



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2015/0112

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FER0557144**

Dated: 11th. March, 2015

Appellant: Robert Latimer ("RL")

First Respondent: The Information Commissioner ("the ICO")

**Second Respondent: The Department for Environment, Food and Rural Affairs
("DEFRA")**

**Before
David Farrer Q.C.
Judge**

and

**Jean Nelson
and
Paul Taylor
Tribunal Members**

Date of Decision: 18th. October, 2015

Date of Promulgation: 30th. October, 2015

The Appellant appeared in person.

The ICO did not appear but made written submissions.

Robin Hopkins appeared for DEFRA

Subject matter:

EIR Reg. 12(5)(a) and (b) and 12(1)(b)

Whether disclosure of the requested material would adversely affect (i) international relations or (ii) the course of justice and, if it would have either effect, whether the public interest in maintaining the exception outweighed the public interest in disclosing the information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that disclosure would adversely affect the course of justice and that the public interest in maintaining the exception provided for in Reg. 12(5)(b) outweighs the public interest in disclosing the information. It therefore dismisses the appeal. DEFRA is not required to take any steps as a result of this appeal.

Dated this 18th. day of October, 2015

David Farrer Q.C.
Judge
[Signed on original]

Abbreviations

In addition to those indicated above, the following abbreviations are used in this ruling -

The EIR Environmental Information Regulations, 2004 (SI 2004/3391).

The EC The European Commission

The ECJ The European Court of Justice.

The EA The Environment Agency

The DN The Decision Notice of the ICO

REASONS FOR DECISION

The Background

1. On 18th. October, 2012, the ECJ, on a complaint by the EC, found the UK to be in breach of the Urban Water Waste Treatment Directive in respect of the Whitburn sewage system. The judgment followed protracted proceedings which began in 2003
2. In accordance with the normal procedure, the judgment led to negotiations between the UK, acting through DEFRA, and the EC designed to agree the implementation of the ECJ judgment.
3. The onus lay on the UK to propose appropriate measures. A failure to agree measures acceptable to the EC could result in a reference back to the ECJ to enforce compliance and to the imposition of financial sanctions on the UK.
4. On 31st. March, 2014 the UK wrote to the EC setting out a series of proposals intended to produce compliance with the ECJ judgment. This is the requested information. The Tribunal received copies.
5. RL 's longstanding involvement in and concern for the issue of sewage disposal at the sites to which the judgment applied is shortly set out in the Tribunal's decision EA/2015/0111 and in earlier decisions so we do not relate it again here. On 10th. April, 2014, that is to say ten days after the service of the UK proposals, he made the following request to DEFRA -

"I understand DEFRA have provided an update regarding the ECJ Court (sic) on the Whitburn case to the EC, under the EIR. Please could you provide a copy of the update provided to the EC [European Commission] ?"

6. DEFRA responded on 13th. May, 2014 refusing the Request and relying on the exceptions provided in EIR Regs. 12(5)(a) and 12(5)(b), that is to say the claims that disclosure would adversely affect international relations (Reg.12(5)(a) and the course of justice (Reg. 12(5)(b)) and that the public interest favoured the maintenance of both exceptions.
7. It maintained that refusal following an internal review requested by RL.
8. RL complained to the ICO on 17th. September, 2014.

The DN

9. The ICO concluded that the proposals in the letter were at a preliminary stage, that discussions were just beginning, that disclosure would be premature and would damage relations with the EC and that the public interest required that they be withheld. He therefore upheld reliance on Reg. 12(5)(a) and dismissed the complaint. Having reached that decision, he did not make a finding as to reliance on Reg. 12(5)(b).

The Appeal

10. Before the hearing the Tribunal alerted RL to the need to prepare his case in relation to both exceptions despite the ICO's decision to make no finding as to Reg. 12(5)(b).

11. No oral evidence was called and there was no closed session.

12. It was not disputed that the UK relations with the EC are "international relations" for the purposes of Reg. 12(5)(a). RL did not accept that negotiations as to measures necessary to comply with an ECJ judgment form part of "the course of justice".

13. Although appearing to accept in written submissions that Reg. 12(5)(a) was engaged, RL submitted at the hearing - as he was entitled to do - that neither exception relied on was engaged and that, if either was, the public interest in disclosure clearly prevailed.

14. He put in evidence, immediately before the hearing, two letters from the EC which, he submitted, were relevant to the questions whether disclosure would adversely affect UK relations with the EC and whether it would be in the public interest.

15. The earlier, dated 4th. November, 2014, was sent by the EC Director General Environment to RL. It upheld a refusal by the EC to give RL access to documents provided to the EC by the UK authorities, apparently because the original decision to refuse was being reviewed by the European Ombudsman. Having reassured RL of the UK's commitment to upgrading the system, the letter continued -

"We have indicated to the UK authorities that there is a need to inform the local public of the options assessed and proposals being considered as soon as possible and they have informed us that they hope to be able to present these by the end of the year or start of 2015 at the latest,"

R.L relies on this passage as contradicting DEFRA's claim that disclosure would damage relations with the EC or the course of justice. He argued that the EC was, in fact, pressing the UK to disclose to the public its proposals for compliance.

16. The second letter, dated 23rd. July, 2015, was from the EC Commissioner for Environment, Maritime Affairs and Fisheries to RL's M.E.P. It was a response to her request for disclosure of the technical measurements provided by the UK to the ECJ and information from the UK as to how it intended to comply with the ECJ judgment. It concluded -

"I trust that information on the improvement works they are proposing to reduce spills of untreated urban waste water from the Whitburn collecting system at both the Whitburn and St. Peter's outfalls is now being made public in accordance with legal obligations to this effect laid down in the national legislation".

The Tribunal assumes, in the absence of specific evidence, that the "national legislation" referred to is the EIR. This letter, RL submitted, was to the same effect as the earlier. The EC was not troubled by but was rather urging disclosure of the UK proposals.

17. The ICO adopted the findings of the DN and argued that RL had focussed on the irrelevant question whether the UK had given the ECJ the true figures as to flows when considering the public interest in disclosure of the requested information.

18. DEFRA contended that both exceptions were engaged. It acknowledged that, at the right time, the public should be informed of the UK's definitive proposals to improve the system, as the EC letters indicated. The objection to disclosure in respect of both exceptions, was timing. The request was made days after the UK outlined its preliminary position to the EC and before the EC had responded to the letter in even the most cursory terms. The contents of the letter was clearly a series of preparatory suggestions seeking to provide a basis for discussion and detailed work. The EC would object to such premature publicity and the UK's position in negotiation would be significantly impeded by objections to a wide range of embryonic ideas which might well be abandoned well before firm proposals were tabled.

Our reasons

19. The relevant EIR provisions are short and straightforward. So far as material they read -

“ 12(1) Subject to paragraph(s) 2 . . ., a public authority may refuse to disclose environmental information requested if -

- (a) an exception to disclosure applies under paragraph 4 or 5 and*
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure.

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(5) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(a) international relations

(b) the course of justice.

20. As to Reg. 12(5)(b) the Tribunal has no doubt that the implementation phase following a judgment of the ECJ that a member state has breached a directive forms part of “the course of justice”. The proceedings before the ECJ are not spent; the case may return to it if the EC contends that, following negotiations, the member state is not compliant with the ruling. The position is akin to the domestic case in which the court makes a preliminary ruling on a particular issue and the parties then seek to agree terms in the light of that ruling.

21. The Tribunal broadly accepts DEFRA’s description of the letter of 31st. March, 2014. It is a two - page document and represents the opening of negotiations with the EC designed to lead to an agreed programme of measures compliant with the ECJ judgment. It refers to the completion of a review of options and the need for more detailed planning. It invites an early indication of the Commission’s views.

22. RL makes the point that fifteen months had passed since the ECJ ruling so that proposals must have reached an advanced stage. The letter refers only to one preceding letter. It is reasonable to suppose that much preparatory work would be required before discussions were launched. It may be that matters could have been pursued with greater urgency, whether by DEFRA or the Northumberland Water Authority. The Tribunal cannot say. The facts are that the letter has the appearance of an introduction rather than a conclusion and that it was sent just ten days before the request.

23. The two exceptions overlap to some extent as to the material factual considerations though not the forensic analysis. Breaches of confidentiality can certainly have an adverse effect on the relations between the negotiating parties. As to prejudice to negotiating positions, it is the party whose stance is disclosed that may suffer the greater injury.
24. The Tribunal is impressed by the support for transparency expressed by the EC, transparency as to the UK's position at any rate. We bear well in mind that those expressions date from later stages in the negotiations when the EC looked for a firm set of proposals on which the UK public would be consulted. Nevertheless, we cannot say that, applying the test of probability, disclosure of the requested information, even in April, 2014, would have had an adverse effect on relations with the EC, even to the extent of making negotiations more difficult.
25. So we do not uphold the ICO's decision that the exception under Reg. 12(5)(a) was engaged.
26. As to the exception enacted in Reg. 12(5)(b) which was not addressed in the DN, we consider that DEFRA was on altogether firmer ground. It conceded in argument that a time must come, in a case such as this, when proposals to be submitted to the EC are published so that the many people whose lives are affected by the determination of such an issue may express their support or objection. Litigation between the EC and a member state on a major environmental information differs markedly in this respect from private adversarial proceedings. Just when that time arrives will depend on the facts of the particular case but might generally be expected when the member state has reached or is close to its final position.
27. The position is quite different where the member state is identifying at an early stage possible solutions which may or may not ultimately be submitted as firm proposals. At this earlier stage, it is entitled to the notorious "safe space" to discuss such matters without the accompaniment of public denunciation or applause or the treatment by the media of half - formed options as fixed intentions. Moreover, once a communication is disclosed, it will probably be very difficult, as a matter of public relations, for its successors, setting out modifications or fresh options, to be withheld.
28. We observe that the EC letter referred to in paragraph 14 speaks of plans for public disclosure by the UK in late 2014 or early 2015 without any apparent concern that this was unreasonably delayed. The references to options assessed and proposals considered imply, if taken literally, a wider duty of disclosure than we consider appropriate. Given the disclosure dates referred to, it is possible that these terms were used with less rigorous concern for their import than is required in a judicial decision. The second letter postdates the request by about sixteen months.

29. The Tribunal concludes that DEFRA's negotiating position, hence the course of justice would have been adversely affected by disclosure of the requested letter ten days after it was sent.
30. The next question is, therefore, the balance of the public interest, account taken of the presumption in favour of disclosure.
31. Plainly, the gravity of the adverse effect on the course of justice resulting from disclosure will vary significantly from case to case. Where it would cause no more than minor and transient difficulties in negotiation, perhaps by the publication of a statistic which both parties had agreed to verify before adoption, the presumption might well tip the scales in favour of disclosure. However, we assess that the prejudice to the UK's position would be substantial in this case, for the reasons already discussed. Therefore, to outweigh the public interest in maintaining the exception, it would be necessary to identify a powerful and specific interest in disclosure. An obvious example would be the exposure of misleading or disingenuous claims by the UK in its dealings with the EC or gross incompetence or irrationality in the way it was presenting its case. No such features are present here. There would have been very little intrinsic value to the public in the disclosure of this particular information in April, 2014.
32. Accordingly, we find that the public interest, taking account of the presumption, clearly favoured the withholding of the requested letter.
33. We therefore dismiss this appeal, though for different reasons from those of the DN.
34. Our decision is unanimous.

David Farrer Q.C.
Tribunal Judge,

18th. October, 2015