Landmark CHAMBERS

FOIA/EIR AND VIABILITY ASSESSMENTS

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FOIA or EIR

- The Environmental Information Regulations 2004 ("EIR") create a regime that overall confers a greater right of access to information than under the FOIA
- Per regulation 2, "environmental information" includes "cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities" that are referred to elsewhere in the definition
- Financial viability assessments ("FVA") have consistently been held to be environmental information where the EIR applies

Duty to make available

- 5(1) – “a public authority that holds environmental information shall make it available on request”
- 5(2); 14(2) - response or refusal should be made as soon as possible and not later than 20 working days after the date of receipt of the request
- Note 3(2)(b): the “holding” of information by a public authority includes if the information “is held by another person on behalf of the authority”
- It will cover independent consultants engaged to review FVAs
- The requirement to make environmental information available is subject to exceptions

Exceptions to the duty to disclose

- Two principal regulations to consider, reg. 12 and reg. 13
- 12(1) - there is a discretion to refuse to disclose environmental information if an exception in reg. 12 applies, **and**, per 12(1)(b), "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"
- The public interest in disclosure must be considered in **all** reg. 12 cases and, per reg. 12(2), the public authority must apply a presumption in favour of disclosure
- 13 – personal data; brings into play the data protection principles in the Data Protection Act 1998

Exceptions to the duty to disclose

- Likely exceptions to rely upon in respect of FVAs:
  - 12(4)(b) “the request for information is manifestly unreasonable”
  - 12(5)(c) “disclosure would adversely affect- … (c) intellectual property rights”
  - 12(5)(d) “disclosure would adversely affect - … (d) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”
- Other exceptions exist in reg. 12(4) and (5)

Manifestly unreasonable requests – 12(4)(b)

- Requests for all correspondence or documents that make reference to a FVA may be manifestly unreasonable
- For example:
  - Large schemes
  - Hundreds if not thousands of emails
  - Disproportionate staff time to consider all emails (particularly if require redaction in line with decision to withhold the FVA itself)
- NB – charging for staff time likely to be acceptable, but not overheads: see Advocate General's opinion in Case C71/14 *East Sussex CC v Information Commissioner*

Intellectual Property Rights – 12(5)(c)

- *Southwark v Information Commissioner* EA/2013/0162
- Upheld reliance on 12(5)(c) for that part of FVA which consisted of a proprietary financial model which allowed dynamic costs assessments to be made during build
- Rejected the ICO's position that needed to prove monetary loss to demonstrate adverse effect: §36
- Accepted that disclosure would harm the developer's interests; competitors able to see and utilise the model

Commercial confidentiality – 12(5)(d)

- Principal exception likely to rely upon
- Four relevant matters to exception being engaged:
  1) Is the information in question commercial or industrial in nature?
  2) Is the information protected by the common law of confidence?
  3) Is such confidentiality provided to protect a legitimate economic interest?
  4) Would the disclosure of the information adversely affect such confidentiality?

Commercial confidentiality – 12(5)(d)

1) Is the information in question commercial or industrial in nature?
   - FVAs will invariably contain information relating to the commercial activity of a developer
   - Construction costs; sale costs; yield estimates

Commercial confidentiality – 12(5)(d)

2) Is the information protected by the common law of confidence?
   - Consider whether the information (a) has the necessary quality of confidence and (b) was imparted in circumstances importing an obligation of confidence
   - Would a reasonable person standing in the shoes of the recipient of the information have realised that upon reasonable grounds the information was being provided to her/him in confidence then this should suffice to impose upon her/him an equitable obligation of confidence: *Coco v AN Clark Engineers Ltd* [1969] RPC 41

Commercial confidentiality – 12(5)(d)

3) Is such confidentiality provided to protect a legitimate economic interest?
   - Establish that some economic harm would (more probably than not) result from disclosure
   - What is typically argued: FVA values and costs enable contractors and buyers to see these estimates and so gain a negotiating advantage that they would not otherwise have, so reducing potential profits

Commercial confidentiality – 12(5)(d)

- The ICO has, at least, made clear that referring to general risks of reduced profits / impaired negotiating ability may well not be sufficient to rely on exemption
- Per *Leeds City Council* (FER0557376, 2 December 2014), "the arguments submitted by the council are not sufficiently detailed to link specific harm to specific elements of the withheld information … [Word by word analysis is not required, but] authorities should be able to identify specific harm and link it to the disclosure of a discrete element of withheld information"
- If this detail is absent, will struggle to overcome presumption of disclosure

Commercial confidentiality – 12(5)(d)

- More recently, *London Borough of Hackney* (FS50538429; 1 April 2015), reliance upon 12(5)(e) upheld by the ICO in respect of information relating to agreed private sales value, gross development value, affordable housing value, supermarket floor space value, total completed value, and total build cost
- A lot of work was done justifying each head of information and why in particular disclosure would stifle potential negotiations (e.g. there would be a reduction in the likely bid range for the appeal site if private sales values were disclosed, as even potentially more "optimistic" investors would aim more closely to the FVA value)

Commercial confidentiality – 12(5)(d)

- The ICO's decision in the *Hackney* matter relates to the same development as considered by the High Court in *R (Perry) v Hackney LBC* [2014] EWHC 3499 (Admin)
- Ground floor supermarket and 53 houses above; 17% affordable housing to be provided against target of 50%
- Application supported by FVA, reviewed externally, but not seen by the Members who approved the application
- Challenge was made on the basis that it was unlawful to prevent members from seeing the FVA and the independent appraisal of it

Commercial confidentiality – 12(5)(d)

- Patterson J: there is no requirement for members to see a full FVA in order to make a lawful decision. Members "were in a position to judge whether they felt they had sufficient information to enable them to carry out their decision making exercise" §64
- In considering arguments, determined that the FVA "contains assumptions about build costs, sales costs and residual values", and so relates to matters that are "**clearly matters of the utmost commercial sensitivity**". Material "was provided and received on the reasonable basis that it would be treated confidentially… **I have no doubt that it should be so treated**": §49

Commercial confidentiality – 12(5)(d)

- *Perry* did not decide the EIR point; that was left to the ICO and its subsequent decision in the *Hackney* case
- Permission to appeal High Court's decision in *Perry* has been refused. But, Mr Perry is pursuing his EIR complaint to the First-tier Tribunal
- *Turner v SSCLG* [2015] EWHC 375 (Admin) is a further High Court decision affirming the confidentiality of FVAs, which also rejected the argument that a full FVA must be reviewed by the actual decision maker, i.e. entirely in line with *Perry*. Permission to appeal on this point refused by Sullivan LJ on 14 May 2015

Commercial confidentiality – 12(5)(d)

4) Would the disclosure of the information adversely affect such confidentiality?
   - If first three questions answered positively, then this question will be also
   - Would not adversely affect confidentiality if the material had already been put into the public domain by the developer

Public interest assessment

- Having established an exception is engaged, it is necessary to weigh the competing public interests, per regulation 12(1)(b). That is:

  – the public interest in disclosing the information

  as weighed against

  – the public interest in maintaining the exception

Public interest assessment

- Matters relating to the public interest in disclosure:
  - The presumption in reg. 12(2)
  - Decision making should be transparent: in so far as FVA relied upon to, for example, support a decision to
    - reduce affordable housing provision
    - demolish a listed building with no viable uses
    - change the use from an uneconomic but protected use

    then such matters go to the heart of the decision or at least are significant aspects
  - Public participation in decision making: should be supported by full consultation with access to all supporting material

Public interest assessment

- Matters relating to the public interest in non disclosure:
  - Other developers will be deterred from providing full and frank viability assessments in other applications; i.e. a floodgates style argument. Not found huge favour:
    - *Bristol v Information Commissioner* EA/2010/0012, "since the passage of the [EIR] there can never be a guarantee that confidentiality will be upheld" §21;
    - *Southwark v Information Commissioner* EA/2013/0162, "this approach gives insufficient recognition to the fact that the legislature has intervened in public authority relationships through FOIA and EIR" §42.
  - But see recent *Hackney* decision at §37 and §91, in context of ongoing s. 106 negotiations and other detailed material

Public interest assessment

- Damage to a developer's commercial interests. But difference in treatment of potential damage to negotiations with contractors / other commercial entities as opposed to potential damage to negotiations with private buyers of housing:
  - Private buyers "are much more likely to be influenced by the market rate at the time" and not FVA estimates: *Southwark* (supra), §57, *Hackney* (supra), §49
  - May be a particular factor in a compulsory purchase context – estimated values for Order land irrespective of whether owner is an individual or business

Public interest assessment

- Damage to viability of a project. Reflection of the above, but can carry sway if project delivers regeneration benefits, as in the regeneration of Elephant and Castle in *Southwark*
- Damage to potential delivery of planning obligation benefits. Similar to the above, since delivery of the project will deliver planning obligations. In so far as claw back provisions exist, impact upon profitability can reduce provision of such further benefits, contrary to the public interest

Public interest assessment

- As with any balancing exercise, much will depend upon the particular facts
- Decisions have gone both ways. Two recent Tribunal decisions (both with Warren J):
  - *Southwark*: information that was to be the subject of commercial negotiation with other business not disclosed (§56), but information about sales to private buyers (and housing associations for AH elements) was (§57). Recall the emphasis upon the public interest in the regeneration of Elephant and Castle

Public interest assessment

- *Greenwich v Information Commissioner* EA/2014/0122: disclosure ordered of whole FVA. Context was important.
  - Development is for c10,000 homes to be built over 20 – 25 years
  - Application to vary AH obligation made in 2012, just after new owner took over the site
  - Strong sense of dissatisfaction with the quality of the FVA, which reading between the lines, seemed in the Tribunal's view to warrant further scrutiny. It assessed current values only despite longevity of the project, and assessments that the housing market was in poor health contrasted with other material

Public interest assessment

- Two decisions on many levels difficult to reconcile; the different factual contexts are important
- Likewise some recent ICO decisions:
  - *Leeds* (supra) from December 2014 requiring disclosure, contrast
  - *Perry* (supra) from April 2015 upholding non-disclosure
- There is at least the distinction in the level of supporting justification for non-disclosure in these two decisions, with much more specific information provided in the *Perry* case
- Interesting that Greenwich Council is now consulting on a policy for all FVAs to be fully disclosable

Reviewing refusals to disclose information

- Internal review – within 40 days, entirely fresh decision by a different person – reg. 11
- ICO complaint – if remain dissatisfied, there is the ability to complain to the ICO. The EIR, reg. 18, effectively imports the enforcement provisions of Part 4 of the FOIA
- If either party is dissatisfied with the ICO's decision, an appeal may be made to the First Tier Tribunal (Information Rights) within 28 calendar days of the ICO's decision

Weaving the threads together

- There is strong support for FVAs being commercially confidential material, protected by law: *Perry, Turner* (both refused permission), and ICO/Tribunal decisions
- On a tangential note, the full detail of FVAs do not necessarily need to be seen by the decision maker. Judgment is required
- There are decisions going both ways as to disclosure when reliance is placed upon the commercial confidentiality exemption in reg. 12(5)(e)
- It remains difficult to predict on a case-by-case basis whether disclosure will be required
- Pointing to regeneration benefits, specific and detailed justifications for non-disclosure, and prejudice to negotiations with other businesses most relevant to resisting disclosure

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