



ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FER0484216**

Dated: 24th. June, 2013

(1) Appeal No. EA/2013/0143

Appellant: Christopher Randle
First Respondent: The Information Commissioner ("the ICO")
Second Respondent: Poole Harbour Commissioners ("PHC")

and

(2) Appeal No. EA/2013/0144

Appellant: Poole Harbour Commissioners
First Respondent: The Information Commissioner
Second Respondent: Christopher Randle

Before
David Farrer Q.C.
Judge
and
Paul Taylor
and
Jean Nelson

Tribunal Members

Date of Decision on (2): 27th. March, 2014

Date of Promulgation: 31st March, 2014

Appeal EA/2013/0143 (1)

is adjourned for further directions to be given with a view to an oral hearing.

Appeal EA/2013/0144 (2)

was determined on written submissions

Subject matter: (2)

(1) Environmental Information Regulations 2004 (“EIR”) Reg. 5(1).

Whether PHC held the requested information .

(2) EIR Reg. 12(5)e)

Whether disclosure would have an adverse effect on the confidentiality of commercial information.

Whether the public interest favoured the maintenance of this exception

Reported cases; (2)

Coco v A.N.Clark Engineers Ltd. (1969) R.P.C. 41

*Bristol City Council v ICO and Portland and Brunswick Squares Association
EA/2010/0012*

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal of PHC (2).

It adjourns the appeal of CR (1) for further directions

Dated this 27th day of March, 2014

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

- 1 CR appeals and PHC cross – appeal a Decision Notice of the ICO dated 24th. June, 2013 which determined a request for information made to PHC by CR on 27th. January, 2012.
2. Poole harbour is a very large natural harbour. It supports a busy commercial and fishing port, a passenger ferry terminal, a number of marinas for leisure boats, a variety of other water sports, marine- related enterprises and a natural habitat of considerable environmental importance.
3. PHC are trustees of a trust created by statute which administers the business of Poole harbour so as to promote the varied interests of its users.
4. An important and growing interest is leisure boating, both sail and power. PHC operates a marina on Poole Town Quay, known as Poole Quay Boat Haven By 2007 the available berths were insufficient to meet increased demand. PHC began a review of the viability of a further marina and, for that purpose commissioned a market review and viability assessment from specialist consultants, Marina Projects Ltd.(“MPL”)
5. MPL submitted a review and assessment to PHC in September, 2007. It was marked “confidential” It considered the current market, the facilities required by a further marina, its design, the allocation of berths, the need for an environmental assessment and the financial implications. It was not specific to a particular location in the harbour.

6. A supplementary report entitled “Addendum to Market Review and Viability Assessment” was submitted in October, 2007. It provided possible business models for the development and operation of a new marina, an estimate of pre – commencement costs and a risk profile analysis.
7. The third report headed “Review of Alternative Marina Access Arrangements”, dated August, 2011 focussed on a new marina located as an extension to the existing Boat Haven on Poole Town Quay and dealt with possible solutions involving remote car parking coupled with access to berths by water taxi. This location represented a change of preferred site option in 2011 from Poole Yacht Club in front of Hamworthy Park.
8. The proposal for an extended marina, operated by PHC in a prime location in the harbour aroused considerable public interest and local opposition, involving, as it did, competition issues with other commercial marinas, questions of traffic congestion and environmental concerns. It also offered the possibility of substantially increased future income to PHC as public custodian of the harbour.

The Request for information

9. On 27th. January, 2012, CR submitted the following request to PHC:-

“Please provide me with copies of all minutes, emails, internal correspondence, budgets, drawings and reports relating to your proposal to extend Poole Quay Boat Haven. Please also include copies of correspondence with Poole People Party, Mr. Mark Howell and Mrs. Mary Parsons regarding your proposal to extend Poole Quay Boat Haven.”

He subsequently confirmed that he was not asking for disclosure of tenders or quotations for the consultancy work.

10. A narrow reading of that request might appear to confine its scope to information as to the option discussed in the third report. However, PHC interpreted it in a broader sense in responding and the Decision Notice relates to information on the project viewed as a whole. Given that the third report refers expressly, albeit in general terms, to its predecessors, that is probably the correct approach and it is adopted for the purpose of this decision.

11. PHC`s initial response was that the request was too ill – defined. There followed a series of exchanges in which the ICO became involved, which are set out in the Decision Notice and do not require repetition here. They culminated in a letter from PHC to CR dated 19th. December, 2012 stating that it was willing to disclose about 400 pages of information, subject to photocopying charges but relying on the exception provided by EIR reg. 12(5) (e) as to the three reports and tender and bidding material (see above) and on reg. 13 (personal data) as to names redacted from correspondence.

12. So December, 2012 is, in our judgement,, the relevant date for consideration of the issues on these appeals, save for confidentiality, which must be assessed as at the date when the relevant information was received by PHC.

13. CR complained to the ICO by letter of 13th. February, 2013, stating that most of the 400 pages was information outside the scope of his request, that few, if any emails, internal correspondence, budgets or minutes had been disclosed and (by implication) that PHC could not properly rely on the reg. 12(5)(e) exemption, having regard to the public interest engaged by the proposed development. He did not pursue the question of personal data (see para.11); the Decision Notice did not, therefore, deal with it and nor does the Tribunal.

14. PHC stood by its denial that it holds any further information within the scope of the request, save the reports, for which it relies on the exception.

The Decision Notice

15. The ICO upheld PHC's claim that it held no further information that required disclosure. He found that the reports represented confidential commercial information imparted in confidence and that such confidentiality was designed to protect the legitimate economic interests of MPL. He concluded, however, that disclosure was not shown to be likely to damage those interests. He ordered disclosure of the three reports.

The CR appeal

16. It is convenient to deal briefly at this stage with our reasons for adjourning the CR appeal and proposals for further steps to be taken for its determination.

17. It is for PHC to prove, as more probable than not, that it holds no undisclosed material responsive to the request, save that for which it relies on an exception.

18. The Tribunal has not seen a schedule of the information disclosed to CR. We are told that it contains very little within the classes of document specified in the request.

19. Whilst the Tribunal cannot and does not, of course, assert that PHC must hold further relevant emails, internal correspondence, budgets or minutes, we are surprised that proposals and changes in proposals as important as those involved here should generate such an apparent dearth of written evidence. PHC is not aware of any information having been destroyed.

20. By letter of 10th. December, 2013, PHC stated that it could add nothing to its response to the ICO. It submitted no witness statement for this appeal.

21. Where a public authority denies that it holds requested information, the Tribunal, like the ICO should be slow to determine otherwise and order it to do what it says it cannot do. For that reason it is appropriate to offer it an opportunity to provide further evidence and answer questions before a final determination is made. Furthermore, the Tribunal needs to know just what documents were disclosed to CR, before reaching any conclusion on the matter.
22. Plainly, no party can be compelled to adduce further evidence or argument or to submit to cross examination on such matters. What is intended is an option, not a requirement.
23. Accordingly, the Tribunal will convene a telephone hearing and will give directions as to the further conduct of this appeal in the near future, after hearing the parties.

The PHC appeal

The case for PHC

24. PHC argued its case in grounds of appeal dated 4th. September, 2013. It submitted that the ICO failed to grasp what type of information within the reports would, if disclosed, damage MPA`s legitimate commercial interests. The important confidential information was not the conclusions and recommendations presented by the reports but the raw data, the statistical material that underpinned them. Those data were obtained and collated by MPA, which had a legitimate interest in preventing their revelation, either to commercial rivals or, save pursuant to contract, to potential clients for its consultancy services.
25. If reg. 12(5)(e) was engaged, then the public interest clearly favoured the maintenance of the exception.

The case for the ICO

26. The ICO submitted that the evidence of likely adverse effects was unconvincing and that PHC confused MPA's interests and competitors with its own. As to the public interest, the ICO assessed the marina project as one of considerable public concern and sensitivity, particularly for environmental reasons. He was not persuaded by PHC's case on this issue as matters stood.

CR's case

27. He questioned whether the reports were confidential information and whether they included a confidentiality clause. If they did, PHC had abandoned such confidentiality by selective publication of material from the reports. He asserted that the third report relates to an issue of great environmental importance to the local community and should be disclosed in the interests of the public debate. The same goes for the 2007 reports; additionally, they raise questions of fair competition with other commercial marina operators and should be disclosed to ensure that PHC would enjoy no unfair advantage over its competitors.

The evidence

28. A remarkable feature of these appeals is that no evidence was adduced by PHC other than correspondence among the parties and the three reports which the Tribunal received in a closed bundle. As regards PHC's appeal, there was no witness statement from either PHC or, more importantly, MPL explaining the sensitivity of the withheld information, the economic interests at stake, the damage that disclosure would cause or the effect (or lack of effect) of the passage of time on such interests or such potential damage. This is the more surprising since the ICO noted at paragraph 44 of the Decision Notice that the argument as to adverse effects "*was couched in very*

general terms” and stated at paragraph 46 that PHC, having been given the opportunity, had “*not provided sufficient evidence that disclosure of the withheld information would adversely affect MPL’s legitimate economic interests*”. Clearly PHC consulted with MPL in preparing for this appeal so that MPL was fully apprised of the disclosure sought. No application was made for MPL to be joined as a party. It seems likely that none was needed since PHC could readily adduce evidence from MPL as part of its case.

29. As a result the Tribunal studied the reports in the limited illumination of the written submissions of PHC including the letter of 13th. December, 2012. The “raw data”, to which those submissions refer, are generally statistics which were presumably at the time available to the public but which undoubtedly required lengthy research to assemble and update as a database for a marine consultancy. “Available” means accessible on the internet or, as to tariffs, by a telephone call or email to the marina or other enterprise concerned. The number and mix of berths, distances from car parks and accessible facilities at comparator marinas are not trade secrets but features which marinas may be expected to publicise.
30. The third report contained a series of comparisons with other marinas and a review of the significant economic changes since the 2007 reports and consequent statistical updates. Unlike its predecessors, its analyses of the raw data and its recommendations are specific to a particular location. This report was submitted about fifteen months before the relevant date (see paragraph 12). and provided at a time when no rival consultant was likely to participate in the proposed development. Furthermore, PHC itself was to be the developer.

The issues

31. Regulation 12(5)(e), provides:-

“For the purposes of paragraph (1)(a) (exceptions to the duty to disclose environmental information), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- - -

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”

That exemption is subject to the test of the balance of public interests (Reg. 12(1)(b)) and, for the purpose of that balance, a presumption in favour of disclosure (Reg. 12(2)).

32. To engage the exemption, five elements must, therefore, be established by the public authority:

- (i) The information is (here) commercial information;
- (ii) It is information of a confidential nature;
- (iii) It is held in circumstances which the law treats as imposing a duty of confidentiality;
- (iv) Confidentiality is designed to protect a legitimate economic interest;
- (v) Disclosure to the public would adversely affect that confidentiality, hence the economic interest.

33. The reports clearly contain commercial information and PHC, notwithstanding its status as a public Trust, is operating as a commercial enterprise with a view to profit.

34. Each report was marked “confidential”. Following the test prescribed by Megarry J. in the well – known case of *Coco v A.N.Clark Engineers Ltd. (1969) R.P.C. 41*, the Tribunal readily infers that PHC realised on reasonable grounds that the information

in the reports was provided in confidence so as to give rise to an equitable obligation of confidence.

35. Point (iv) is the first to present any complication. Confidentiality is “provided by law” to protect the legitimate economic interests of the party who provides the confidential information, here MPL. The exception is not engaged in respect of PHC`s interests in preventing competitors from learning about its plans for a new Marina. The distinction is significant because PHC`s letter to the ICO and subsequent submission to the Tribunal appear at times to suggest that such interests may be relevant to its refusal. Reference is made to advantages to be gained by other marinas to the detriment of PCH.

36. However, attention is also drawn to the interests of MPL in concealing from its consultant competitors and from other marinas, which are potential clients, data on costs, tariffs and other matters which study of the reports would reveal. PHC submits that MPL had legitimate interests which the confidentiality of the reports was designed to protect.

37. That leads to the final requirement for reliance on the exception, the likelihood that disclosure would have an adverse effect upon the confidentiality of the information provided by MPL. The adverse effect must evidently involve damage to the legitimate economic interests

38. PHC cited the following extract from *Bristol City Council v ICO and Portland and Brunswick Squares Association EA/2010/0012* (paragraph 13) -

“It may be that the release of the report would in fact have had no adverse affect (sic) on the economic interests of the developer but, as we have found . . . there were reasonable grounds for saying its release would damage their economic interests”

to argue that –

“(the test) *is whether disclosure in theory would cause harm on the balance of probabilities.*

That is a misreading of the Decision. The relevant paragraph is concerned, not with the nature of the harm which might result from disclosure but with the question whether confidentiality was intended, in that case, to protect a legitimate economic interest, as its subtitle indicates. The regulation simply imposes a condition, to be satisfied on a balance of probabilities, that disclosure “*would adversely affect . . . legitimate economic interests*”. It says nothing about disclosure causing harm in theory, whatever that might mean.

39. So the question whether reg.12(5)(e) is engaged depends on the answer to the further question: is it more likely than not that disclosure of the reports in December, 2012 would have damaged the legitimate economic interests of MPL ?

40. The Tribunal thinks it unlikely, in the absence of contrary evidence, that MPL`s legitimate economic interests, its competitive advantage, would suffer from disclosure of data and proposals contained in the first two reports, submitted five years earlier and in a quite different economic climate, as the third report pointed out.

41. The third report was far more recent and deserves separate consideration. As indicated above, it included some updating of the first two. It is plainly the report of most interest to CR and the group of which he is a leading member
.

42. The report focuses on the provision of a water taxi service to overcome the problems of further traffic congestion at and near the Poole Town Quay. It contains a limited range of statistics regarding tariffs in neighbouring marinas and data relating to a number of distant comparator harbours. It reviews the changing market and sets out a

range of design proposals, which are not, according to PHC, the sensitive elements of the withheld information. As the ICO observed, nothing within the report appears to reveal information presently held only by MPL. That other information is generally accessible to the diligent does not prevent its communication from importing confidentiality but may be relevant to the question whether disclosure would adversely affect legitimate commercial interests.

There is no compelling evidence that its disclosure in December, 2012 would have done so. On the other hand, the third report was confined to a single location and largely to the issue of access to that location. In the absence of contrary evidence, it is far from clear what advantage MPL's competitors, as distinct from PHC's rival marinas, could extract from it.

43. Like the ICO, the Tribunal concludes that PHC has not proved on a balance of probabilities that disclosure would adversely affect MPL's legitimate economic interests, viewed as at December, 2012, and that the exemption provided by reg.12(5)(e) is therefore not engaged.

The balance of public interests

44. We have received submissions on this issue from all parties and give our ruling upon it in case our decision as to the engagement of the exception is challenged.

45. As indicated earlier in this Decision, the plans to develop a significantly extended marina at the Poole Quay site are a matter of considerable legitimate interest and concern to a wide range of interests, prominent among them local residents. Issues of traffic congestion, onshore environmental impact and possible effect on marine life on the one hand and possible economic benefits to the town and its hinterland on the other demand close scrutiny and the opportunity for public participation,

46. Having read the reports the Tribunal has no doubt that their disclosure, especially, for obvious reasons, the disclosure of the third report, would be of substantial value in the public debate as to this proposed development.

47. The public interest in withholding disclosure lies in the general principle of preserving confidentiality where commercial information is communicated in confidence.

48. We have regard to that principle here but also to our earlier conclusion that no adverse consequences for MPL's business are likely in this case, given the nature of the information in the reports and, as to the reports from 2007, the passage of time since their submission.

49. Even if there were some adverse effect, we conclude that it would be very limited.

50. The Tribunal has regard to the presumption in favour of disclosure.

51. Accordingly, we judge that the balance of public interests strongly favours disclosure of all three reports, should such a question require consideration.

52. For these reasons we dismiss PHC's appeal.

53. This decision is unanimous.

Signed

David Farrer Q.C.

Tribunal Judge

27th. March, 2014