



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE NO: GIA/1236/2019
[2020] UKUT 54 (AAC)**

RYAN V THE INFORMATION COMMISSIONER

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: EA/2018/0195

Decision date: 18 February 2019

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

1. This appeal concerns land that was acquired by Tesco for a proposed development. As is often the case when land is sold for development, there was provision for the developer to make provision that is beneficial to the community. By 2015, Tesco had decided not to proceed and sold the land on.

2. Before then, Mr Ryan had become interested in the negotiations between the local authority and Tesco, and in particular about advice that the authority received from its agent. In 2017, he made a request under the Freedom of Information Act 2000. It was dealt with under the Environmental Information Regulations 2004 (SI No 3391). Following a complaint to the Information Commissioner, all the information that Mr Ryan had asked for was disclosed with the exception of one passage, which the Commissioner decided was an exception under regulation 12(5)(e) on the ground that 'disclosure would adversely affect ... (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic

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interest'. Accordingly, regulation 12(1)(b) provided that the information had to be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.' This had to be applied in accordance with regulation 12(2), which provides: 'A public authority shall apply a presumption in favour of disclosure.'

3. On appeal, the First-tier Tribunal confirmed the Commissioner's decision, save for one sentence that it ordered to be disclosed. In short, the information that was withheld related to the tactics that the local authority should apply in negotiations with Tesco. The tribunal accepted that there was a 'significant public interest in understanding what had happened' on the basis of the argument put by Mr Ryan at the hearing. This is how the tribunal set out his argument:

The appellant provided further information at the hearing about the public interest in disclosure. He explained that the community had been due to be provided with an adult education centre as part of the sale agreement. Matters took so long that an adult education centre was set up elsewhere in 2013. The community also had an urgent need for a health and social care centre, so this was the alternative space that Tesco agreed to provide under the sale agreement. However, the Council's negotiations failed and Tesco pulled out. As a result, the health and social care centre has been moved into the library – which is an unsuitable space for this service and has halved the size of the library. Ongoing pain has been caused to the community by these decisions. The land has now been sold on to the builders Bellways (Thames Gateway). The appellant's position is that whatever negotiation strategy was used by the Council, it has clearly failed and the public should know what this was in order to call the Council to account for failing to further the public good.

However, the tribunal decided that this was outweighed by the public interest in maintaining the exception. The information related to 'negotiation tactics on a specific topic' and:

... there is a clear public interest in allowing the Council to approach negotiations on a level playing field. Disclosure of specific negotiation tactics would undermine the Council's ability to negotiate similar deals with land owners on a commercial basis, as those land owners would be aware in advance of the Council's likely tactics. This would prevent the Council from obtaining the best value in its land deals, with a consequential effect on the public purse. It is clearly in the public good for the Council to be able to conduct effective commercial negotiations.

4. I consider that the tribunal's reasoning on the case for maintaining the exception is flawed. It takes no account of the content of the information. I have read it and it seems to me to contain nothing unique or unusual. It is the sort of advice that a local authority would generally be given in the circumstances. As

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anyone involved in selling or acquiring land for large scale development would surely have their own advisers, it is also the sort of advice that would be anticipated by the other side. If that is right, making it public would not hamper a local authority in the ways identified by the tribunal.

5. I am not saying that my reading of the information would necessarily result in the balance shifting to favour disclosure. That is why I have remitted the case for rehearing, when the knowledge and experience of the specialist members will assist the tribunal to decide how that balance should be struck. My concern is that the tribunal did not take the factors I have mentioned into account, at least so far as its written reasons show.

6. It is possible that, if the information would be well known to anyone advising on development issues, disclosure would not do much to further the public interest as set out by Mr Ryan. The test for the balance of public interests is a comparative one, so that the weaker the case for one side, the less the public interest on the other side needed to outweigh it. As I said in *FCO v Information Commissioner and Plowden* [2013] UKUT 275 (AAC):

15. I accept Mr Eadie's argument that the First-tier Tribunal made an error of law in its approach to the public interest test. He accepted that the tribunal had undertaken the assessment of the public interest in maintaining the exemptions correctly by asking what the detrimental effects of disclosure might be. But he argued that it failed to do the obverse and ask what the benefits of disclosure might be. I accept his argument that the information that the tribunal ordered to be disclosed was not particularly informative. Given that, the tribunal needed to explain what the public interest was in disclosure that could be set up against the interest in maintaining the exemptions, which it described as 'very high indeed'.

The tribunal did make the point about the lack of value in the information if disclosed, but it did not show how the presumption in favour of disclosure might shift the balance in Mr Ryan's favour.

7. When I gave permission to appeal, I was also concerned that the tribunal appeared to be saying that it could not take account of material that was not before the Commissioner and that the case involved the exercise of a discretion. Having read the submission from the Commissioner, which does not support the appeal, I am satisfied that there was no discretion involved in this case. And having re-read the tribunal's written reasons, I am also satisfied that, whatever the tribunal may have meant, it did not restrict Mr Ryan in the case that he put on the public interest. I need say no more on this point.

Signed on original
on 18 February 2020

Edward Jacobs
Upper Tribunal Judge