First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2017/0187

Decided without a substantive hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS SUZANNE COSGRAVE AND JOHN RANDALL

Between

KENNETH RICKARD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

CORNWALL COUNCIL

Second Respondent

OPEN DECISION AND REASONS

NB Numbers in [square brackets] refer to the open bundle

Introduction

1. This is the appeal by Mr Kenneth Rickard against the partial rejection by the Information Commissioner (the Commissioner) on 26 July 2017 of his complaint that Cornwall Council had wrongly refused to disclose certain information to him under regulation 5 of the Environmental Information Regulations 2004 (EIR).

Procedural history

2. Mr Rickard lodged his appeal on 25 August 2017. The Council was later added as a party.

3. Mr Rickard initially opted for an oral hearing. This was due to be heard in Bodmin on 16 January 2018. However, he did not attend, informing the General Regulatory Chamber (GRC) when contacted that morning that he had not received notification of the hearing. It appears that he had changed his email address but had not informed the GRC. In addition, Mr Simon Mansell, a legal executive with the Council who had been handling the case on its behalf, was unable to attend for pressing personal reasons (it transpired that he had not intended formally to represent the Council at the hearing but rather to make himself available in case of questions from the Tribunal). In the circumstances, the Tribunal had little option but to adjourn.

4. Following that hearing, the Commissioner suggested to Mr Rickard that he consider opting for paper determination of the appeal. Mr Rickard acceded, as did the Council. The Tribunal has concerns about the Commissioner's suggestion. As an unrepresented appellant, not well versed in legal proceedings, Mr Rickard may not have appreciated the advantages of an oral hearing, where one's own evidence can be supplemented and clarified, an opponent's evidence tested and evolving legal arguments responded to in a way which is not possible with paper determination. The Commissioner did not explain this to Mr Rickard. He may well have opted for paper determination simply as the less stressful course - he says his health has suffered as a result of pursuing the request.

5. The Tribunal nevertheless provisionally acceded to the parties' wish, whilst making it clear that it reserved the right to require a hearing depending on the responses to the series of directions which proved necessary. In the event, it was satisfied that it could properly determine the appeal without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended). [1]

Factual background

6. The case relates to an integrated waste management (IWM) contract which the Council entered into with SITA Cornwall Ltd (now known as Cornwall Energy Recovery Ltd) (SITA or the Contractor). [2] SITA is part of the Suez International Group and is a private company. The contract – often referred to as 'the Project Agreement' – was made under the private finance initiative (PFI) and procured

[1] SI 2009 No 1976

[2] https://www.cornwall.gov.uk/media/10354020/b-amended-and-restated-pa-1.pdf

under the negotiated procedure of the Public Services Contract Regulations 1993, although it appears that SITA was the only remaining tenderer by the time its bid was accepted. [3] The plant is known as the Cornwall Energy Recovery Centre (CERC) and the main operation is based at St Dennis, Cornwall. It was originally made in 2006, set to last for 30 years. There then followed a long hiatus while SITA sought planning permission. The Council as local planning authority granted permission, but this was successfully challenged in the High Court. The Court of Appeal overturned the High Court's decision in 2012. [4]

7. Because of the long delay, the parties decided to restate the contract. This involved revising certain parts, including by updating financial information. The parties entered into a Supplemental Agreement on 21 March 2013. [5] There are a number of schedules to both the Project Agreement and the Supplemental Agreement. Most have been made public but some have not. It is those schedules, and parts of the Supplemental Agreement itself, which form the basis of the present dispute. (References in this decision to the schedules to the Project Agreement are as revised). The Supplemental Agreement recites that the Contractor's obligations under the Project Agreement 'include the finance, design, construction, refurbishment and operation of new and existing facilities that are required for the receipt, handling, transportation, storage, recycling, compositing and disposal of the municipal waste of the County of Cornwall, including a proposed Residual Waste Treatment Plant [RWTM]'.

8. The CERC entered into operation in March 2017. Its target is to convert energy from the waste which it processes into enough electricity to power 21,000 homes each year. The revenue value of the contract to the contractor is around £1.1 billion and, in 2013, the net present value of cost to the Council was said to be £433 million.

9. Mr Rickard's interest is as a local resident. In a submission made following the aborted January 2018 hearing, he says that he had been following the Council's waste disposal plans since a 2002 public inquiry about the local waste plan. He also says that the incinerator is unpopular and has been controversial from the outset.

The request

10. Mr Rickard's request was preceded by an enquiry of the Council on 18 September 2016 **[126]** whether there were any parts of the contract with SITA which remined redacted. On 21 September 2016, the Council informed him that there were. It gave him the link to the redacted contract. On 25 September 2016 **[127]**, Mr

[3] SI 1993 No 3228 https://www.legislation.gov.uk/uksi/1993/3228/contents/made
[4] *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379
[5] https://www.cornwall.gov.uk/environment-and-planning/recycling-rubbish-and-waste/waste-management/waste-contract/

Rickard requested 'detailed copies of all the redacted parts of the Integrated Waste Management Contract'. He questioned the need for continuing redactions given that the original contract was signed many years previously.

11. Although Mr Rickard did not spell this out, the Tribunal accepts that what he wanted was the contract as revised in 2013.

The initial response and review

12. On 25 October 2016, the Council gave its response **[128]**. It said that both the EIR and the Freedom of Information Act 2000 (FOIA) applied to the request. This was because there was a mixture of environmental and financial information ('environmental information' is defined by regulation 2 of the EIR: see below). To the extent that the information fell within the EIR, it relied on the exceptions in regulation 12(5)(c) and (f); [6] to the extent that it fell within FOIA, on section 43 (commercial interests). The Council noted that clause 101.2 of the Project Agreement designated certain information, listed in schedule 30, as commercially sensitive which should be kept confidential, although that was subject to any legal requirement for disclosure.

13. The Council also noted that '[t]he withheld information is mainly information pertaining to SITA's pricing of the Project Agreement. Disclosure would adversely affect SITA's position in the market when competing for other contracts. In addition the information could be exploited by third parties to the detriment of SITA and/or the Council'.

14. All these exceptions/exemptions are qualified, which means that, if they are engaged, the public authority still has to consider whether there is greater public interest in withholding the information or in disclosing it. The Council listed general factors pointing to disclosure (for example, enhancing scrutiny of its decisions and contributing to public debate on the issue). On the other side of the equation was the fact that disclosure would adversely affect SITA's position in the market, and that the information could be exploited by (unspecified) third parties to the detriment of SITA and/or the Council. The balance of public interest lay,

[6] '(5) … a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

…

(c) intellectual property rights

…

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii)has not consented to its disclosure'

the Council maintained, in withholding the redacted information at the time of the request.

15. Mr Rickard requested an internal review on 28 October 2016 **[132]**. He did not give any reasons.

16. The Council provided its review on 1 December 2016 **[133]**. The reviewer simply maintained that the public interest in withholding the redacted information outweighed that in disclosure.

Proceedings before the Commissioner

17. Mr Rickard made a complaint to the Commissioner on 3 December 2016 **[135]**. He suggested that the contract had from inception been a mystery and had attracted much controversy over the very significant commitment of taxpayers' money (which he put at some £800m) in the context of general public finances restraint and reduction in other services.

18. In its letter to the Commissioner on 14 June 2017 **[143]**, the Council explained that it had had considerable dealings with Mr Rickard about CERC for over 10 years. He had made multiple EIR or FOIA requests, supplemented by formal complaints and general correspondence. He had made further requests since the present one. All this had represented a significant burden for the Council. As a result, it had informed Mr Rickard in May 2017 that any further requests would be deemed manifestly unreasonable within regulation 12(4)(b) of the EIR. However, that has no bearing on the present request.

19. The Council did acknowledge that the CERC remained a matter of public interest, although the planning process had permitted representations, including from Mr Rickard. Information was routinely made public and the Council regularly engaged with the local community via the CERC Community Forum (the Forum), with minutes published online (although Mr Rickard was not a member and did not attend meetings).

20. The Council said it had released most of the contract. It was withholding commercially sensitive parts and personal information. However, it decided to release further information from clauses 50, 51 and 71 of, and schedule 1 to, the contract. This left:

- Clause 5 of, and schedules 1 and 2 to, the Supplemental Agreement (outstanding claims between the parties: the Council relied on the exceptions in regulations 12(5)(e) of the EIR (harm to legitimate economic interests) and 13 (personal data) of the EIR, the latter in relation to schedule 1

- Schedule 6 to the Project Agreement (outstanding planning permissions and conditions) to the Project Agreement, Part I (extension of special areas of

conservation) (apportionment of costs in certain scenarios, which had not occurred): regulation 12(5)(e)

- Schedule 13 to the Project Agreement (planned maintenance) (nature and frequency of maintenance of facilities and equipment): regulation 12(5)(e)

- Schedule 20 to the Project Agreement (employee information): regulation 13

- Schedule 23 to the Project Agreement (payment mechanism and excess cashflow sharing mechanism): regulation 12(5)(e)

- Schedule 25 to the Project Agreement (financial model): regulation 12(5)(e)

- Schedule 34 to the Project Agreement (RWTP Power and Heat Generation) (likely claw back of costs through the sale of waste management bi-products): regulation 12(5)(e)

21. The Council then set out in some detail why regulations 12(5)(e) and 13 were engaged and the public interest favoured withholding the remaining information. On reflection, it abandoned reliance on regulation 12(5)(c) and (f). It also attached a document entitled *FOI/EIR Public Interest Test Proforma* **[158]**. This document, which seems to have been prepared by the Contractor in October 2016, sets out standard form responses for FOI requests for those parts of the contract which had not been made public.

22. On 3 July 2017, Mr Rickard told the Commissioner that he did not want personal data. Regulation 13 of the EIR therefore falls away, and with it the dispute around schedule 1 to the Supplemental Agreement (that must remain withheld).

The Commissioner's decision notice

23. The Commissioner issued her decision notice on 26 July 2017. Drawing on the Tribunal's decisions in *Elmbridge Borough Council v Information Commissioner and Gladedale Group* [7] and *Worcester County Council v Information Commissioner and Mercia Waste Management Ltd* (*Mercia*), [8] she decided that some parts of the contract the Council was still withholding should be disclosed to Mr Rickard and some withheld. The parts to be disclosed were schedule 6 part I and schedule 34 in its entirety. It is believed that the Council has subsequently disclosed that information.

24. The Tribunal will refer to the remaining information as 'the disputed information'. It falls into these categories: (i) any potential claims which the Council and SITA had of each other in 2013 (Supplemental Agreement, clause 5 and schedule 2); (ii) planned maintenance (schedule 13 to the Project Agreement); (iii) payment

[7] EA/2016/0106
[8] EA/2015/0209 (10 April 2017)

mechanism (schedule 23 to the Project Agreement); and (iv) financial model (schedule 25 to the Project Agreement).

The Grounds of Appeal, the Responses and subsequent proceedings

25. In his Grounds of Appeal, Mr Rickard reiterated that he could not see the justification for confidentiality 11 years into the contract. Although not expressed as such, that was an argument that regulation 12(5)(e) was not engaged. He made some factual assertions which he said supported his case on public interest (some of them for the first time). These were: (i) councillors were pressurised into signing the original contract: (ii) the Council's procurement procedures may not have been followed; (iii) the building of an access road and external connection to the National Grid unnecessarily cost the Council an additional £8m and £3m respectively; and (iv) a £25m loan granted by the Council to the Contractor in 2012 was granted without the approval of Councillors.

26. He attached extracts from the report dated November 2012 by Eunomia Research and Consulting (Eunomia) commissioned by the Forum. Eunomia was asked to consider the feasibility of an alternative plan for waste management in Cornwall. Mr Rickard summarised its conclusions as that the contract was outdated, not fit for purpose and offered poor value for money. A change of approach would save taxpayers nearly 50% of the present contract cost.

27. Mr Rickard argued that public interest favoured disclosure. He had a democratic right as a council taxpayer to know how his taxes were spent.

28. Later in the proceedings, Mr Rickard raised two further matters. First, he drew attention to serious damage to the roof of the incinerator in 2017 and attached correspondence between himself and Mr Paul Masters, the Council's strategic director for neighbourhoods, in April 2018. Mr Masters explained that a review of the design had been carried out with a new installation planned. Mr Rickard concluded that there appeared to have been 'serious failures in construction, management, material and design', reinforcing the need for transparency. There had, he suggested, been non-compliance with the Construction (Design and Management) Regulations 2015.

29. Second, he disputed the Contractor's claim that release of the disputed information would benefit its competitors. This was because of overcapacity in the sector. As of April 2018, Mr Rickard said, there were 44 incinerators in operation in the UK with another 16 under construction, a further 45 with planning permission and another 30 with permission pending. In total there were 135 incinerators subject to contracts. The EU Waste Management Directive, Mr Rickard continued, had set a recycling target of 50% by 2020 and DEFRA had indicated that the 'circular economy' [9] could be statutory by 2020. Mr Rickard

[9] Described by one website in this way: 'Looking beyond the current "take, make and dispose" extractive industrial model, the circular economy is restorative and regenerative by design. Relying on

attached a short extract from another Eunomia report, its *Residual Waste Infrastructure Review Issue 12* (July 2017). Eunomia there posited two scenarios. Under scenario 1, its analysis suggested that the UK's supply of capacity would exceed the available quantity of residual waste in 2020/21 (or in 2023/4 if the export of refuse-derived fuel (RDF) was excluded). Excess demand rose to 9.5 million tonnes in 2030/1 (5.9 million tonnes if RDF exports were excluded). Under scenario 2, capacity would again exceed residual waste in 2020/1, with the excess rising to 3.4 million tonnes in 2030/1. If exports were excluded, treatment capacity which was already committed broadly balanced the projected level of residual waste requiring treatment in 2030/1. The analysis effectively assumed that no further projects progressed beyond the planning stage. However, a number of facilities had already reached that stage. If new projects proceeded, the excess capacity relative to demand for treatment might occur earlier and/or ultimately reach a higher level.

30. In short, Mr Rickard's argument was that there was no benefit to competitors in knowing the disputed information because no further plants of this sort would be commissioned, and competitors would therefore not be able to do anything with the information. In an earlier submission, made after the aborted January 2018 hearing, he also questioned whether the incinerator was still technologically relevant.

31. In that submission, he added that in 2017 Suez was fined £500,000 'for breaking the law while conducting Cornwall Council's IWM contractual duties' (but he did not elucidate or document); emissions had been a bone of contention since the outset and the Council had failed to conduct any ambient air quality monitoring or soil testing; he repeated his assertions that some Councillors had been distressed after agreeing the original contract (one immediately suffered a severe stroke from which she never fully recovered, he said) – none of the 84 Councillors had seen the contract before the meeting and only four ever saw it (and then only a small part); the £25 million loan to SITA was not approved by Councillors until some time after officers had already done so under delegated authority (many questions were raised about why an international group such as Suez needed a loan); procurement was not in accordance with EU rules in relation to the access road; and the Forum was poorly attended and something of a sham (he had never attended).

32. In her **Response**, **the Commissioner** summarised the background and the legal context. Given that the Council had now been joined as a respondent, she left it to it to comment on the adverse effects of disclosure on legitimate economic interests (including those of the Contractor).

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system-wide innovation, it aims to redefine products and services to design waste out, while minimising negative impacts. Underpinned by a transition to renewable energy sources, the circular model builds economic, natural and social capital':
https://www.ellenmacarthurfoundation.org/circular-economy

33. The Commissioner raised one new matter, quite properly. She had identified certain information in schedules 13, 23 and 25 which might constitute 'information on emissions' for the purposes of regulation 12(9) of the EIR. The significance of this is that the regulation 12(5)(e) exception cannot apply to information falling within regulation 12(9).

34. In closed communications with the Council (shared with the Tribunal), the Commissioner subsequently identified information which might constitute information on emissions. In response, the Council explained why, in its view, none of it did and the Commissioner later accepted its explanations. For obvious reasons, Mr Rickard has not seen the exchange, save that the Commissioner's letter to the Council of 20 November 2017 **[124]** in which she explains her general approach to regulation 12(9) is in the open bundle.

35. The Commissioner also summarised her position on public interest. She acknowledged that the large expenditure involved in the CERC provided a significant general weighting in favour of disclosure and that there was a public interest in information associated with it being available. However, she was not convinced that the disputed information would enhance the public interest in scrutinising the Council's handling of the matter, bearing in mind that much of the contract was now available. It was, she suggested, for the Tribunal to form its own view on public interest in light of the Council's Response and any oral evidence. The Council was best placed to comment on the factual allegations made by Mr Rickard in his Notice of Appeal.

36. In its **Response**, **the Council** addressed each of the items of disputed information:

- **Clause 5 of, and schedule 2 to, the Supplemental Agreement (outstanding claims prior to refinancing in 2013)**: disclosure would affect the Contractor's commercial position as it would not be as competitive in future bids for public sector contracts. The Council would be detrimentally affected, too. The parties had agreed to the confidentiality of the information

- **Schedule 13 to the Project Agreement (planned maintenance)**: the schedule set out the nature and frequency of maintenance of facilities and equipment at the Municipal Recovery Facilities and the CERC and was industrial in nature. The type and frequency of planned maintenance was system-specific and constituted technical information not otherwise in the public domain. Disclosure would adversely affect the confidentiality of the Contractor's commercial information if the detail of how it bid and therefore priced planned maintenance was disclosed to competitors

- **Schedule 23 to the Project Agreement (payment mechanism)**: the parts still withheld related to costs and profits and information relating to the Contractor's pricing. Disclosure would adversely affect the Contractor's commercial competitiveness as competitors could then see the basis on which

it had entered, and therefore might in future, enter into commercial negotiations. The schedule included the price per tonne charge for the treatment of waste for all contract waste processed and per process (i.e. landfilled or processed by way of energy recovery). That would be of use to competitors competing for similar contracts. The schedule included 2012 prices for services which were market-tested

- **Schedule 25 to the Project Agreement (financial model)**: the schedule contained commercially confidential information about the costs and profits of the Contractor and information relating to pricing. Disclosure would adversely affect the Contractor's competitiveness by offering a competitor crucial insight into the overall commercial bargain including payment terms for the construction of the CERC, details of funding arrangements and other detailed costs and profits

37. The Council made a number of other points. First, the Contractor entered into arrangements with third parity contractors throughout the term of the Project Agreement and it would be detrimental to its negotiating position were they to see the Contractor's pricing and assumptions. Second, disclosure would also affect the Council's business relationship as purchaser with third parties: suppliers might withhold sensitive information if they thought it might have to be disclosed. Third, the Project Agreement was still a fledgling contract with nearly 22 years to run and used a pricing structure which was still relatively new in the industry. Disclosure could therefore adversely impact on the Council's ongoing relationship with the Contractor. Fourth, the Council gave a broad outline of its position on emissions.

38. The Council also addressed the public interest arguments raised by Mr Rickard in his Grounds of Appeal. It disputed, in effect, that Councillors had been pressurised into entering the contract into 2006 (but, in any event, it had been revised by Councillors in 2013); the procurement process under the procurement regulations had been followed; much of the financial information was only four years old (not 11 as Mr Rickard claimed); Councillors did approve a £25 million loan (at a meeting at which Mr Rickard attended and asked a question); the Council published all payments under the contract on its website which gave council taxpayers information about how their taxes were spent; and the Council and the Contractor was represented at the quarterly meetings of the Forum, which received updates from the St Dennis and Nanpean Community Trust administering the Community Fund to which the Contractor made payments based on the amount of electricity exported from the incinerator and to which the Council also contributed. It added that most of the contract had been disclosed.

39. Mr Stephen Daughtry, the Contractor's representative under the contract since January 2016, gave a short witness statement on 27 November 2017 **[260]**. He pointed to the parts of the contract defined as 'commercially sensitive information' and suggested that the Council should be concerned to abide by the

terms of the Supplemental Agreement. He dealt briefly with the categories of disputed information but did not add anything material to the Council's Response.

Discussion

40. The appeal raises a number of issues.

Do the EIR apply as opposed to FOIA?

41. This does not appear to be a contentious issue. The Council now accepts that the disputed information is 'environmental information' and that the EIR rather than FOIA therefore apply (section 39 of FOIA provides an absolute exemption under that Act where information is environmental information). That is the Commissioner's position, too, and Mr Rickard has not indicated dissent from it.

42. The Tribunal agrees that the disputed information is environmental information. The definition of 'environmental information' in regulation 2 of the EIR, though not limitless, is wide. In *BEIS v Information Commissioner and Henney*, [10] the Court of Appeal looked for a sufficient connection between the information requested and the environment.

43. There is clearly a sufficient connection in the present case, given that the subject-matter is a waste incinerator. As the Commissioner put it in her Response, the disputed information, which comprises a range of financial and technical information relating to the operation of the CERC, is information 'on' a measure that is likely to affect the state of elements of the environment within regulation 2(1)(a), such as air and atmosphere, land and landscape, either directly or through its effect on one or more of the factors set out in regulation 2(1)(b), such as energy and noise.

Does any of the disputed information relate to 'emissions' within regulation 12(9)

44. The next question, logically, is whether regulation 12(9) applies to any of the disputed information because, if and to the extent that it does, the exception in regulation 12(5)(e) (the only one on which the Council relies now that Mr Rickard has confirmed that he does not want personal data) cannot apply.

45. Regulation 12(9) provides:

> '*To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled refuse to disclose that information under an exception referred to in paragraphs 5(d) to (g)*'.

[10] [2017] EWCA Civ 844

46. As noted, on 20 November 2017 **[124]** the Commissioner wrote an open letter to the Council, attaching a closed table identifying, non-exhaustively, categories of information which she provisionally considered constituted information on emissions within regulation 12(9). She referred to her guidance on the provision [11] and explained her general approach. First, information on emissions could only concern outputs of a process or by-products, not inputs, and that such outputs or by-products must be uncontained or uncontrolled (for example, gas, steam, smoke or noise). Second, information on items going to landfill fell within regulation 12(9) to the extent that they are uncontained or uncontrolled. Third, assumptions and formulae used to calculate emissions constituted information on emissions (she briefly referred in this connection to financial information from schedules 23 and 25 identified in her table).

47. The guidance says that the Commissioner adopts the plain and natural meaning of the word 'emissions', as did the Tribunal in *Ofcom v Information Commissioner and T-Mobile*. [12] Applying definitions in *The Shorter Oxford English Dictionary*, [13] emissions will generally be the by-product of an activity or process, which is added (or potentially added) to and affecting the elements of the environment and over which any control is relinquished. However, a broad interpretation should be given, consistent with the purpose of Directive 2003/4/EC (the directive), which the EIR transpose into domestic law, and the Aarhus Convention, which underpins it, broader than that in Directive 2008/1/EC (the Integrated Pollution and Control Directive). [14] Information on localised or low-level emissions is still information on emissions, and can relate to emissions which have not yet taken place.

48. The leading case on regulation 12(9) is *GW v IC and Local Government Ombudsman and Sandwell Metropolitan Borough Council*. [15] The requester had asked for a copy of Counsel's Opinion obtained by a local authority about the ambit of its statutory nuisance powers under the Environmental Protection Act 1990. The requester was concerned about emissions from a wood-burning stove used by his neighbours. One of the issues was whether the Opinion constituted 'information on emissions'. If so, regulation 12(5)(d) (confidentiality of proceedings), on which the local authority relied, could not apply.

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[11] https://ico.org.uk/media/for-organisations/documents/1616/information-on-emissions-eir-guidance.pdf (2013)

[12] EA/2006/0078 (September 2007)

[13] 'Emit' – '1. Give off, send out from oneself or itself (something imponderable, as light, sound, scent, flames etc); discharge, exude (a fluid)'; 'Emission' – '1. Something emitted; an emanation. 2. The action or an act of emitting'.

[14] 'direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land'

[15] [2014] UKUT 130 (AAC) GIA/4279/2012 (11 March 2014)
http://www.bailii.org/uk/cases/UKUT/AAC/2014/130.html

49. Upper Tribunal Judge Turnbull noted that 'emissions' are listed as one of the 'factors' in the definition of 'environmental information' in regulation 2(b) of the EIR. There had, he said, to be a close connection between that reference and regulation 12(9). As a result, the latter did not cover anything beyond information relating to the nature, extent and so forth of emissions. That did not extend to legal advice about the width of statutory powers available to address emissions.

50. The judge referred to paragraph 14 in the Commissioner's guidance:

> '*Identical information can fall within several aspects of regulation 2(1). A lot of information is environmental because it is on a measure affecting, or likely to affect, the elements of the environment listed in regulation 2(1)(a) directly or via one of the factors mentioned in 2(1)(b). However, regulation 12(9) will only be relevant where information falls within the definition of environmental information directly under regulation 2(1)(b). In other words it will only apply where information is directly linked to emissions*'.

He said he agreed with the third sentence but not the fourth: the legal test was not whether there was a direct link between the information and emissions. The judge did not express disagreement with any other part of the guidance.

51. For obvious reasons, Mr Rickard has not seen the table and therefore has not been able to comment on whether the information identified by the Commissioner could indeed constitute information on emissions.

52. The table has four columns with these headings: the documents; the particular information which the Commissioner thought might constitute information on emissions; the questions she had about that information; and the Council's comments. Having considered the Council's comments, the Commissioner was satisfied that none of the information constituted information on emissions within regulation 12(9). So is the Tribunal. It cannot discuss the particular information in an open decision (and there is no need for a closed decision on this aspect given that it has never been part of Mr Rickard's case that regulation 12(9) applies to the disputed information and that the Commissioner and the Council are now of one mind). The Tribunal can say, however, in general terms that the thrust of the Council's case is that particular substances identified by the Commissioner are in fact contained and controlled; particular references are to process plant, not emissions, or are otherwise not related to emissions; other references are not to processes or outputs or by-products; and yet further references are to the release of funds or are otherwise financial in nature. The Tribunal accepts all this. The result is that the information does not fall within the term 'emissions' in regulation 2(b) and is therefore not 'information on emissions' within regulation 12(9).

53. Regulation 12(5)(e) is therefore in play.

Can the Council rely on regulation 12(5)(e) EIR?

54. Regulation 12 reads:

> *'(1) Subject to paragraphs (2), (3) and (9) a public authority may refuse to disclose environmental information requested if –*
> *(a) an exception to disclosure applies under paragraphs (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.*
> *…*
> *(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*
> *…*
> *(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*

55. The issues for consideration are therefore: (i) would disclosure of the disputed information (or part of it) adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest – in other words, is subparagraph (e) engaged in relation to some or all of the disputed information?; and (ii) if so, is there nevertheless a weightier public interest in the information being generally available, bearing in mind the injunction in regulation 12(2) that public authorities must apply a presumption in favour of disclosure?

Is regulation 12(5)(e) engaged?

Introduction

56. Under Article 4(2) of the directive, 'The grounds for refusal mentioned in paragraphs 1 and 2 [replicated in the EIR] shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure'. That applies as much to regulation 12(5)(e) as to other exceptions.

57. That said, there is little doubt about the proper scope of that exception, though there may be some difficulty in applying it in practice. In *Mercia*, a case with striking similarities to the present one, the Tribunal cited (with evident approval) the four tests which the Commissioner had applied (as she has in the present case): (i) the information has to be commercial or industrial in nature; (ii) it has to be subject to a duty of confidence provided by law; (iii) the confidentiality has to be required to protect an economic interest; and (iv) that economic interest, and therefore its confidentiality, has to be adversely affected by disclosure of information.

58. The first two criteria cover similar ground – it is inherently unlikely that information which is commercial or industrial in nature will not be subject to a duty of confidence provided by law. The disputed information meets these criteria. The information is found in a valuable commercial contract dealing with an industrial process. The law will *prima facie* protect such information, provided it reaches a threshold of seriousness. [16] Similarly, the third and fourth criteria really collapse into the single question whether disclosure would adversely affect a legitimate economic interest. It is not clear what function the adjective 'legitimate' has, but presumably it is to exclude from protection economic interests which are illegal or unlawful.

Would the disputed information have been of value to competitors around the time of the request?

59. As noted above, late in the proceedings Mr Rickard made the argument that regulation 12(5)(e) could not be engaged because there was overcapacity in the sector, there was therefore no prospect of similar waste plants being commissioned and the Contractor therefore had no competitors for whom the disputed information would be valuable.

60. The Council responded briefly to Mr Rickard's contention via email sent on 14 May 2018. It made two points. First, the fact that other plants might have been granted planning permission in the UK did not mean that contracts for construction/maintenance had been awarded in 2016 (when the request was made). It described as supposition Mr Rickard's assertion that there was no prospect of new contracts for further plants. Second, revealing pricing information could limit the Contractor's ability to get best value for money when negotiating with third party contractors.

61. The Tribunal accepts these arguments. The fact that a market may be contracting does not mean that there can be no new contracts. In any event, Suez is an international company and the fact that the UK market for this type of waste-to-energy plant is diminishing does not exclude opportunities outside the UK: the adverse effects required by regulation 12(5)(e) are not territorially limited. Although the burden of proof rests on a public authority relying on the exception to show that adverse effects to legitimate economic interests would (not simply might), on the balance of probabilities, be caused by disclosure, the Tribunal is entitled to infer that the market in question, though contracting, still presents opportunities absent clear evidence to the contrary. Mr Rickard has failed to provide such clear evidence.

62. In the Tribunal's judgment, it cannot be said that, around the time of the request, there was no realistic prospect of similar plants being commissioned, such that the disputed information had no value for competitors.

[16] In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, Megarry J said that '…equity ought not to be invoked to protect trivial tittle tattle, however confidential'.

63. However, even if this is wrong, the fact that the Contractor's economic interests would (as the Tribunal finds) be adversely affected by disclosure as far as its negotiating ability with its subcontractors is concerned – in other words, in the context of the present contract – is sufficient to engage the exception. With a contract as large as this one, it is inevitable that the contractor will need to engage a number of different subcontractors, at different times. If those subcontractors knew how relevant aspects of the main contract were priced, that would give them an unfair advantage in negotiating with the Contractor, who would be at a corresponding disadvantage. The Contractor's legitimate economic interests would be adversely affected.

The categories of disputed information

64. Apart from the overcapacity issue, Mr Rickard does not expressly argue that regulation 12(5)(e) is not engaged. Rather, he focuses on public interest. The Tribunal has nevertheless considered engagement.

65. By case management directions (CMD) issued on 16 April 2018, the Tribunal gave its provisional view on whether elements of the disputed information should be disclosed. The Council subsequently indicated that it accepted that view. The Commissioner has not commented. Mr Rickard continues to maintain that all the disputed information should be disclosed.

i. **Clause 5 of, and schedule 2 to, the supplemental agreement (outstanding claims prior to refinancing in 2013)**:

66. The Council has redacted the whole of this information.

67. By its CMD of 16 April 2018, the Tribunal gave its provisional view:

i. Clause 5 of the supplemental agreement (claims outstanding between the parties to the agreement) should be disclosed: there is no warrant for maintaining that it engages regulation 12(5)(e) of the Environment Information Regulations 2004

ii. Schedule 1 (referred to in clause 5) contains personal data. Mr Rickard has confirmed that he does not wish to see personal data. The schedule should be withheld

iii. Schedule 2 (also referred to in clause 5) should be disclosed, for these reasons:

a. The Tribunal does not accept that disclosure would have an adverse effect on legitimate economic interests within regulation 12(5)(e). With a contract as large and complicated as the HWC, it is to be expected that there will be claims by one or other of the parties. The fact that a claim has been made does not mean that it is valid.

*b. In any event, it appears from the public interest pro forma answers in the open bundle (**[158]**, **[159]**) that, under schedule 30 to the contract, schedule 2 was only to remain confidential until 21 March 2018 (the fifth anniversary of the contract restatement). That is recognition of the fact that claims will be withdrawn, settled or litigated to a conclusion and that any legitimate confidentiality which attaches to them will therefore dissipate over time. The Tribunal has to consider the application of regulation 12(5)(e) as at the date of the request (25 September 2016). Since any confidentiality will have been lost on 21 March 2018 at the latest, it follows that the Tribunal is in effect only considering the period 25 September 2016 to 21 March 2018. Bearing in mind that the claims will have been made prior to the contract restatement, the Tribunal considers that any adverse effect on legitimate economic interests through disclosure would have ceased to apply by the time of the request. The information would be of very little value to a competitor by this stage*

c. If that is wrong, the public interest in disclosure outweighs that of withholding the information. Particularly given the value of the contract and the controversy which has surrounded it, the public has an interest in knowing about disputes between the Council and [the Contractor].

68. Clause 5.1 sets out the basic rule that the Supplemental Agreement and the amended and restated Project Agreement constitutes settlement and/or waiver of all claims by the parties as at the date of the Supplemental Agreement. Clauses 5.2 and 5.3 then say that the Council and the Contractor reserve the right to bring claims against the other in relation to any of the issues identified in schedule 2 along with those which could not reasonably be expected to be identified by each party as giving rise to a claim under the Project Agreement (following reasonable enquiries made of individuals listed in schedule 1 part B) in that Agreement's form prior to the Supplemental Agreement. Clauses 5.6 and 5.7 provide that claims relating to matters which arose prior to the date of the Supplemental Agreement should be determined in accordance with the terms of the Project Agreement in its form prior to the Supplemental Agreement; and any claims relating to matters arising on or after the Supplemental Agreement should be determined in accordance with the terms of the Project Agreement as amended.

69. It will be seen that there is nothing confidential about the terms of clause 5 itself. It simply says that most extant claims are subsumed into the Supplemental Agreement but preserves some. Schedule 2 sets out the preserved claims. For the reasons set out in the 16 April 2018 CMD, in the Tribunal's judgment this information is not confidential and is therefore not protecting a legitimate economic interest. Even if this is wrong, there is a supervening public interest in the information being available because the public is entitled to know what disputes the contract has generated and, therefore, what costs taxpayers might recoup or what further costs they might incur.

70. The Tribunal's provisional view has become its concluded view.

ii. Schedule 13 (planned maintenance)

71. Schedule 13 had been completely redacted. It deals with planned maintenance of the various parts of the CERC.

72. In its CMD of 16 April 2018, the Tribunal suggested provisionally:

> '*Schedule 13 (maintenance planning) should be withheld to the extent that it contains information about when particular planned maintenance should take place and /or the replacement lifecycle of components but otherwise disclosed. The timescales could be valuable to a competitor as relevant to costings but the remaining information would not.*
>
> *The Tribunal also notes that there was a similar claim to withhold planned maintenance information in Worcester County Council v The Information Commissioner and Mercia Waste Management Ltd. [17] The contract at issue in that case was, of course, different but there appear to have been striking similarities with the present contract and indeed the Commissioner has placed heavy reliance on the decision of the (differently-constituted) Tribunal. In paragraph 53, the Tribunal noted that the generic parts of the 'Outline Detailed Maintenance Plan' had been disclosed (which has not happened in the present case). It decided that a 'list of components making up the [Waste to Energy] Plant, with the nature and regularity of maintenance work being set out against each one' should be withheld as potentially valuable for competitors or sub-contractors. Its approach broadly reflected that of the present Tribunal*'.

73. The Council subsequently sent a marked-up version of the schedule reflecting its interpretation of the Tribunal's approach. This left unredacted: the column headings *Facility*, *Expected Maintenance* and *Time of Unavailability* for the HWRC plant along with each geographical facility; the column headings *Maintenance Required*, *Annual Maintenance – Time of Unavailability*, *Life Cycle Maintenance*, *Life Cycle Expected Years* and *Time of Unavailability* of the RTS and DRTS along with the relevant facilities; the column headings *Maintenance Required Bodmin MRF and Maintenance Contract Year* for the Bodmin MRF, and the column headings *Maintenance Required Pool MRF*, *Year(s)* and *Time of Unavailability* for the Pool MRF, along with the items of equipment (such as bag splitters and conveyors); the heading *Nature and Frequency of Maintenance per Nature* and column subheadings *Area*, *Component*, *Nature*, *Frequency of Maintenance* and *Expected Lifetime* for the RWTP along with the items of equipment (and relevant parts of those items) and whether the maintenance was routine or lifecycle; and, also for the RWTP, the heading *Number of days of unavailability per contract year of 12 months* with the column subheadings *Annual Maintenance (day) and each year from 2011 to 2036* and *Routine interim outage, "Main" outage (incinerator lines)* and *Regular Maintenance*.

[17] EA/2015/0219

74. All this would give the reader information, in general terms, about what is being maintained and where, but not how long the maintenance would take, when it would take place or how long the relevant operation would therefore be out of action.

75. The Tribunal considers that some further information of a general nature can be disclosed, as discussed in the short closed decision, without giving competitors useful information. However, it maintains its provisional view that information about the nature and regularity of maintenance work, and the time various parts of the CERC would as a result be out of action, engages regulation 12(5)(e) as potentially valuable for competitors or subcontractors and therefore adversely affecting the legitimate economic interests of the Contractor.

iii. Schedule 23 (payment mechanism)

76. Most of schedule 23 is publicly available. Part A sets out the payment mechanism and part B the excess cashflow mechanism.

77. In its CMD of 16 April 2018, the Tribunal gave its provisional view:

> '*The redacted parts of schedule 23 (payment mechanisms) should be withheld, save that it is now conceded that references to Goonvean may be disclosed. The information is potentially valuable to a competitor. Most of the information in the schedule has been disclosed*'

78. The reference to 'Goonvean' derives from schedule 34 (power and heat generation from the RWTM), which has now been disclosed. This explains that the Contractor has entered into a heads of agreement in July 2006 with Goonvean Ltd for the supply of heat to the latter. Goonvean Ltd is therefore a subcontractor of SITA. The published version of schedule 23 had redacted the prefix 'Goonvean' from terms such as 'Adjustment' 'Heat Supply Agreement' and 'Incremental Costs'. Only the identity of the company had been redacted. The Council now concedes that the redaction is not warranted.

79. Still redacted is information such as the percentage of the payment per tonne in paragraphs 4.11 and 4.12; parts of the formula for calculating recycling deductions in paragraph 9.22; the penalty for customer dissatisfaction in paragraph 9.24; the business day facility delay deduction in paragraph 9.25; parts of the non-contract waste adjustment calculation in paragraph 12A.2; the calculations for the unitary charge index factor; a figure in Table 1A (price per tonne – base case) in Appendix 1; most of the figures in Table 1B (price per tonne); the figures for the contracted inactive waste tonnage for the years 2017 to 2037 in Table 2; the figures for the contracted BCW tonnages to landfill for those years in Table 3; the Contractor's commission for specified waste items and the price per tonne for those items; and the percentage amounts which the Council and the Contractor are allowed to withdraw from the Excess Cashflow Account in specified circumstances (paragraphs 2.2 and 2.4 of part B).

80. The Tribunal accepts that all this information is commercially sensitive and that disclosure would have an adverse effect on the legitimate economic interests of the Council and, more particularly, the Contractor. Mr Rickard has not sought to argue otherwise (except that he maintains that there are no competitors). Regulation 12(5)(e) is therefore engaged.

iv. Schedule 25 (financial model)

81. The whole of schedule 25 has been withheld.

82. The schedule sets out in enormous detail the cost of the contract, by year and item. As the Tribunal said in the 16 April 2018 CMD, all the information is potentially valuable to a competitor. Mr Rickard has again not sought to argue otherwise (except that he maintains that there are no competitors). Regulation 12(5)(e) is therefore engaged.

How should the public interest be applied to the information to which regulation 12(5)(e) applies?

83. The contract was entered into under the PFI. PFI contracts are controversial. They use private finance to build public projects. They have since 1992 been encouraged by Government as a way of securing finance for new schools, hospitals and other public projects. They are more expensive than direct financing. They are less popular than at one time, perhaps reflecting increasing concern about value for money: at the turn of the century, some 60 new projects were signed-off each year; in 2015, there were fewer than 10.

84. Some describe PFI contracts as mortgaging our future, even as economic theft, or see no place for private profit in public works as a matter of principle. Others see the private sector as a vital tool in releasing funds which would otherwise not be available for much-needed public projects and in injecting efficiency into large projects, justifying the extra cost.

85. These are philosophical and political questions and it is not for the Tribunal to resolve them. The fact is that, particularly at the time of the original CERC contract, it was government policy to encourage and facilitate PFIs, including for waste disposal. They are lawful and the EIR has to be applied on that basis. There is no suggestion that the directive or the Aarhus Convention contemplate that the private sector would not be involved in projects touching on the environment or therefore in generating environmental information. It is an inevitable consequence of that involvement that some information will normally have to be withheld from competitors and therefore the public: information is a key tool in private enterprise and there cannot be an information free-for-all if an enterprise is to flourish. As the Tribunal noted in *London Borough of Southwark and The Information Commissioner* [18] (in the context of regeneration of social housing):

[18] EA/2013/0162 (9 May 2014)

'*Once you use private sector profit making organisations to help fund regeneration and to deliver infrastructure, social housing and other public goods, then inevitably considerations of commercial confidentiality and the need to avoid harm to commercial interests must be given full weight when assessing the public interests for and against disclosure*'. [19]

86. The result, however, is that principles collide. On the one hand is this imperative for some confidentiality. On the other is the imperative for transparency and accountability in public affairs so that, in the present context, residents and council taxpayers can assess on an informed basis whether their political representatives are spending wisely the money given to them in trust and ensuring the best interests of residents. More generally, the first preamble to the directive recognises the importance of access to environmental information:

> '*Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of view, most effective participation in environmental decision making and, eventually , to a better environment*'.

87. Finding accommodation for these conflicting principles is no easy task. There is no empirically correct answer and reasonable people may arrive at different conclusions. That is why Commissioner decisions, and Tribunal decisions, may sometimes appear to conflict. The CERC contract is very expensive and appears to be particularly controversial, both in its original and restated manifestations, and Mr Rickard and his fellow taxpayers are concerned to uncover what they suspect to be poor decision-making, inappropriate or even corrupt behaviour and inadequate value for money. It is axiomatic that only with information can there be informed public debate and accountability. (The Tribunal should make it clear that it has seen no evidence of corrupt behaviour).

88. That said, because the EIR recognise that legitimate economic interests may trump transparency, and because there is no suggestion in the regulations or its EU and international forebears that the private sector should not be involved in public projects, the desire for maximum transparency is unlikely to morph into the total transparency Mr Rickard would like to see, short of compelling public interest arguments. That would be in practice to render impossible private sector involvement (whether via PFIs or otherwise) in public works touching on the environment. Something less than total transparency is not inconsistent with the presumption of disclosure in regulation 12(2) because a presumption can be rebutted and the EIR clearly contemplate that the presumption of transparency sometimes will be.

89. The benchmark, in the Tribunal's view, is that as much information should be publicly available as possible, without (short of compelling reasons) imperilling the very commercial sensitivities on which PFIs are founded. That is why the

[19] Para 51

Tribunal has carefully scrutinised the disputed information and has ordered release of some further information. It should be acknowledged that the Council had already released considerable information unprompted by an EIR (or FOIA) request, then released further information to Mr Rickard following his request and has not challenged the Commissioner's decision that further information should be released. The overall contract price is in the public domain and the Council periodically releases details of ongoing payments.

90. Mr Rickard has attempted to argue, in effect, that the circumstances surrounding the CERC contract *are* sufficiently compelling for everything to be disclosed. It is not to dismiss out of hand the legitimacy of at least some of his concerns to conclude (as the Tribunal does) that his arguments are not sufficiently compelling in public interest terms for the disclosure of the remaining information to which regulation 12(5)(e) applies. To recap: Mr Rickard argues that (i) councillors were pressurised into signing the original contract: (ii) the Council's procurement procedures may not have been followed; (iii) the building of an access road and external connection to the National Grid unnecessarily cost the Council an additional £8m and £3m respectively; (iv) a £25m loan granted by the Council to the Contractor in 2012 was granted without the approval of Councillors; and (v) problems were experienced with the roof of the incinerator in 2017.

91. The difficulty Mr Rickard faces is twofold. First, he is not able to substantiate any but the last of these allegations. Second, even if he could they are not sufficient to override the legitimacy of the economic interests of the Council and the Contractor. The Tribunal stressed on more than one occasion that Mr Rickard needed to draw a causative link between allegation/public interest and particular parts of the disputed information. He has not done so. Even if councillors felt pressurised into signing the original contract in 2006, that has little relevance to whether information from the substantially restated contract in 2013 should be disclosed – there is no credible suggestion that the alleged pressure somehow vitiates the contract. Releasing the disputed information will not throw any light on whether procurement procedures were followed, or on the building of the access road and external connection to the National Grid or the £25m loan (and, even if there was information touching on these matters amongst the disputed information, the vast majority could have nothing to do with them). The problems with the roof were experienced in 2017, after the request. They could in principle, as Mr Rickard suggests, indicate design problems, perhaps originating in 2006. But even if that was so it would not, in the Tribunal's judgment, justify releasing detailed, widespread financial information going to the core of the PFI contract. There is nothing directly relevant in schedule 13, either.

92. Mr Rickard relies on the Eunomia report in 2012. The report is critical of the contract and suggests it represents poor value for taxpayers. But, far from supporting his case for greater transparency, the fact that Eunomia was able to produce a detailed assessment without having access to withheld information indicates that there is sufficient information in the public domain for informed

public debate. Eunomia had to make some assumptions it would not have had to make had it seen the full picture but that did not prevent it from arriving at reasoned, detailed and at times strident conclusions. Its report was on the original contract but there is no reason to think that it could not conduct a similar exercise on the restated contract.

93. For these reasons, the Tribunal has concluded that the public interest favours withholding the remaining disputed information to which regulation 12(5)(e) applies.

Conclusion

94. The appeal is allowed in part. Within the later of 28 days and the determination of any application by either the Commissioner or the Council for permission to appeal (and any subsequent appeal), the Council is to disclose (i) clause 5 of, and schedule 2 to, the Supplemental Agreement; schedule 13 in the form described in the closed decision; and an amended schedule 23 with the previously redacted references to Goonvean included. The Tribunal's decision is unanimous.

Signed

Judge of the First-tier Tribunal
Date: 7 August 2018
Promulgation Date: 9 August 2018