



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0108

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0428392

Dated: 26 April 2012

Appellant: Barrie Lambert
Respondent: Information Commissioner
Additional Party: London Borough of Merton

Heard at: Field House, London

Date of hearing: 3 April 2013

Date of decision: 10 April 2013

Before

Angus Hamilton

Judge

and

Richard Fox

and

Narendra Makanji

Subject matter: Environmental Information Regulations 2004 Regulation 12(5)(e)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 26 April 2012 and dismisses the appeal.

REASONS FOR DECISION

Introduction

- 1 The Environmental Information Regulations 2004 (EIR) Regulation 5 provides that:

‘a public authority that holds environmental information shall make it available on request’.

- 2
 - a) Regulation 12(5)(e) of EIR 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’.
 - b) Reg 12(1)(b) imposes an additional requirement, namely – ‘in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.’

Request by the Appellant

- 3 The Information Commissioner in his Decision Notice (DN) of 26 April 2012 has correctly set out the chronology leading up to this appeal. There is no dispute between the parties that the EIR is the relevant legislation to be considered here rather than the Freedom of Information Act 2000.
- 4 We are aware however that there has been a dispute between Mr Lambert and the Commissioner over the extent of the information not disclosed to Mr Lambert by Merton (the 'disputed information') and consequently the information specifically referred to by the Commissioner in the DN.
- 5 The confusion over this issue has not been helped by the terminology employed by both the Commissioner and Mr Lambert nor by the very lengthy responses submitted by the parties in response to requests for clarification made by the Tribunal prior to this hearing.
- 6 The matter was confused in particular by the Commissioner apparently restricting the disputed information to 'the rates and percentage terms negotiated for the contract extension' when Mr Lambert sought this information in relation to both the initial contract between Merton and FM Conway Ltd ('Conways') which ran between 2005 and 2010 and the extension which ran from 2010 to 2012.
- 7 There was also some additional confusion over the parties' different understanding of the term 'rates'.
- 8 The Tribunal have approached the matter on the basis that what Mr Lambert was keen to establish was the detailed breakdown of charges to be made by Conways under both the initial contract running between 2005 and 2010 and the extension to that contract running between 2010 and 2012.

- 9 This does now appear to be accepted by all parties and this is the precisely the information which has been redacted from the information that has been disclosed to Mr Lambert by Merton. Additionally the Commissioner has conceded that the analysis in his DN could have been far better expressed. The Commissioner and Merton both contend that the exemption in Reg 12(5)(e) of the EIR applies to the redacted information in both the 2005-2010 contract and that in the 2010-2012 extension.
- 10 Whilst dealing with issues of confusion the Tribunal also notes that it is quite clear that Mr Lambert is, through the appeal, seeking the disclosure of information which he did not seek in his original request to Merton. For example, in his witness statement prepared for these proceedings (page 349 of the bundle) he asks the Tribunal to direct that Merton disclose **‘the annual cost of all other contracts held by FM Conway at any time during the period 2005-2012’**. Unfortunately, although Mr Lambert was informed by the Tribunal prior to this hearing that it is not possible to extend his request for information in this manner, he has persisted in making such requests. The result is that the issues in the case have become muddled by irrelevant arguments.

The Appeal to the Tribunal

- 11 On 26 April 2012 the Appellant submitted an appeal to the Tribunal (IRT). The Notice of Appeal did not directly challenge the Commissioner’s analysis in relation to the applicability of Reg 12 of EIR but rather asserted that the Commissioner had incorrectly identified the disputed information (see paragraphs 4-9 above).
- 12 In subsequent submissions Mr Lambert appears to be contending that he public interest in disclosure outweighs the public interest in non-disclosure (e.g. p29 and 154-5 of bundle and submissions of 21 March) and that the passage of time has rendered at least some of the disputed information no longer commercially sensitive (e.g. p97 bundle and p144 of bundle)

The Questions for the Tribunal

- 13 The Tribunal judged that the questions for them to consider were whether:
- a) Reg 12(5)(e) applies to the disputed information and whether
 - b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Evidence & Submissions

- 14 With the agreement of all parties this matter was considered by the Tribunal on the papers alone. Those papers included extensive submissions from all the parties and the Tribunal members were grateful to all the parties for the effort they had clearly put into the preparation of their submissions.
- 15 The evidence from the parties also included a number of witness statements from:
- Mr Barrie Lambert
 - Ms Patricia Pain (for Mr Lambert)
 - Mr Mario Lecordier - Traffic & Highways Service Manager (Merton)
 - Mr Ron Woodland- Legal Director, FN Conway & Co (Merton)
 - Mr Christopher Warner- Litigation & Planning (Merton).
- 16 On the applicability of Reg 12(5)(e) the Commissioner posed four basic questions in his DN:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic

interest?

- Would disclosure of the information adversely affect the confidentiality?

The Tribunal found this approach to be very helpful and adopted it.

- 17 In response to the four questions the Commissioner contended in the DN as follows:

Is the information commercial or industrial in nature?

The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The withheld information relates to a contract that the council has with a third party concerning highway maintenance. The council advised the Commissioner that the specific information being withheld in this case is the schedule of rates and the precise percentage terms negotiated. In view of this, the Commissioner is satisfied that the information is clearly commercial in nature.

Is the information subject to confidentiality provided by law?

The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.

The Commissioner understood that the council's position was that the information was covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:

Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.

Was the information shared in circumstances importing an

obligation of confidence? This can be explicit or implied.

Having considered the withheld information, the Commissioner is satisfied that the information is not trivial and is not in the public domain. He therefore concludes that the information has the necessary quality of confidence.

The council explained to the Commissioner that there was an implicit understanding that the withheld information would not be disclosed as this was the standard practice regarding procurement information of this nature. In view of this, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

The Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In line with this approach, the council consulted with the contractor involved and supplied the Commissioner with a copy of their response as evidence that the arguments reflected the genuine concerns of the contractor. Having considered this, the Commissioner was satisfied that there was sufficient evidence to demonstrate that the authority was not speculating on behalf of the contractor.

The argument proposed to the Commissioner was that the disclosure of the withheld information would adversely affect the commercial interests of the contractor because it would essentially allow their competitors to copy their approach or undercut them in future tender exercises. There was also a concern that the disclosure could damage their relationship customers who would clearly wish to secure the best possible deal and may be dissatisfied as a result of viewing the disclosed information.

The Commissioner considered the withheld information together with the above argument and he was satisfied that there it was more probable than not that the disclosure of the withheld information, given the level of detail it provides, would adversely affect the commercial interests of the contractor when bidding for future contracts and damage its commercial relationship with other customers. The Commissioner notes that the contract dates from 2005-10 but includes an extension and variation for the years 2010-12. The council told the Commissioner that the rates are still considered to be current although the contract has been extended. The Commissioner was willing to accept that the information was not of such an age that it would not still prejudice the commercial interests of the contractor.

The council proposed other arguments relating to its own commercial interests which the Commissioner did not find sufficiently persuasive to engage the exception. In particular, the council argued that disclosure of the information may hinder the council's ability to achieve value for money in future procurement exercises, as suppliers could become reluctant to engage with the council in the future. The council expressed concern that suppliers may offer less or incomplete information for fear that information could be disclosed to the public. The council also argued that those submitting tenders may increase their bid pricing to protect themselves from commercial losses resulting from the disclosure of information. Finally, the council said that it was concerned that disclosure may decrease the differentiation between bidders.

As explained above, the Commissioner has to be satisfied that the prejudice described would be "more probable than not". In the cases of the arguments put forward regarding the council's own commercial interests, the Commissioner considered that there were powerful arguments against this being the case. The Commissioner's published guidance on section 43(2), the exemption relating to commercial interests under the Freedom of Information Act 2000, states that public authorities should be wary of making the argument that the potential for commercial information to be released would reduce the number of

companies willing to do business with the public sector or result in less information being provided, leading to reduced competition and increased costs. The guidance states the following:

“In practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the overall value of public sector contracts is a great incentive to tender for them.

Increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition”.

- 18 The question - **Would disclosure of the information adversely affect the confidentiality?** – is not specifically addressed in the DN but the Tribunal felt that it was hard to envisage a situation where confidentiality would not be harmed by disclosure.
- 19 Merton very much adopted and supported the Commissioner’s analysis on these points but additionally suggested that the disputed information could also be regarded as confidential under Regulation 43 of the Public Contract Regulations 2006 (p363 bundle) and also that the disputed information might constitute a ‘trade secret’ (p364 bundle).
- 20 As already mentioned Mr Lambert did not provide explicit detailed representations in response to the Commissioner’s analysis of Reg 12(5)(e) but he did indicate that he felt that the Commissioner had ignored his argument in relation to the ‘effluxion’ of time. In fact as can be seen from the quotations from the DN which are set out above the Commissioner did indeed consider the issue of the age of the disputed information:

The Commissioner notes that the contract dates from 2005-10 but includes an extension and variation for the years 2010-12. The council told the Commissioner that the rates are still considered to be current although the contract has been extended. The Commissioner was willing to accept that the information was not of such an age that it would not still prejudice the commercial interests of the contractor.

- 21 In relation to the public interest test, namely - whether 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information' – the Commissioner reasoned as follows in his DN:

Public interest arguments in favour of disclosing the information

There is always some public interest in the disclosure of information for its own sake. This is because disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

There is also a more specific public interest in understanding how public money is being spent when a contract is awarded to a third party and understanding whether the contractor is providing a value-for-money service.

Public interest arguments in favour of maintaining the exception

The exception under regulation 12(5)(e) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party. There is a public interest in ensuring that the commercial interests of a third party are not prejudiced in circumstances where it would not be warranted or proportionate.

In this case, the Commissioner was satisfied that it was more probable than not that disclosure of the withheld information would adversely affect the commercial interest of the contractor by providing information that could be exploited by its competitors and customers or which may damage the

contractor's relationship with its customers.

Balance of the public interest arguments

The council recognised the strong public interest in accountability about public money. Such concerns are arguably even more pressing given the current economic climate and the Commissioner notes that this particular contract has been the subject of a two year extension clause which may increase the public interest in transparency surrounding costs. However, the council said that it has already provided a significant amount of information to the complainant about the contract including the total annual cost year by year. The council also said that it is satisfied that its own processes are robust enough to ensure that value for money is secured.

The Commissioner was satisfied that if this information was disclosed, it would prejudice the commercial interests of the contractor for the reasons described above. He is satisfied that the level of prejudice would be severe enough to outweigh the public interest in disclosure.

Disclosure of such detailed cost information would impact significantly on the contractor's ability to be as competitive as possible by disclosing to its competitors the details of its general approach. This would allow those competitors to understand, to a very detailed level, how the contractor had managed the costs involved which could lead to imitation or undercutting in the future. Disclosing information of this nature could also damage significantly the company's relationship with its other customers.

Having considered all the circumstances, the Commissioner agrees with the council that an appropriate level of transparency has been struck in this case and that disclosure of the total annual costs of the contract year by year is enough to satisfy the legitimate public interest in assessing whether the council is securing value for money. It is the Commissioner's view that disclosing the contractors' individual cost information and the precise percentage terms negotiated would not be proportionate in the circumstances of this case.

- 22 Again Merton, in its submissions, adopted the Commissioner's analysis albeit in a far more concise manner :

the Second Respondent, whereas recognising a strong public interest in

accountability when it comes to public money, submits that disclosure of cost information and the precise percentage terms negotiated (which would of course be disclosure to the world and not just the Appellant) would seriously prejudice the commercial interests of both the Second Respondent and FM Conway Ltd and that this outweighs disclosure.

- 23 Mr. Lambert contended in his submissions that the public interest clearly favoured disclosure. He did not do so in detail in his submissions to the Tribunal but rather did so by reference to a document contained within the bundle at pp 154-155 which the Tribunal carefully considered.

Conclusion

- 24 Having considered the submissions from the parties in this case the Tribunal concluded that they found the submissions from the Commissioner to be the most coherent and compelling in relation both to the applicability of Reg 12(5)(e) of EIR and on the issue of the public interest test. Consequently the Tribunal found that the exemption in Reg 12(5)(e) did apply to the disputed information and that in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information.
- 25 The Tribunal did accept the principle that the need for confidentiality waned with time and felt that this was well illustrated by the '30 year rule' in relation to confidential government documents. However in relation to this specific case the Tribunal felt that the information wasn't 'stale' enough to justify a loss of confidentiality. The Tribunal considered that the disputed information still had the potential to be of great use to Conways' competitors and to undermine Conways' relationships with other customers.
- 26 The one qualification that the Tribunal wished to express about the

Commissioner's analysis was in relation to his consideration of the question - ***Is the confidentiality required to protect a legitimate economic interest?*** – where the Commissioner refers to his own guidance on certain points as if, in the Tribunal's view, that guidance had some authoritative status. The Tribunal felt that this part of the analysis added almost nothing to the preceding analysis on this point and could have simply been omitted.

27 Our decision to dismiss this appeal is unanimous.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 10 April 2013