consultants. On 30 January 2006 Bovis requested a copy of the appraisal, citing the Freedom of Information Act (“FOIA”).
4. The Council refused the request under FOIA, both initially and on internal review, but ultimately took the view (correctly) that the relevant statutory provisions were not those in FOIA but in the EIR. The Council ought then to have reconsidered under EIR but failed to do so.

¹ under the Town and Country Planning Act 1990, as amended.

5. On 27 July 2006 Bovis renewed its request, relying specifically on the EIR, and at the same time complained to the Information Commissioner. The Council refused again, on the basis that the exceptions for internal communications and confidentiality applied, and that the public interest in maintaining the exceptions outweighed the public interest in disclosure.
6. Meanwhile, on 14 March 2006 the Council issued a decision refusing one of the two planning applications, and on 30 June 2006 Bovis appealed to the Planning Inspectorate, while continuing negotiations with the Council both on the planning appeal and on the duplicate planning application.

The complaint to the Information Commissioner

7. In the course of the Commissioner's investigation it was determined that the information held by the Council and falling within the scope of one or both requests consisted of a report dated April 2003 by Chestertons, and reports by Carter Jonas dated 30 August 2005 and 24 March 2006.
8. It is worth noting that the fact that the requester was Bovis neither strengthened nor weakened the case in favour of disclosure. The relevant considerations (including the public interest considerations) would be the same if the requester was any member of the public. However, the practical significance of disclosure to Bovis is necessarily a factor in the analysis, since any disclosure to the public would include disclosure to Bovis.
9. The Commissioner issued his Decision Notice on 23 March 2009. The Tribunal has commented in other cases on the undesirability of delays in the Commissioner's consideration of matters referred to him,² and we say no more about it in this case.
10. The Commissioner took account of both of the information requests. The Commissioner adjudged that the information was environmental information, falling within the EIR. He considered that neither of the exceptions relied upon by the Council was engaged; and so he did not need to consider the application of the public interest test. He required the Council to disclose the information.

² See, for example, *Students Loan Company Ltd v Information Commissioner* EA/2008/0092, paragraph 7.

The appeal to the Tribunal

11. The Council commenced an appeal to the Tribunal on 17 April 2009, contending that both of the exceptions relied upon applied, and that the public interest balance favoured non-disclosure.
12. The Tribunal joined Bovis as an additional party. Bovis supported the Commissioner's decision, but in the event did not appear at the appeal hearing.
13. Prior to the matter coming before us the Council disclosed some introductory material to one of the reports and three appendices.³ The disputed information that we are concerned with consists of the remaining elements of the three reports.

The questions for the Tribunal

14. There has been no appeal from the Commissioner's finding that the disputed information was environmental information within the EIR. Regulation 5 imposes on public authorities a duty to make environmental information available on request. Regulation 12(2) mandates a presumption in favour of disclosure.
15. Subject to the public interest test, a public authority may refuse to disclose information to the extent that-
 - “the request involves the disclosure of internal communications” – Reg 12(4)(e)
 - or
 - “its disclosure would adversely affect ... the confidentiality of commercial ... information where such confidentiality is provided by law to protect a legitimate economic interest” – Reg 12(5)(e).
16. The Council's case on appeal is that the Commissioner took too narrow an approach to each of the two relevant exceptions.
17. The Commissioner maintains his position that the disputed information does not involve the disclosure of internal communications. In regard to the confidentiality

³ On reconsideration, the Council took the view that it had mistakenly disclosed more of the Chestertons report than it ought to have done. We are not required to make any decision about that.

exception, he accepts that the disputed information was commercial information, and that its confidentiality would have been adversely affected by disclosure, but contends that the exception did not apply because the confidentiality was not provided by law, and because it was not to protect a legitimate economic interest.

18. When an exception applies, the public authority may refuse disclosure if-

“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information” – Reg 12(1)(b).

19. Accordingly the issues in this appeal are:

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

(2) Did the request engage the exception in EIR regulation 12(5)(e), or is the Commissioner right in one or more of his contentions that the exception did not apply because

(a) the information’s confidentiality was not provided by law,

(b) the confidentiality was not to protect a legitimate economic interest?

(3) If either or both of the relevant exceptions was engaged, in all the circumstances of the case did the public interest in maintaining any such exception outweigh the public interest in disclosure?⁴

20. These questions fall to be considered as at the time when the Council dealt with the requests. That is because the appeal is from the decision of the Commissioner, whose statutory function was to consider whether the information requests were dealt with by the Council in accordance with the EIR: see FOIA s50, as applied to the enforcement of the EIR by EIR regulation 18.

⁴ This question is subject to a qualification concerning aggregation of exceptions, which we will refer to further below.

Evidence and findings

21. We heard oral evidence, in both open and closed session, from Mr Brian Glasson BA MA MRTPI CMS, who is head of development services at the Council, and from Mr John Cann MBA Dip (Est Man) FRICS, who was the principal author of the Chestertons report, being at the relevant time the National Director responsible for Chestertons' residential development and consultancy team based in Bristol. We also received in evidence a large volume of correspondence and other documents concerning the background to and progress of the planning applications made by Bovis. We received in closed session the disputed information itself and some related confidential correspondence.

22. We found both witnesses to be impressive, informative, credible and reliable. Both were clearly able and experienced in their respective fields, and throughout did their best to help us with careful and accurate answers to the questions put to them. The only qualification we make to this assessment is that Mr Glasson's witness statement contained some phrases, which appeared to us to have been influenced by legal considerations, designed to assist the characterisation of the consultants' reports as internal communications.⁵ In reaching our conclusions we have had regard to the form and substance of the actual relationship between the Council and the consultants as disclosed by the evidence.

23. Having regard to the nature of the issues and our view of the witnesses it is not necessary for us to rehearse the voluminous evidence which we received. Based on that evidence we can summarise our principal findings material to the issues as follows:

- a. The site was allocated for development in the Local Plan which was emerging in 2002 and 2003. A master plan for the site was drawn up by potential developers and there were discussions with the Council concerning the nature of an appropriate scheme. The Chestertons development appraisal of April 2003 was made in this context, to assist the Council in the formulation of the Local Plan and in anticipation of an application for planning

⁵ Such as: 'the council ... embedded the work of the consultants into the council's assessment team'.

permission for the scheme. It was a detailed appraisal, of high quality, informed by Chestertons' national expertise.

- b. Bovis's applications for planning permission were made on 14 October 2003. The Council was rightly keen that the development should go ahead, but only in an acceptable manner, with appropriate mitigation of its potentially negative impacts.
- c. The development under consideration was large. It was to be a major mixed use development on 74ha of land, including 2,200 new dwellings and 66,000 sq m of employment floor space.
- d. The high importance of the s106 process is illustrated by the nature of the obligations ultimately agreed with Bovis in late 2007 and early 2008, which involved:
 - i. £2.9m contribution to off-site public open space provision
 - ii. construction of a new roundabout and link road
 - iii. £3.8m contribution to off-site highway works
 - iv. £4.4m contribution to improved bus services
 - v. 6.4ha of public open space, and £1.3m contribution to maintenance
 - vi. construction of a 60 place nursery
 - vii. 2ha site for a primary school
 - viii. £5m for a two form entry primary school and £1.6m to expand existing capacity
 - ix. provision of a 50 bed extra-care facility
 - x. provision of an 870 sq m community building
 - xi. over 730 units of affordable housing

- xii. five or six figure contributions to public art, a car club, provision of a community worker and improved library services
- e. Where a development is on this scale, the parties come to a s106 negotiation from unequal positions. The three principal elements of inequality are:
- i. There is a mis-match of information. The developer has information to which the Council is not privy. It knows, for example, the price of the land, what it expects to spend on carrying out the development, its sales and phasing policies, and the projected income figures. These are informed both by specific investigations of the particular site and by experience gained elsewhere.
 - ii. There is a mis-match of resources. The developer has available to it expertise which the Council does not have. In addition to its in-house expertise the developer can commit large sums for specialist advice from consultants. In contrast, the Council has limited expertise in house and a very limited budget for buying in outside expertise. It has to be able to justify all expenditure to its taxpayers. This imbalance applies notwithstanding South Gloucestershire's status as a unitary authority (meaning it is in a stronger position than many local councils, some of which are much smaller).
 - iii. There is a mis-match of room for manoeuvre. A developer with a national business has considerable flexibility. Answerable to its shareholders, it can choose whether to retain, develop or sell a site, or parts of it, and when. It can concentrate its operations in a different region first, if it thinks it will be more profitable to do so, or await changes in the market or in the regulatory framework. The Council operates in its own area only, and its freedom of decision is tightly constrained both by statute and by central government.
- f. The Council's task in negotiating the s106 agreement was delicate and difficult. The developer wished to maximise its financial return. The Council had to press for as much as possible from the developer to mitigate the impacts of the development, while not insisting on so much as would

prejudice its viability. If it set its sights too low, the Council and its taxpayers would suffer from the negative impacts themselves or from the increased financial burden of mitigating them by expenditure from the public purse. If it set its sights too high, the development would not be financially viable for the developer and (subject to the outcome of any appeal) would not go ahead. The Council would then not be able to meet the development targets imposed on it by central government, less suitable sites would come under pressure for development instead, and the economic and other benefits of the development for the local community, including additional housing and jobs, would be lost.

- g. The Council did not have in house the expertise required for a detailed development appraisal of the application site. In order to conduct the negotiation effectively, the Council needed to strengthen its negotiating position by redressing the imbalance as far as it could. The Chestertons appraisal, and the subsequent appraisals by Carter Jonas (obtained because Chestertons went into administration), were used for this purpose. They greatly enhanced the Council's ability to conduct the negotiations effectively.
- h. The engagement of the consultants was made in the ordinary way by means of contracts for the provision of expert services to the Council. The contracts contained appropriate confidentiality clauses which bound the consultants. The consultants worked closely with the Council but were not seconded to the Council or otherwise embedded within the Council's organisation. Nor did they take decisions or otherwise act on the Council's behalf. The Council regarded the consultants' role as important not only because the same expertise was not held in house but also because the consultants brought an independent view from outside the Council which acted as a reality check on the Council's perception of the issues.
- i. Some s106 negotiations are conducted on an open-book basis, where the Council and the developer agree to share their confidential information and appraisals with each other. This increases the chance of an appropriate

outcome, but Bovis was not willing to go down that route in 2003-2006.⁶ At the time the Council had no means of compelling Bovis to disclose its information.

- j. As negotiations proceeded, the Chestertons appraisal went through a number of iterations, testing the effect of adjustments to the assumptions made. Some were merely seen on screen, others were communicated in writing to the team within the Council responsible for dealing with Bovis's applications.⁷ The team regarded all such information as highly confidential.
- k. The Council expected a very high degree of public scrutiny in the way it carried out its functions and made decisions. A large amount of information relating to Bovis's applications, and the Council's assessment of them, was released on the Council's website or made available to the public on request. However, the Council was also concerned not to release information which could justifiably be withheld under FOIA or EIR, where such release would have damaged the interests of the Council and its taxpayers.
- l. Given the absence of an open-book approach, it was important to the Council to keep confidential the financial details of the appraisals (including the methodology and the assumptions). As Mr Glasson and Mr Cann explained-
 - i. At the point when the information requests were made Bovis was not arguing that the Council's proposed requirements would render the development economically unviable overall, albeit Bovis had suggested that viability was imperilled at some earlier points in the process.
 - ii. Disclosure would have involved the risk that Bovis would use the appraisal to retreat from its position on viability. It could 'cherry pick' the elements of the Council's appraisal which were more in its favour than its own appraisal, so as to recalculate the viability less

⁶ That is in contrast with Bovis's current stance. We understand Bovis has asked to re-open negotiations on an open-book basis because of the altered economic situation.

⁷ The Commissioner did not contend that such iterations fell within the scope of the information requests and it is not necessary for us to consider whether they did so or not.

favourably, and could also focus its attention on challenging the weaker adverse elements of the Council's appraisal. Manipulation of the Council's figures by large amounts in a manner favourable to Bovis would have been easy because of the sensitivity of outcomes to small alterations in the assumptions fed in to the model. The Council, having no other documents to compare its appraisal against, except for such selected information as Bovis chose to put forward in its own favour, would be effectively pressurised to accept Bovis's arguments, thus increasing the risk of a larger burden of mitigation falling on public funds, unless the Council chose to refuse the application.

- iii. Because of the detailed nature of the 2003 report, as at 2006 these considerations still applied at least as much to the 2003 report as to the updated Carter Jonas reports.
- m. On behalf of the Commissioner Mr Pitt-Payne in a powerful cross-examination criticised the logic of Mr Glasson's and Mr Cann's reasoning concerning the likely course of negotiations if disclosure were made, but we were not ultimately persuaded by his criticisms. Negotiations are influenced also by factors other than strict logic, and we accept the evidence of the witnesses on the practical realities and risks of a negotiation of this kind. In particular, we accept that disclosure of the appraisals in response to the information requests made in 2006 would have accentuated the imbalance of power. In our judgment, having heard the witnesses cross-examined, we consider this would probably have led to a substantially less favourable outcome for the Council and its taxpayers.

Legal analysis

Exception 12(4)(e) – internal communications

24. The EIR were passed to give effect to Directive 2003/4/EC. Recital (16) of the Directive states:

“The right to information means that the disclosure of information should be the general rule and that public authorities should only be permitted to refuse a

request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. ...”

25. In line with the recital, Article 4.2 of the Directive requires that the grounds under which a request for environmental information may be refused “shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure”. In September 2009 the Information Commissioner published Guidance titled “An introduction to the Environmental Information Regulations (EIR) exceptions”. We regard that guidance as unhelpful in so far as it states that the exception for internal communications “should be interpreted broadly”.

26. We were referred to the decision in *Secretary of State for Transport v Information Commissioner* EA/2008/0052. In that case the Tribunal held that the internal communications exception was engaged in relation to a draft report by Sir Rod Eddington, the chief executive of British Airways plc, prepared for the Secretary of State. We note that the facts were exceptional: the Tribunal concluded that Sir Rod was firmly embedded within the civil service and acted as the head of a team of civil servants. In regard to the scope of the exception, the Tribunal stated: “We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external communication, for example, by reference to the nature of the communication or its audience. It will depend on the context and facts in each situation.” [paragraph 94]

27. The Council submitted that in the present case the consultants were integrated into the Council in the relevant sense. We disagree, and have indicated our finding in paragraph 23h above.

28. The Commissioner invited us to do what the Tribunal said was not desirable or possible. He proposed that communications with a third party consultant would only be internal ‘in very limited circumstances, where the third party is closely integrated into the local authority and is exercising legal or administrative functions as part of or on behalf of the authority’. We decline the Commissioner’s invitation. We respectfully agree with paragraph 94 of the Transport decision and do not consider

it appropriate or helpful to add the proposed gloss to the statutory language which, while it may aid the analysis in some cases, may distort it in others.⁸

29. The Council urged us to take a purposive approach, by following the wording back to its sources. The language of the regulation closely reflects the language of the Directive which gave rise to it (Directive 2003/4/EC):

“Member States may provide for a request for environmental information to be refused if: ... the request concerns internal communications, taking into account the public interest served by disclosure” – Article 4.1(e).⁹

30. The Directive was foreshadowed in a proposal presented by the Commission on 29 June 2000. The explanation of the proposed exceptions included:

“It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns ... internal communications. ...”

31. Based on this explanation, Ms Proops for the Council submitted that our interpretation of the exception should not be so restrictive that it then failed to serve the underlying purpose of allowing a private thinking space. She said a mechanistic approach would be inappropriate. Why should the outcome be different, depending on whether the person giving the advice for the purposes of internal deliberations by the Council was an employee or an outside consultant? She submitted that the test should be whether the information was generated in order to inform an internal process which required a private space. She also relied on paragraph 7.4.5.2 of the Guidance to the Environmental Information Regulations 2004, published by the Department for Environment Food and Rural Affairs in March 2005, which noted the possibility of the exception applying to reports by inspectors or consultants reporting to the public authority as part of an internal process.

⁸ Mr Pitt-Payne said the proposal was not put forward as a gloss on the statute, but in our view that is what it would amount to.

⁹ We were also referred to the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998). Article 4.3(c) of the Convention provided: “A request for environmental information may be refused if: ... (c) The request ... concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.” The Directive was made to give effect to the Aarhus Convention.

32. In response Mr Pitt-Payne for the Commissioner accepted that matters of form were not determinative on their own. He submitted that we should look at both the form and the substance of the relationship between the Council and the consultants, and that for present purposes the crucial word in the statutory definition of the exception was “internal”.
33. We have some sympathy with Ms Proops’ submission, and would not wish to encourage a narrowly mechanistic approach to the interpretation of the exception. But we accept Mr Pitt-Payne’s submission, as far as it goes, remembering at the same time that the factual and legal nature of the relationship between the Council and the consultants is only the context of the communications on which we need to focus. In the final analysis it is not the relationship but the communications themselves on which we must make a judgment. Paying attention both to form and to substance, and to the particular circumstances and nature of the communications in question, we are not convinced that the consultants’ reports can properly be characterised as internal communications of the Council. The Council has not satisfied us that the internal communications exception was engaged.

Exception 12(5)(e) – commercial confidentiality

34. This exception may be analysed as containing three elements-
- a. the confidentiality of the commercial or industrial information;
 - b. the confidentiality is provided by law to protect a legitimate economic interest;
 - c. disclosure would adversely affect the confidentiality.
35. There was in the end no dispute between the parties that the reports constituted confidential commercial information, and that disclosure would adversely affect such confidentiality (since it would destroy it).
36. The Commissioner contended that the confidentiality was not provided to protect a legitimate economic interest but, looked at overall, was for enabling the Council to exercise its statutory planning functions. We are unable to regard those as two mutually exclusive purposes. In our view the Council’s duty to define appropriate

s106 obligations cannot sensibly be separated from the purposes of those obligations, which included securing economic advantages and avoiding economic detriments, as we have explained above.

37. Mr Pitt-Payne's principal argument was that the confidentiality of the information was not "provided by law". The words "provided by law" should be read as meaning "imposed on the public authority by law", for otherwise they were mere surplusage. In this case the Council made a choice to treat the information as confidential and to obtain the consultants' agreement to obligations of confidentiality. It was free to disclose the information at any time if it chose to do so. The confidentiality was not imposed on the Council by law.

38. He referred us to the decision of the Tribunal in *Office of Communications v Information Commissioner* EA/2006/0078. In that case the Tribunal considered, obiter, the meaning of exception 12(5)(e). It said at paragraph 64:

"We interpret the language of ... 12(5)(e) to mean that, in order for the exception to be engaged, a party relying on it must establish that it has a right to protect the information in question under the law of confidentiality. This requires it to establish that the information has the necessary quality of confidence, that it was communicated to a third party in circumstances that give rise to a reasonable expectation that confidentiality would be maintained and that unauthorised disclosure is either threatened or has occurred."

39. Mr Pitt-Payne relied on this passage for the proposition that the exception was concerned only with the case where the public authority owed a duty of confidentiality to a person from whom it had obtained information, and not with the converse case where the public authority had merely extracted an obligation of confidentiality from a third party.

40. We do not consider that paragraph 64 of the Ofcom decision, properly understood, supports Mr Pitt-Payne's proposition. The Tribunal's statement of the law in that paragraph was not intended to be exhaustive but was tailored to the facts under consideration.¹⁰ Ofcom had received information from mobile network operators

¹⁰ One of us was a party to the decision, but we consider this to be self-evident in any event.

which was alleged to be the operators' confidential information, in respect of which Ofcom owed a duty of confidence to the operators. The Tribunal had no occasion to consider what the position would have been if the information that was alleged to be confidential had been Ofcom's own information.¹¹

41. We are unable to see either in the express words of exception 12(5)(e) or in the policy of the exception any justification for the contention that the exception applies only where a confidentiality obligation is owed by the public authority and not where a confidentiality obligation is owed to the public authority. Wherever, because of the sensitive nature of the information, the law recognises the confidentiality of the information as deserving of legal protection, the confidentiality is provided by law.¹² This exception stands in contrast with the exemption in FOIA s41, which is expressly directed to information received in confidence by a public authority, where disclosure by the authority would amount to an actionable breach of confidence.

42. Mr Pitt-Payne accepted that, given the nature of the information in the present case, it was clearly confidential so as to deserve legal protection in English law, whether there was a term in the consultants' contracts to that effect or not.¹³ In our judgment the confidentiality was provided by law to protect legitimate economic interests, within the meaning of exception 12(5)(e). Disclosure would adversely affect that confidentiality and damage the economic interests which we have identified. Our conclusion is that the confidentiality exception was engaged.

The public interest test

43. We commence consideration of the public interest by reminding ourselves of the statutory presumption in favour of disclosure of environmental information, and that we are concerned with the situation at the time when the requests were considered by the Council.

¹¹ The Tribunal's statement of the law was repeated and relied upon in *North Western and North Wales Sea Fisheries Committee v Information Commissioner* EA/2007/0133. Like the Ofcom case, that was a case where the public authority was said to be under an obligation to third parties to keep their information confidential.

¹² We regard the wording of the Aarhus Convention at article 4.4(d) (referring to information "protected by law"), the corresponding explanation in the Aarhus "Implementation Guide", and the wording of article 4.2(d) of the Directive as being consistent with our view.

¹³ The sensitivity of the information was underscored by Mr Cann's evidence that it was not only the Council but also Chestertons who had interests to protect, which could be adversely affected by disclosure.

44. The Commissioner submitted, in favour of disclosure in the public interest, that disclosure would-

- a. foster accountability and transparency in respect of the Council's planning process;
- b. inform public understanding of how the planning process was operated by the Council in this specific case;
- c. increase public understanding of the Council's general approach to handling planning issues, particularly in respect s106 agreements;
- d. inform the public more fully about the assistance given to the Council by external consultants in the planning process, both in the specific case and more generally.

45. We accept all of these points. We consider, however, that the potential significance of the disputed information in the above respects would have been relatively limited in view of the very large amount of other information which was in the public domain concerned with this particular site and also concerning the planning process generally.

46. On the other side of the equation we must consider the public interest in maintaining the confidentiality exception in the circumstances of this case. Here we draw attention to our factual findings. The development was an important one for the Council and for the inhabitants of South Gloucestershire. The economic advantages and disadvantages being played for in the negotiations with Bovis were weighty, involving millions of pounds. The asymmetry of power in the negotiations was a very real concern, and the potential for loss to the public purse was very significant. The effective conduct of the negotiations was imperative in the interests of the public, in particular the taxpayers of South Gloucestershire. Given the lack of reciprocity, in our view disclosure of the disputed information would have been detrimental to those interests. This applies to all three reports.

47. Accordingly, in our judgment the public interest in disclosure, as we have described it above, was in the circumstances of this case strongly outweighed by the public interest in maintaining the exception.

Aggregation of exceptions

48. As a result of our findings that only one exception applied, and that the public interest in maintaining that exception outweighed the public interest in disclosure, we are spared the necessity to consider aggregation of exceptions for the purposes of the public interest test, as directed by the Court of Appeal in *Office of Communications v Information Commissioner* [2009] EWCA Civ 90, paragraphs 34-43.

49. We acknowledge that we are bound by decisions of the Court of Appeal and that it is our duty loyally to follow them unless overturned by higher authority. We are aware that the decision of the Court of Appeal is currently under appeal to the Supreme Court of the United Kingdom, and the following remarks are made by the Chairman and Dr Fitzhugh only.¹⁴ We make no comment on the arguments on statutory construction with which the Supreme Court will be concerned, but we have to say that we have found ourselves unable to understand how in practice the Court of Appeal's concept of aggregating exceptions when applying the public interest test could produce different results from considering exceptions singly. Richards LJ dealt with the aggregation issue in theoretical terms, without giving an example of how aggregation might make a difference in practice.

50. We first note that some circumstances of a case may be of more relevance to one exception than to another. As the Tribunal said in *Student Loans Company Ltd v Information Commissioner* EA/2008/0092, in regard to the similar public interest balance under FOIA:

“The public interest in disclosure has by its nature a wide ambit, since it includes the high level reasons why Parliament passed the Act and why disclosure is generally in the public interest because it promotes transparency, accountability, public confidence, public understanding, the effective exercise of

¹⁴ Ms Tatam was a member of the Tribunal which decided the Ofcom case at first instance, and expresses no view on aggregation beyond that already contained in the first instance decision.

democratic rights, and other related public goods. The other side of the balance is more narrowly defined. The statute directs us to consider whether the public interest in disclosing the information is outweighed not by *the public interests in withholding the information*, but by *the public interest in maintaining the exemption*. The latter is focused not on generalised reasons why it would be good to keep the information private but on the aspects of public interest which relate to the particular exemption or exemptions defined by the Act and relied upon in the particular case.” [paragraph 53]

51. We do not understand the concept of aggregation as directing us to treat as relevant, to a particular exception, facts which are not in truth relevant to that exception.
52. Where in the circumstances of the case the public interest in maintaining a particular exception is outweighed by the strength of the public interest in disclosure, we are unable to appreciate how the balance can be reversed by highlighting the existence of other exceptions which are also outweighed by the strength of the public interest in disclosure. The statutory question - whether the public interest in maintaining the exception ‘outweighs’ the public interest in disclosing the information - directs us, in figurative language, to make a judgment on relative importance. This is an intellectual, not a mechanical or mathematical, exercise. ‘Aggregation’ seems to mean ‘thinking about the public interests in favour of all applicable exceptions at the same time’. If on considering all the circumstances the Tribunal judges that the public interest in maintaining exception A is less important than the public interest in disclosure, and that the public interest in maintaining exception B is also less important than the public interest in disclosure, we cannot see how thinking about both exceptions at the same time can somehow transform the public interests in maintaining them into something more important than the public interest in disclosure. We express the hope that the decision of the Supreme Court in the Ofcom appeal will provide the guidance which the Tribunal needs in order to understand the balancing exercise which it is required to carry out.

Conclusion and remedy

53. We have concluded on the evidence that was presented to us that the confidentiality exception in regulation 12(5)(e) was engaged and that the public interest in maintaining the exception outweighed the public interest in disclosure.

54. It follows that the Council was justified in not disclosing the disputed information. Accordingly, the Information Commissioner's decision to the contrary was not in accordance with law, and we allow the appeal.

55. Our decision is directed to the circumstances at the time the request was dealt with by the Council. The assessment of the factors affecting disclosure would be different if made as at today's date, but it is not necessary for us to decide whether a fresh request, in the circumstances which currently pertain, should be answered by disclosure. It would be necessary to consider, among other things, the current attempt by Bovis to renegotiate the terms of the s106 agreement owing to the deterioration in the economic situation and the possible relevance of information within the appraisal to other sites. The answer would not be obvious and it is better that we express no view on the likely outcome.

56. Our decision is unanimous.

Signed

Andrew Bartlett QC

Deputy Chairman, Information Tribunal

Date 20 October 2009