First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0255

Heard at Field House
On 2 April 2019

Before

JUDGE SHANKS

ANDREW WHETNALL

MARION SAUNDERS

Between

TONY MASON

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:
Appellant: in person
Commissioner: not present

DECISION OF FIRST-TIER TRIBUNAL

For the reasons set out below this appeal is allowed and the following substitute decision notice is issued.

Substitute Decision Notice

Complainant: Tony Mason

Public Authority: Ministry for Housing, Communities and Local Government

Decision
The Public Authority did not deal with the Complainant's request for environmental information made on 15 April 2018 in accordance with Parts 2 and 3 of the Environmental Information Regulations 2004 (EIR) in that they redacted certain passages (identified below) from the requested file on his PROD application relating to Land at Ravensfield House, the Burroughs, Hendon made on 25 January 2016 which they were not entitled to redact on the basis (as claimed) of regulations 12(4)(e) and/or 12(5)(f) and/or that they were outside the scope of his request.

Steps to be taken
The Public Authority must by 1600 on 10 May 2019 supply to the Complainant the following documents:

(a) a copy of the memo dated 23 January 2017 (at pages 214-216 of the Tribunal bundle) with the manuscript on page 214 and the redacted text under the heading "Conclusion and Recommendation" on p216 restored;
(b) a copy of the emails at page 223 with the redactions in the paragraphs beginning "Thanks for the update", "The lease is currently holding over" and "We have reread the covenants" restored (except that in the paragraph beginning "The lease is currently holding over" certain words which constitute personal data which have been separately notified may remain redacted).

HH Judge Shanks
12 April 2019

REASONS

Background facts

1. The Appellant, Tony Mason, owns a house in Egerton Gardens, Hendon in the London Borough of Barnet. There is a piece of unused land which backs onto his garden and those of five of his neighbours which is referred to in our papers as "the land at (or behind) Ravensfield House". This land is about 320 sq metres in size. It has no direct access by road or footpath. LB Barnet owns the freehold to the land and it is leased to Middlesex University as part of a bigger parcel which includes Ravensfield House. The land has been unused since 1993. Mr Mason and his neighbours have been interested in acquiring it for some time.

2. On 25 January 2016 Mr Mason made a request to the relevant Secretary of State under the so-called PROD (Public Request to Order Disposal) Scheme to use his powers under section 98 of the Local Government, Planning and Land Act 1980 to order the Council to dispose of the land.

3. While that request was still outstanding, there were negotiations between the Council and the residents and by a "without prejudice and subject to contract" letter dated 17 June 2016 the Council agreed in principle to sell the land to Mr Mason and his five neighbours; the letter made clear that sales would have to be simultaneous and involve all the land as it would not be satisfactory for the Council to be left with any "landlocked land". Two sets of valuations were obtained by the Council, neither of which was acceptable to Mr Mason, and for that and possibly other reasons the proposal fell through and the Council wrote confirming that they would no longer be proceeding with any sale on 16 January 2017.

4. A decision on the PROD was then made by the Secretary of State by letter dated 25 January 2017. The letter records that the Secretary of State accepted that the land was "unused/underused" and goes on to say this:

> **While the Council's letter of 16 January raises some question on whether a sale will proceed on the current negotiations, in all the circumstances, the Secretary of State is not persuaded that a direction to dispose would be appropriate in the wider public interest …**
> **Accordingly, the Secretary of State has decided that it would not be appropriate for him to give a direction in this case …**

The request for information, complaint and appeal

5. On 15 April 2018 Mr Mason wrote to the Ministry for Housing, Communities and Local Government requesting information under the EIR in the following terms:

> **I request … all non-exempt information held in connection with my PROD … application …**
> **I am seeking access to the complete file. This includes:**
> **1.Any input information provided by any organisation (particularly [the Council]) relevant to the outcome of the decision**
> **2. Any legislation applied by the [Ministry] when making the final PROD decision**
> **3. Any departmental guidelines used by the Ministry to guide the "public interest" test decision**
> **4.The detailed analysis that formed the basis of the public interest on which the outcome of the decision was based**

6. The Ministry responded by supplying a redacted version of the PROD file. The redactions we are concerned with are as follows:
   (1) Redactions to the document at pages 214-216 of our bundle, which is a memo from a caseworker to a Senior Planning Casework Manager in the Ministry dated 23 January 2017. The memo sets out the background to Mr Mason's request and relevant circumstances. The redacted passages are words under the heading "Conclusions and Recommendation" and a handwritten note by the Manager agreeing to the caseworker's recommendation with brief reasons. The Ministry relied on regulation 12(4)(e) of the EIR ("internal communications") to redact these passages.
   (2) Three redactions from an exchange of emails dated 30 August 2016 between the caseworker at the Ministry and a Council representative which are at page 223 of our bundle. The Council's position is that the redacted passages were not within the scope of Mr Mason's request for information or come within the exception provided by regulation 12(5)(f) of the EIR (adverse effect on third parties providing information).

   There were also redactions of personal data relating to individual officers made under regulation 12(3) and 13 of the EIR. Mr Mason takes no exception to these and they should remain in place.

7. Mr Mason complained to the Information Commissioner about the Ministry's handling of his request for information. The Commissioner upheld the approach of the Ministry in a decision notice dated 8 November 2018. Mr Mason appealed to this Tribunal against the Commissioner's decision notice.

8. On the appeal we were supplied with unredacted versions of the documents in issue on a closed basis. We held a hearing at which Mr Mason (who was the only party to appear) was able to address us at some length and answer our questions. Before we turn to consider the real issues as we see them (encapsulated at paragraphs 6(1) and 6(2) above respectively) we record the following: (a) we note that Mr Mason is extremely concerned about the actions of the Council in relation to the whole matter, and in particular the valuations that were obtained: these are not matters which are within our purview on this appeal; (b) he raised a concern as to whether the Ministry had in fact disclosed the whole file: we have no reason to doubt that they have; (c) in particular in his request for information he asked for relevant legislation and guidelines: we

are satisfied that there would have been no such material on the file; (d) in his notice of appeal Mr Mason states that the withheld information is his personal data and should therefore have been disclosed to him under the Data Protection Act 2018: even if that is right, this Tribunal only has jurisdiction in relation to the EIR which do not apply to an applicant's personal data (see: regulation 5(3)).

The memo of 23 January 2017 (pp 214-6 of our bundle)

9. Mr Mason accepted that the two passages redacted from the memo dated 23 January 2017 were "internal communications" under regulation 12(4)(e). In those circumstances the Ministry were entitled to refuse disclosure of them provided that, in all the circumstances, the public interest in maintaining that exception outweighed the public interest in disclosure of the information, with a presumption being applied in favour of disclosure (see: regulations 12(1)(b) and (2)). The issue is therefore whether in the circumstances of this case the public interest balance comes out in favour of maintaining the exception for "internal communications".

10. The relevant public interest protected by regulation 12(4)(e) is the public interest in officials giving ministers free and frank advice and avoiding the "chilling effect" which may result from a fear of disclosure, which may adversely affect the quality of advice given. We take account of this potential effect of disclosure in this case. We note, however, that the decision on which the official was advising was a fairly routine one and certainly not "vital [or] sensitive" (words used in the *Kikygawa* case (EA/2011/0267) quoted in the Commissioner's Response) and that the redacted material consists basically of a recital of reasons for the decision to refuse the PROD, rather than advice on options. In the circumstances we did not feel any need to assess the strength of the general points made by Mr Mason in his written submissions about the importance of so-called "chilling effect" considerations.

11. On the other hand, there is clearly a public interest in disclosure of the redacted passages. The case relates to a piece of land of 320 sq metres in an urban environment which has been left unused for more than 20 years, which we consider to be a matter of legitimate public concern. We agree with the Commissioner that disclosure would provide the public with an insight into the decision-making process in relation to PRODs. Further, in this particular case, we note that the decision letter to which we refer at paragraph 4 above provides almost no detail as to the reasoning for the refusal of the PROD so that disclosure of the reasons in the memo becomes more important. It is also relevant that, as we understand the position, there is no right of appeal against that refusal, meaning that the refusal letter is potentially the last word on the matter. We recognise that this consideration is of particular interest to Mr Mason, but it is also of relevance to others in the neighbourhood and to the wider public interest.

12. Weighing the respective public interests and bearing in mind the presumption in favour of disclosure we consider that the balance favours disclosure in this case and that the Ministry ought to have disclosed the redacted passages along with the remainder of the memo. We therefore disagree with the conclusion of the Commissioner and allow the appeal in this respect.

Emails of 30 August 2016 (p223 of our bundle)

13. The Ministry have set out their case in relation to these emails at pages 317 and 318 in our bundle, which we have considered in their unredacted form. The Ministry says first that the redacted words in the emails are outside the scope of Mr Mason's request for information. We disagree. They appear in documents which are clearly part of the relevant file (which is what Mr Mason asked for) and must have *some* relevance to the Ministry's consideration of the case (or, we would observe, the Council would not have sent them to the Ministry).

14. In the alternative, the Ministry rely on regulation 12(5)(f) which provides an exception to the obligation to disclose where disclosure "… would adversely affect … the interests of the person who provided the information …" where that person was under no legal obligation to provide it and has not consented to its disclosure. We accept that the Council and the University (which is the original source of the information) may well prefer it if the redacted words were not disclosed and that the exception therefore applies on the face of it. However, considering the contents of the emails in context we find it difficult to see how the Council or the University would be adversely affected in any significant and relevant way by disclosure of the pretty unspecific and unsurprising expression of intent recorded (particularly given the passage in the email at page 219 which was "unredacted" in the course of the appeal).

15. But in any event the Ministry can only rely on regulation 12(5)(f) if the public interest in maintaining the exception outweighs that in disclosure (and, we repeat, there is a presumption in favour of disclosure). We have expressed the view that we cannot see that any significant and relevant adverse effect for the Council or the University will flow from disclosure. On the other hand, disclosure will contribute to the public's understanding of the decision-making process in this case (and, again, our comments about the decision letter and the lack of an appeal are relevant here). Furthermore, there is a clear public interest in the public being informed about intentions expressed in relation to what may happen to this piece of land, however informally.

16. Weighing the respective public interests, we consider that the public interest balance favours disclosure of the three passages which have been redacted from the emails of 30 August 2016. Save for a few words which we have notified the Commissioner separately which we consider to constitute personal

data and which can be withheld under regulation 12(3) and 13, we therefore require the disclosure of these three passages by our substitute decision notice.

Conclusion

17. For these reasons we allow Mr Mason's appeal and issue the substitute decision notice above. Our decision is unanimous.

HH Judge Shanks
12 April 2019

Date Promulgated: 17 April 2019