IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

(INFORMATION RIGHTS) **Case No.** EA/2010/0012

ON APPEAL FROM:

Information Commissioner
Decision Notice ref FER0209326
Dated 10 December 2010

Appellant: Bristol City Council

Respondents: (1) Information Commissioner
(2) Portland and Brunswick Squares Association

Heard at: Royal Courts of Justice

Date of hearing: 12 and 13 May 2010

Date of decision: 24 May 2010

Before

HH Judge Shanks

Richard Fox

Alison Lowton

Representation:

David Fletcher for the Appellant

Fiona Banks for the Information Commissioner

Alex Goodman for the Second Respondent

Subject areas covered:

Environmental Information Regulations 2004

Public interest test, Reg 12(1)(b)

Presumption in favour of disclosure, Reg 12(2)

Exceptions, Regs 12(4) and (5)

Confidential information (5)(e)

Cases referred to:

Coco v AN Clark Engineers Ltd [1969] RPC 41

Lancashire Fires Ltd v SA Lyons & Co Ltd [1996] FSR 629

R (on application of Cummins) v LB Camden [2001] EWHC 1116 (Admin)

Decision

The appeal is dismissed. The information requested must be made available to the Second Respondent by 23 June 2010.

Reasons for Decision

Background facts

1. This appeal concerns a development site in the St Paul's district of Bristol on which two Victorian buildings stand, namely the Coroner's Court building and the Lakota building. On 17 October 2007 Lakota Development LLP applied to Bristol City Council for planning permission to refurbish the Coroner's Court building and convert it into flats and to demolish the Lakota building and replace it with a purpose built mixed use building. Because the Coroner's Court building was a listed building

and the site was in the Stokes Croft conservation area, the developer also required listed building consent for the refurbishment of the Coroner's Court building and conservation area consent for the demolition of the Lakota building. It is relevant to record at the outset that the Council itself owned the Coroner's Court building and there was a conditional contract of sale for it between the Council and the developer.

2. Planning Policy Guidance 15 (which provides comprehensive advice to local planning authorities on controls for the protection of historic buildings and conservation areas) states that proposals to demolish buildings which make a positive contribution to the character or appearance of a conservation area should be assessed against the same broad criteria as proposals to demolish listed buildings.[1] Those criteria require that there should be:

   > **clear and convincing evidence that all reasonable efforts have been made to sustain existing uses or find viable new uses and these efforts have failed … or that redevelopment would produce substantial benefits for the community which would decisively outweigh the loss resulting from demolition.**[2]

   No doubt with PPG 15 in mind the developer lodged plans with their application showing a scheme for the retention and refurbishment of the Lakota building and said in their planning statement that a viability report had been prepared by Atis Real (who are valuers) and "issued separately" and that it showed that any profit from that scheme would be negligible at best (and therefore, it followed, the scheme would be unviable).[3]

3. On 24 January 2008 the developer's application was published on the Council's website and on 28 January 2008 the Portland and Brunswick Squares Association, a local residents' group which was concerned about the proposal to demolish the Lakota building, requested under the Environmental Information Regulations 2004 that the Council supply them with a copy of the viability report so that they could "… make effective comments on the conservation area application." The Council refused to disclose the report in reliance on regulation 12(5)(e) (which relates to

[1] See PPG 15 para 4.27
[2] See PPG 15 para 3.17
[3] See Stride Treglown Planning Statement paras 4.4.12 to 4.4.15 and 4.5.6

commercial confidentiality) and that decision was upheld on an internal review in a letter dated 4 April 2008.

4. April 2008 is therefore the relevant date for considering the issues raised by this appeal but we record the following subsequent developments:

    (1) In June 2008 the Council granted planning permission and listed building and conservation area consent for the proposed development. The report by officers to the Development Control Committee stated at page 12 that the Lakota building made a positive contribution to the character and appearance of the conservation area and stated at page 15:

    > **Alternative conversion schemes were considered by the applicants as part of the development process, but in reality the condition of the building, coupled with the limitations surrounding its original design, prevents a viable option. It should be noted that a number of objections have been made on the basis that the case for demolition has not been made. With respect to those comments a major factor in the case is the viability [report] put forward by the applicant, which is considered to be commercially sensitive, and therefore has not been made available to third parties. However, it has been considered by an independent QS, who considers the conclusion to not be unreasonable.**

    (2) On 9 September 2008 the Association started judicial review proceedings against the Council seeking to quash the planning permission and listed building and conservation area consents; those proceedings were adjourned in March 2010 pending the outcome of this appeal; meanwhile the development remains "on hold";

    (3) On 28 July 2008 the Association complained to the Information Commissioner about the way its request for information had been handled by the Council; the Commissioner issued a decision notice dated 10 December 2009 finding that the exception in regulation 12(5)(e) did not apply and therefore requiring the Council to disclose the requested information; against that decision the Council appealed to this Tribunal.

The issues arising on the appeal

5. It was not in dispute that the Association's request for the viability report referred to a document issued by Atisreal Ltd dated 14 November 2007 headed "Development Appraisal, Lakota Refurbishment, Lakota Building Only" which was provided to the Council by Stride Teglown (planning consultants acting for the developer) on 19 November 2007. It was also accepted that it covered a related "Feasibility Cost Estimate" dated 15 February 2008 issued by APS (quantity surveyors) which was supplied to the Council subsequently at the request of officers, even though the latter document came into the hands of the Council after the Association's request for information. We were provided with unredacted copies of both these documents; for clarity we shall refer to them as the "Lakota viability report" and the "Lakota cost estimate" respectively. It was also not in dispute that the contents of these documents comprised "environmental information" for the purposes of the 2004 Regulations.

6. The Council contended that the Commissioner was wrong to conclude that regulation 12(5)(e) did not apply this information; the Commissioner and the Association maintained, on somewhat differing grounds, that he was correct. This is the first main issue that we must decide; in doing so it is open to us to review the Commissioner's findings of fact and to take account of evidence provided to us which was not before him. Because the Commissioner concluded that the exception at regulation 12(5)(e) did not apply at all he did not consider whether the public interest in maintaining that exception outweighed the public interest in disclosing the information as required by regulation 12(1)(b); it is accepted, however, that if the Council succeed on the first main issue they must also succeed on the public interest issue if their appeal is to be allowed. This is the second main issue we must decide; in doing so, we must take account of all relevant circumstances applying as at April 2008.

7. Before turning to those issues we should record that the Council sought at the beginning of the hearing leave to amend its grounds of appeal to rely also on the exception at regulation 12(5)(f). We refused them permission to do so on the short ground that it was far too late in the proceedings for such an amendment to be allowed without a danger of the respondents being unfairly prejudiced.

The first main issue: regulation 12(5)(e)

8. Subject to the public interest test and the presumption in regulation 12(2) which we consider below, regulation 12(5)(e) provides that:

> **… a public authority may refuse to disclose information to the extent that its disclosure would adversely affect … the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest**.

Thus, in order to come within the terms of the exception it must be shown that:

(1) The information in question is “commercial or industrial”;

(2) The information is subject to confidentiality provided by law;

(3) Such confidentiality is provided to protect “a legitimate economic interest”;

(4) The disclosure of the information would adversely affect such confidentiality.

There was no issue on (1); we will consider (2) to (4) in turn.

Was the information subject to confidentiality provided by law?

9. It was common ground that in order to be subject to confidentiality provided by law the information must (a) have the necessary quality of confidence and (b) be imparted in circumstances importing an obligation of confidence. As to (a), the Commissioner accepted that all that was required for the “necessary quality of confidence” was that the information was not trivial and not in the public domain (criteria which were clearly satisfied in this case) but Mr Goodman for the Association submitted that something more was required, namely that a reasonable person would regard the information as confidential and that that question must be judged by the usages and practices of the particular industry or trade concerned, and that in this case a reasonable person would not regard it as confidential because the planning process is one that assumes and requires public involvement. For this proposition of law he cited a passage from a decision of Sir Robert Megarry V-C quoted at p 645/6 of the report in *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1996] FSR 629. It looks as if Sir Robert Megarry was dealing with a case involving

an employment relationship and "trade secrets" where somewhat different considerations may arise but in any event we prefer to deal with the factual issues raised by Mr Goodman's submission in the context of (b) (whether the information was imparted in circumstances importing an obligation of confidence) where we consider they more naturally arise.

10. The evidence as to the circumstances in which the information in question was imparted by the developers to the Council took the form of various documents attached to a statement of Katherine Evans, a partner in the developer's solicitors, and two statements provided by Alison Straw, an Area Planning Co-ordinator and the case officer in relation to this development, who also gave oral evidence. From this evidence it emerged that the Lakota viability report was sent to Ms Straw by Mr Renshaw of the planning consultants by email on 19 November 2007 along with a number of other documents, including a letter from the developer setting out a "section 106" offer[4] and a separate development appraisal prepared by Atisreal for the actual proposed scheme (ie refurbishment of the Coroner's Court building and demolition of the Lakota building) which was in similar form to the Lakota viability report and which was relevant to the section 106 offer. It is not clear on whose initiative those documents were sent to Ms Straw but they were clearly provided as part of the normal dealings that would take place in the course of a planning application like this one and the Lakota viability report was clearly sent in order to support the case that refurbishment of the Lakota building was not a viable option. Neither the email nor the attached documents were marked as confidential. Shortly after receiving these documents Ms Straw queried with Mr Renshaw whether the section 106 offer letter could be published on the Council website; he replied in an email on 1 December 2007 that it could be published if one piece of commercially sensitive information (namely forecast rate of return) was blanked out; he also enclosed a cost plan prepared by APS in similar form to the Lakota cost estimate supporting the figures in the development appraisal for the actual proposed scheme, stating that it needed to be treated as private and confidential. When Ms Straw received the request for the Lakota viability report from the Association with which we are concerned in this appeal she immediately emailed Mr Renshaw on 4

4 Section 106 agreements are described in Planning Circular 05/05 as private agreements negotiated, usually in the context of planning applications, between local planning authorities and persons with an interest in a piece of land, and intended to make acceptable development which would otherwise be unacceptable in planning terms.

February 2008 listing it and the other documents which had been sent to her by Mr Renshaw and seeking confirmation that the developer wished them to remain confidential. He replied on 6 February 2008 stating that it was not appropriate for the Association "to see the information" and that the developer would not wish potential contractors to be aware of figures which would give them a commercial advantage. The Lakota cost estimate was supplied to the Council later in February 2008 in response to a specific request by the Council. It states on its introductory page: "This is a controlled document that contains information which may be privileged or commercially sensitive."

11. Ms Straw's evidence was that she regarded all the documents referred to above, including the Lakota viability report and cost estimate, as having been submitted to the Council on a confidential basis; although only some were expressly stated to be confidential it was, she said, implicit that all viability reports and other documents containing costings were disclosed on that basis, this being the "usual practice". We accept that evidence which is consistent with her own behaviour at the time and consistent with the cogent evidence given by Zoe Willcox, the Council's Service Director for Planning and Sustainable Development, who also gave oral evidence as to the usual practice. Although unfortunately we received no formal evidence from the developer, we were shown a letter from Mr Renshaw dated 3 June 2009 which states that the release of the Lakota viability report to the public would have been damaging to his clients because it would have disclosed assumptions about refurbishment costs, rates to be paid to marketing agents and interest rates which might be of use to potential tenderers, marketing agents and competitors and that it was therefore submitted by him to the Council on the basis that it was confidential. Having considered the contents of the Lakota viability report in detail along with the other documents sent by Mr Renshaw to the Council which we describe in paragraph 10 above, we accept that the views expressed by Mr Renshaw in this letter about the affect of disclosure of the Lakota viability report were genuine and reasonable and we also accept that he did indeed submit it to the Council on the basis that it was confidential.

12. Mr Fletcher for the Council and Ms Banks for the Commissioner referred us to the well known case of *Coco v AN Clark Engineers Ltd* [1969] RPC 41 for the correct

test as to the circumstances when an obligation of confidence should arise. In that case Megarry J stated at p48:

> **It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence then this should suffice to impose upon him an equitable obligation of confidence.**

Both the Commissioner and the Association maintained that no obligation of confidence arose on the part of the Council in relation to the Lakota viability report and cost estimate because they were provided to the Council in connection with the application for conservation area consent and because of the requirements of PPG 15[5] and not, as with the other documents, as part of a section 106 negotiation: in those circumstances and bearing in mind that the planning process is meant to be open and public, they said, the developer can have had no reasonable expectation that they would be kept confidential (and therefore, presumably, the information was not being provided in confidence "upon reasonable grounds"). However, in view of our findings in paragraph 11 above (a) that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being provided) and (b) that the views expressed in Mr Renshaw's letter about the affect of disclosure of the viability report were reasonable, we have reached the conclusion that the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realized that that was what the developer was doing. In these circumstances, an obligation of confidence was imposed on the Council by law in relation to the Lakota viability report and cost estimate and, it follows, they were therefore "subject to confidentiality provided by law".

[5] See paragraph 2 above.

Was confidentiality provided to protect a legitimate economic interest?

13. The Commissioner submitted that because the Lakota viability report related to a hypothetical scheme (namely the retention and refurbishment of the Lakota building) any confidentiality was not provided to protect a legitimate economic interest. It may be that the release of the report would in fact have had no adverse affect on the economic interests of the developer but, as we have found, it was subject to confidentiality provided by law because there were reasonable grounds for saying its release would damage their economic interests. It is clear, therefore, that the confidentiality provided by law was there to protect a legitimate economic interest and that there is really nothing in the Commissioner's point.

14. Given our findings on the issues raised in paragraphs 8(2) and (3), it must follow that disclosure of the Lakota viability report and cost estimate would adversely affect confidentiality provided by law to protect a legitimate economic interest (the issue raised in paragraph 8(4). We therefore conclude, in contrast to the Commissioner who did not have all the evidence that we did, that regulation 12(5)(e) did apply in this case. It is therefore necessary for us to consider the public interest balance.

The second main issue: the public interest balance

15. Regulations 12(1) and (2) provide:

(1) … a public authority may refuse to disclose environmental information requested if-

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

Thus, regardless of the fact that disclosure of the information in question would, under the general law, have involved a breach of confidence by the Council, there was nevertheless a presumption that it should be disclosed to the Association and

it could only be withheld if, in all the circumstances as at April 2008, the public interest in maintaining its confidentiality outweighed the public interest in its disclosure. We turn to consider the weight of those public interests.

Public interest in disclosure

16. Our attention was drawn to the Directive (2003/4/EC) which gave rise to the 2004 Regulations, and in particular to recital (1) which provides the underlying rationale for disclosure of environmental information:

> **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.**

We think it is very significant that the information requested in this case was directly relevant to (and, as it turned out, a "major factor"[6] in) a specific environmental decision about the demolition of a protected building which was imminent and controversial. In this context our attention was also drawn to the following relevant features of the planning regime:

(1) local communities should be given the opportunity to participate fully in the process of drawing up plans and to be consulted on proposals for development;[7]

(2) voluntary bodies and individual citizens share responsibility for the stewardship of the historic environment with local planning authorities;[8]

(3) there should be "clear and convincing evidence" to justify a decision to allow demolition of a protected building;[9]

(4) local planning authorities must take account of any representations made about planning decisions;[10] and

[6] See paragraph 4(1) above.
[7] See paragraph 41 of Planning Policy Statement 1.
[8] See paragraph 1.7 of PPG 15.
[9] See PPG 15 quoted in paragraph 2 above.
[10] See art 19(1) of the Town and Country Planning (General Development Procedure) Order 1995

(5) they must articulate reasons for a conservation area consent decision.[11]

17. All that in our view indicated a very weighty public interest in disclosure in this case. There is another feature which we think added substantially to its weight, namely the fact that the Council owned the Coroner's Court building which comprised part of the development site. We accept Mr Goodman's submission based on *R (on application of Cummins) v LB Camden* [2001] EWHC 1116 (Admin) that this feature gave rise to a need for "particular scrupulousness" on the part of the Council and that would have increased the desirability of disclosing to the public everything relevant to the case, in particular the Lakota viability report which was likely to be a major factor in the decision on an important element of it.

18. The Council's evidence (which we are prepared to accept) is that they are generally open and transparent in the way they deal with planning matters and that the only categories of information for which they maintain confidentiality are viability reports and costings and information relating to the habitats of protected species of animal. They also made the point that the they are able to have viability reports scrutinized by external experts employed by them (as they did in this case). They also maintained in effect that the Association and (it must follow) the public at large could have managed without the information requested because it would have been open to them to obtain their own viability report on the Lakota building based, if they saw fit, on the plans lodged with the application by the developer to which we refer in paragraph 2 above. All those are relevant considerations but none of them deal with the fundamental point that the Council was intending to take account of evidence presented to them by the developer which the public were not going to be able to see or comment on directly. Nor do they address the general mismatch (which we believe we can properly take account of) between the resources of developers and residents' groups.

<u>Public interest in maintaining confidentiality</u>

19. There is of course an inbuilt public interest in maintaining commercial confidences. However, in this case the fact that Mr Renshaw did not expressly state that the Lakota viability report and cost estimate were provided in confidence would tend to

[11] See reg 3(5) of the Planning (Listed Buildings and Conservation Areas) Regulations 1990

indicate that they were not of great sensitivity to the developer. It is also relevant in this context they were not provided as part of a negotiation for a section 106 agreement but as part of the evidence to justify the demolition of the Lakota building as part of what was otherwise an open and public process.

20. We have already found at paragraph 11 above that there was a genuine and reasonable apprehension that the disclosure of the Lakota viability report and cost estimate would damage the developer's economic interests. However, the degree of risk and the possible damage were in our view fairly limited for two particular reasons: first, the Lakota viability report and cost estimate related to a scheme which was, by definition, hypothetical so that tenderers, marketing agents and others could not know for sure that the figures in them were based on costs which the developer actually anticipated; second, the Lakota cost estimate expressly stated that all costs within it "… reflect general pricing levels within the construction industry at 1st Quarter 2007".

21. Perhaps most tellingly in favour of the public interest in maintaining the confidentiality of the information in this case, the Council witnesses drew attention to their need to receive genuine viability reports in relation to planning applications and the substantial risk they perceived that developers would simply not supply these if they thought that there was a danger they would be disclosed. Ms Straw in particular gave evidence that she had within the last month received a call from a developer wanting to know about the outcome of this appeal before he would supply a viability report in relation to a section 106 negotiation. It seems to us there are three points to be made in response to this perceived danger: first, since the passage of the 2004 Regulations there can never be a guarantee that confidentiality will be upheld in relation to any information supplied by a developer to a local planning authority; second, it may be that different considerations apply in relation to a viability report like the one in this case (put forward as evidence to support the PPG 15 case) from those that apply in relation to a viability report put forward in a section 106 negotiation and that that distinction can be readily recognised by developers; third, so far as PPG 15 viability reports are concerned, it seems to us that developers will not be able to refuse to supply them if they want to obtain the relevant consent but that, given their hypothetical nature, it may be possible for

them to construct such reports in a way that does not reveal sensitive commercial information specific to themselves.

Conclusion on public interest

22. Taking account of all the circumstances and in particular the considerations identified in paragraphs 16-21 above, we are of the view that the public interest in disclosure substantially outweighed that in maintaining the exception in this case. Accordingly, applying the regulation 12(2) presumption we are satisfied that the Lakota viability report and its associated cost estimate ought to have been disclosed by the Council when requested by the Association.

23. We emphasise that that decision arises from the circumstances of this particular case and is not designed to set a precedent. The result *may* have been different, for example, if the information had not been provided to satisfy the PPG 15 criteria or if the Council had not owned the Coroner's Court building. Our decision certainly does not mean that every piece of commercially sensitive information which is provided in confidence by a developer to a local planning authority in the course of a planning application must be disclosed to the public on request. Those dealing with such requests on behalf of local planning authorities will have to continue to exercise their judgment conscientiously in accordance with the Environmental Information Regulations 2004 and the Code issued by the Secretary of State thereunder.

Overall conclusion

24. For the reasons set out above, although we disagree with the Commissioner's decision in relation to the applicability of regulation 12(5)(e), we agree with his decision that the requested information ought to have been supplied and we therefore dismiss the appeal and require the Council to disclose it after the time for appealing has expired.

25. Our decision is unanimous.

26. Finally we note that although this case started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in

particular articles 2 and 3 and paragraph 2 of Schedule 5) the Tribunal dealing with it is now constituted as a First-tier Tribunal. Under the rules of procedure now applying an appeal against this decision on a point of law may be submitted to the Upper Tribunal. A party wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

HH Judge Shanks

Dated 24 May 2010