



**IN THE FIRST-TIER TRIBUNAL**

**Case No. Appeal No. EA/2012/0052**

**GENERAL REGULATORY CHAMBER INFORMATION RIGHTS**

**ON APPEAL FROM:**

Information Commissioner's Decision Notice No: FER0419712

Dated 31<sup>st</sup> January 2012

**BETWEEN**

**MR ROBERT STURMER**

Appellant

And

**THE INFORMATION COMMISSIONER**

Respondent

and

**NORTH EAST DERBYSHIRE DISTRICT COUNCIL**

Second Respondent

Determined on the papers on 21<sup>st</sup> June 2012 and thereafter.

Date of Decision 23<sup>rd</sup> day of November 2012

**BEFORE**

Fiona Henderson (Judge)

Richard Enderby

And

Narendra Makanji

Subject matter: EIR – Regulation 12(4)(a) - information not held

For the reasons set out below, the Tribunal allows the appeal and substitutes the decision notice FER0419712 dated 31<sup>st</sup> January 2012 as follows:

The Tribunal is satisfied that NEDDC did hold recorded information within the scope of the request at the date of the information request namely valuation BM/1 and the cost per unit breakdown of 29.6.2006. These were not disclosed and as such NEDDC breached regulation 5(1) EIR, their disclosure pursuant to this case is outside the time allowed under EIR consequently they have breached regulation 5(2) EIR.

In light of the provision of these documents pursuant to these proceedings. the Tribunal does not require any additional steps to be taken.

Dated this 23rd day of November 2012

Signed: Fiona Henderson (Judge)

## **REASONS FOR DECISION**

### Introduction

1. This appeal is against the Information Commissioner's Decision FER041972 dated 31<sup>st</sup> January 2012 which concluded that the North East Derbyshire District Council (NEDDC) does not hold or has ever held the relevant valuation as recorded information. On a balance of probabilities he concluded that no other relevant information is held.
  
2. The Appellant has been in correspondence with NEDDC in relation to the sale of some land in Mickley in 2006 to a private development company for the sum of £80,000<sup>1</sup>. This was sold by the development company as 2 sites for the sum of £655,000<sup>2</sup> the following year without having been developed. In a document entitled Audit and Corporate Governance Scrutiny Committee Report No: DC1/09/11/BM of the Director of continuous improvement/s151 Officer<sup>3</sup> dated 23<sup>rd</sup> June 2011 authored by Mr Bryan Mason Chief Financial Officer NEDDC the following passage appeared:
 

*"... [the Council] still needs to ensure that the price that is offered is in line with a realistic value for the site. In the case of this sale the valuation was undertaken by the Council's own in house officer a fully qualified Member of the Royal Institute of*

---

<sup>1</sup> The Council's position is that they would have received some additional benefit from the proposed provision of a shop by the developer although this would not have been a Council asset and that including inflation the value to them of the transaction was equivalent to £200,000.

<sup>2</sup> Land registry figures quoted in paragraph 5.2 of the ACGSC report

<sup>3</sup> Henceforth referred to as the ACGSC Report

*Chartered Surveyors*<sup>4</sup>. *The valuation undertaken indicated that a price in the region of £80,000 to £135,000 was an appropriate price for the piece of land in question.*

3. Mr Sturmer therefore wrote on 14<sup>th</sup> July 2011 asking for the following:
  - i. How did G. Goodrich determine these figures?
  - ii. What procedures did he use?
  - iii. There is a significant SPAN of £55,000 with G. Goodrich's valuation; Why was the TOP figure not attained (£135,000)?
  - iv. At what date was this valuation made?
  - v. Why was a guide price not published in the advertising campaign which apparently involved local estate agencies and newspaper advertisements in 2005?
  - vi. From where Mr Mason have you, 6 years later, produced your documented figures of £80,000 to £135,000? Please provide evidence of how and when this £80,000-£135,000 was determined.
  
4. NEDDC responded on 10<sup>th</sup> August 2011 that:
 

*“you are already in possession of all recorded information relating to the Mickley land sale and the Council does not hold anything further to supply you with.”*

Upon review on 6<sup>th</sup> September 2011 they asserted that Mr Sturmer was in possession of the ACGSC report and:

*“The purpose of the Act does not extend to responding to questions relating to how sums of money were arrived at”.*
  
5. Following his investigation, the Commissioner accepted that NEDDC did not hold any recorded information based on the search carried out by NEDDC and the Council's explanation which was provided in their letter of 14<sup>th</sup> December 2011 as:
 

*“he is asking for reasoning behind a subjective valuation which was not based on recorded information.....*

*The information requested (“how did Bryan Mason arrive at a valuation?”) did not constitute recorded information, was a value judgment and did not profess to be more than an opinion. It would therefore only be held in Mr Mason's head....*

---

<sup>4</sup> This position was held at the time by G. Goodrich.

*The “valuation” would not be held as recorded information as it was a subjective opinion framed only in Mr Mason’s head”.*

6. This explanation is in direct conflict with Mr Mason’s own assertion at paragraph 9.9 of his report that he is quoting the figures from the file as provided by the Council’s in house valuer. The Tribunal is satisfied that it was wrong in the face of such a glaring inconsistency for the Commissioner to accept this explanation without further investigation.
  
7. NEDDC did not address this inconsistency in its evidence or submissions to the Tribunal and the case was adjourned for NEDDC to provide additional evidence and witness statements from Mr Goodrich the valuer and Mr Mason the author of the ACGSC report. From this it is apparent that:
  - i) Mr Goodrich did undertake “...*a residual assessment (as opposed to a formal valuation) of the offer [which] was made once the detailed planning aspects of the development were clarified and that formed the basis of the subsequent reports to the Council.*”
  - ii) This was recorded and a copy of this has been provided as BM/1, this valuation was for £81,790- £115,5000.
  - iii) Mr Mason in his statement stated that the valuation in the HCGSC report was “...*taken from a working paper held on the paper file which I had access to. A copy of that paper is attached marked ‘Exhibit BM1’*”.
  - iv) This report is signed by Mr Goodrich, and states that its purpose was “*to assess residual value of the development sites with assumption of planning permission being granted under the conditions of sale*”.
  - v) Mr Mason further adds:
 

*“I have had the opportunity to review the [HCGSC] report and, in particular, paragraph 9.9 and compare it to Exhibit BM1. I am of the view that the figure of £135,000 has been incorrectly transposed from the working paper and should read £115,000. To that extent, the figure of £135,000 is erroneous and cannot be substantiated by any existing information held by the Council”.*

8. It is not clear whether NEDDC are arguing that because of the erroneous transcription no information is held in scope or because this was a residual valuation rather than a formal valuation that it does not fall within scope. The Tribunal notes that since Mr Mason is clear that this is the document that he has got his figures from (albeit mis-transcribed) we are satisfied that it does fall within the terms of the request. Additionally the terms of the request relate to a “valuation” as does the HCGCS report and that as such a “residual valuation” falls within scope.
9. In a further adjournment the Council were asked for an explanation of the disparity between their response to the Commissioner and Mr Mason’s evidence. Their response was that:
- “The comment sought to establish the fact that Mr Mason is not a valuer and does not hold any relevant qualifications in that respect. ...The gist of the letter of 14 December was to demonstrate the fact that Mr Mason attempted, in lay man’s fashion, to provide assistance and interpretation. Indeed, this can be further demonstrated by the fact that until the Audit and Governance Report was revisited as a result of this appeal, the transposition of figures had not been noticed. Valuations are not Mr Mason’s field of expertise.”*
10. The Tribunal notes that this is in the context of being asked a direct question as to from where Mr Mason had got the figures quoted in his report. From his evidence it is clear that he got them (albeit wrongly transposed) from BM/1. The Tribunal does not consider this to provide an adequate response as to why such a misleading and factually incorrect response was given to the Commissioner. In light of Mr Mason’s evidence and the numerous times this issue has been revisited:
- through correspondence with Mr Sturmer,
  - through the Commissioner’s investigation, and
  - the Tribunal process;
- for the transposition to be noticed at this late stage the Tribunal concludes that NEDDC have either not checked with Mr Mason directly or certainly not had BM/1 in mind prior to the intervention of the Tribunal.

11. Both the Commissioner and Mr Sturmer confirmed that they had never been provided with a copy of this report; it was not placed in the Tribunal's bundle. In the second adjournment NEDDC were asked why BM/1 was not provided to Mr Sturmer before. NEDDC responded that:

*"The Council was of the view that Mr Sturmer was in receipt of all documentation relating to this matter. It appears that this document was not included and the realisation has **only just come to light as a result of this Tribunal case.**"<sup>5</sup>*

12. The Tribunal notes that this is despite the HCGSC report stating that para 2.6

*"Where the report refers to documents and information held in the files of NEDDC the details quoted have been independently checked to those files by the Head of the Internal Audit Consortium."*

13. Additionally during the Commissioner's investigation he specifically asked NEDDC *"what information has been disclosed to the complainant that directly addresses the scope of his request? Please provide copies and explain why these disclosures might satisfy the complainant's request."*

The copies supplied by NEDDC in response to this question did not include BM/1. If the Council believed that BM/1 had already been supplied, the Tribunal would have expected it to have been supplied at this date and additionally for it to have been present in the agreed Tribunal bundle.

14. NEDDC has now provided an explanation of how Mr Goodrich determined the figures in their second adjournment submissions dated 18/9/12. The Tribunal is satisfied that part of requests i and ii are answered in part by provision of BM/1 which shows the working of the calculation on its face. We are satisfied that the request encompasses a request for source figures if retained. The cost per unit breakdown of 29<sup>th</sup> June 2006<sup>6</sup> shows the source of some of the figures used. This was clearly recorded and we are satisfied should have been disclosed pursuant to this request. NEDDC also submit that other comparatives have not been retained but some figures were determined from publications namely *Spons architect and Builders Price Guide*.

---

<sup>5</sup> Emphasis added

<sup>6</sup> Not previously disclosed to the Tribunal and attached to the letter of 18.9.12. There is no evidence it was previously disclosed to Mr Sturmer.

Whilst this is recorded information presumably held by the Council its use in this context does not appear to have been recorded, and so we are satisfied that this information was not disclosable since it would require additional information to be recorded by way of explanation.

15. The Council have addressed the date at which BM/1 was made<sup>7</sup> in their submission of 18/9/12. The document is undated and Mr Goodrich is unable to place a precise date although he has provided a timescale. From this we are satisfied that the date of this document is not recorded and as such not disclosable under EIR.
16. Save as set out above, the Tribunal is satisfied that the remainder of the requests for information have either been provided to Mr Sturmer (e.g. the Council have already disclosed that when put out to tender, there was only one offer whose monetary contribution was £80,000) or are not recorded.
17. The Tribunal has considered whether GMG/1 (the report to the executive 2004)<sup>8</sup> contains a valuation. We are satisfied that it merely records an analysis of the offer price. It does not contain the valuation relied upon by Mr Mason and as such is not within scope.
18. We note that no electronic search has been undertaken, however, in light of the witness statements of Mr Mason and Mr Goodrich, and the detail in the submissions of 18<sup>th</sup> September 2012 we are satisfied on a balance of probabilities that all relevant information retained is in the paper file and that **now** this has been adequately searched.

#### Other Matters

19. Mr Sturmer has raised various other matters during the course of this case: e.g.
  - i. He argues that NEDDC do not have an adequate retention policy and that this subverts the aims of EIR,

---

<sup>7</sup> Requests iv and vi

<sup>8</sup> Exhibited to Mr Goodrich's statement

- ii. He invites the Tribunal to refer BM/1 to an independent quantity surveyor for assessment of content and verification.

However these areas are not within the jurisdiction of this Tribunal whose role is limited to determining whether information is held and whether it should be disclosed not whether it should be held or whether it is accurate.

### Conduct of NEDDC

20. The Tribunal notes the repeated assertions by NEDDC to Mr Sturmer that he has had all relevant information when it is plain that he had not. Additionally they construed the information request as asking for explanations when it also asked for clearly identified documentary evidence. The Tribunal does not consider that there is evidence that NEDDC have deliberately withheld the information since the fact of the valuation is apparent from the face of the report, however, it does conclude that NEDDC has given scant attention to this information request, and has not reviewed the matter adequately or appropriately. Their response to the Commissioner was misleading and inaccurate and they have been cavalier in their case preparation failing to ensure that all relevant material was in the bundle or that they had served evidence that dealt with the issues before the Tribunal, the evidence and relevant documents being produced up to 3 months after the initial hearing. Despite the main issue of the appeal being the prima facie inconsistency between the response to the Commissioner and the terms of the report, NEDDC did not address this in any of their submissions until specifically required to.

### Conclusion

21. The Tribunal is satisfied that NEDDC did hold recorded information within the scope of the request at the date of the information request namely valuation BM/1 and the cost per unit breakdown of 29.6.2006. These were not disclosed and as such NEDDC breached regulation 5(1) EIR, their disclosure pursuant to this case is outside the time allowed under EIR consequently they have breached regulation 5(2) EIR.
22. In light of the provision of these documents pursuant to these proceedings, the Tribunal does not require any additional steps to be taken.



Dated this 23rd day of November 2012

Fiona Henderson  
Tribunal Judge