EA/2019/0240 - P

Between:

WARRENPOINT HARBOUR AUTHORITY

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

And

LIAM ELLISON

Second Respondent:

Tribunal: Sitting at R.C.J. Belfast on 9 January 2020 & Tele Conference on 3 & 4 April 2020.

Panel:

Judge Brian Kennedy QC

Ms Anne Chafer

Mr Paul Taylor

Appearances:

Appellant: Michael Egan B.L. of Counsel

Kieran Grant Representative of Appellant.

Second Respondent:

Liam Ellison – Litigant in Person.

Result: Appeal allowed.

Decision with Reasons

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner, the First Respondent, ("the Commissioner") contained in her Decision Notice dated 12 June 2019 (reference FS50798810), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the request for information and the Commissioner's decision are set out in the Decision Notice ("DN"). The appeal concerns the question of whether the Commissioner was correct to determine that the Appellant "Harbour Authority" had failed sufficiently to demonstrate that the information was protected by commercial sensitivity.

CHRONOLOGY:

5 Sept 2018	Request for details of contractual or license partners of Warrenpoint Harbour
5 Oct 2018	Trust refuses, citing s43 FOIA, requests some clarification but does not offer an internal review
31 Oct 2018	Requester complains to Commissioner

[3] RELEVANT LEGISLATION:

Freedom of Information Act 2000

Section 43 Commercial interests.

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2) above.

COMMISSIONER'S DECISION NOTICE:

[4] The Second Respondent; Mr Ellison's request to the Harbour Authority read as follows:

i. The names of all companies/organisations who were in contract….or had licensed agreements with Warrenpoint Harbour Authority during the period July 2008 and January 2018;

ii. The commencement date and duration of the contracts/licensed agreements….;

iii….specify the port authorities which were utilized in respect of each of the individual contacts or licensed agreements, for example, access to open level facilities or storage sheds that were made available as part of the contract(s) or licensed agreement;

iv. The recorded turnover of volume in tonnes over the duration of each contract/licensed agreement;

v. *The Port Authorities stated requirements in relation to each contract i.e. licensing, insurance, health and safety and environmental protection.*

[5] Mr Ellison explained to the Commissioner that he did not want to know specific financial arrangements between the Harbour Authority and the users of the harbour, but rather he was seeking to establish the number of contracts issued, their duration and renewals so as to ensure the equal application of the appropriate regulations. The Harbour Authority stated that disclosing the withheld information would prejudice both its ability to continue a commercially viable operation and also the commercial interests of its customers. The harm to the Harbour Authority was described as damage to reputation, limiting its ability to enter future advantageous contracts. The customers would face having their confidential commercial and contractual arrangements made public.

[6] The Commissioner viewed the withheld material, and informed the Harbour Authority that she considered the information to be "*fairly mundane"* and requested further evidence on how the material would cause the damage alleged. The Harbour Authority provided information from two customers arguing that the requested information would allow competitors to draw conclusions about turnover, costs and capacities. The Commissioner noted that the withheld information did not contain any details on financial turnover or

costs, and she did not see how any competitors could use the volume turnover in tonnage. As the onus was on the Public authority to prove the applicability of s43, the Commissioner was not satisfied that the commercial interests of either the Harbour Authority or its contractual partners would be harmed by the disclosure, and so ordered that the information be released. She also criticised the Harbour Authority for failing to offer an internal review, in accordance with the s45 code of practice.

GROUNDS OF APPEAL:

[7] The Harbour Authority has limited its appeal solely to the information in respect of the customer specific tonnage turnover, agreeing to disclose the rest of the material outlined at parts 1-3 and 5 of the request. It argued that specific tonnage turnover as requested, was akin to financial turnover as it reveals a level of business activity that is "*patently commercially sensitive"* and could allow competitors to derive financial turnover in certain markets based on commodities with fairly standardised prices. The Commissioner was provided with statements from two customers who gave specific details as to how the disclosure would harm their business. The Harbour Authority relied especially on a statement from Dara O'Reilly, Chief Financial Officer of Quinn Cement (NI) Ltd, in which Mr O'Reilly raised concerns that competitors could use the information to determine whether the company's sales volume had dropped below a commercially viable level, and then strategically target its customers with lower prices. This may drive Quinn Cement (NI) Ltd out of its arrangement with the Harbour. It argued that, for those reasons, the exemption was applicable and the public interest lay in protecting the information.

[8] The Finance Director of the Harbour Authority, Kieran Grant, also provided a statement to the effect that there are twelve competitor ports on the island of Ireland and the cost of transportation between them is a "negligible*"* consideration when selecting a port. He also added that only three ports on the island are subject to FOIA, and any disclosure made under FOIA would leave the port's market position *"significantly weakened"*.

COMMISSIONER'S RESPONSE:

[9] The Commissioner stated that nothing in the Harbour Authority's initial or subsequent submissions dislodged her original belief that disclosure would be likely to prejudice the commercial interests as alleged. She reminded herself of the steps elucidated in *Hogan and Oxford City Council v Information Commissioner* EA/2008/0092:

vi. Identify the applicable interests;

vii. Identify the nature of the prejudice i.e. prove it to be real and causally linked to disclosure; and

viii. Assess the likelihood of prejudice.

[10] The Commissioner questioned how the requested information would allow competitors to determine a realistic estimate of profit without knowing other costs of business. She also observed that competitors were also already likely to be able to estimate volumes of goods passing through the port merely by observation, particularly if they too are based there. She invited the Harbour Authority to provide further information to establish the causal link between the disclosure and any prejudice, but noted that the following factors weighed most heavily in convincing her that the exemption was not engaged:

ix. the historical nature of some of the information at the date of request;

x. the fluctuations in commodity prices;

xi. the issue of transportation costs impacting decisions, a matter that would not be impacted by disclosure; and

xii. the information disclosed from the Appellant's accounts.

REQUESTER'S RESPONSE:

[11] Mr Ellison explained that concern for accountability and oversight was related to the absence of a functioning local government in Northern Ireland at the time of the request and the attendant lack of scrutiny of public authorities. His purpose was to ensure that the Harbour Authority was abiding by its own statutory obligation to ensure that anyone trading through the port shall have written permission from the Chief Executive. He agreed with the Commissioner that the tonnage information would not prejudice any present commercial interest as his request is for historical information of actual volume, not tonnage projected or estimated at the point that the contract was signed. He cited *Derry City Council v ICO* EA/2006/0014 to support his argument that the age of the information can diminish its commercial sensitivity.

[12] Mr Ellison also provided documents relating to his own business to show that because of *"variation and range in price… without having knowledge and insights into other costs and overheads it would be impossible to link a gross tonnage figure to a constantly*

changing price structure". He also added that much more information is available for publicly traded companies that also use the port. Prior to the hearing, Mr Ellison also provided the Tribunal with copies of the Harbour Authority's Annual Reports for 2015 and 2016, together with the Economic Impact Statement from September 2017, all of which publish specific information about the contractual arrangements with, and tonnage of cement exported by, Quinn Cement (NI) Ltd. Similar information was published in relation to the passage of grain, wood pellets and coal through the port, along with the roll on/roll off figures for the company 'Seatruck'. The information, he argued, could hardly be considered commercially sensitive *per se* if the Harbour Authority is disclosing it voluntarily in its Annual Report.

[13] He stated that the risks of losing customers was overstated, as the choice to use Warrenpoint Harbour would have been a balance of the various costs or transport, service, facilities, management, support and infrastructure. The use of other comparable ports would cause significant, not negligible, increases in transportation costs for some of the businesses in question.

[14] Mr Ellison argued that the information should be considered environmental information under the Environmental Information Regulations 2004, but subsequently accepted that FOIA was the appropriate legislative framework for his request following submissions by all parties on the applicability of FOIA or EIR, further to the Directions of the Tribunal following its permission to adjourn the initial oral hearing.

APPELLANT'S REPLY

[15] The Appellant added that causal relationship between disclosure and the alleged prejudice has been amply demonstrated through the statements of the customers and nothing could be done to mitigate the effects of the disclosure. From Quinn Cement (NI) Ltd it was argued that disclosure of the tonnage information would allow competitors to calculate minimum viable loads. ReGen Ltd stated that tonnage information would allow competitors to calculate its reclamation percentage of recyclable material from waste processed. This is because the total tonnage of processed waste is public knowledge.

[16] Furthermore, any public interest in transparency and accountability in the management of the port would not be met by the disclosure of this very specific material. There is no wider public interest in the disclosure of this material, and it was asserted that

Mr Ellison, who was, at the time, negotiating the use of port facilities for a client, had requested the material.

HEARING:

[17] Prior to the hearing, Mr Ellison complained that contrary to the Harbour Authorities assurances that it would disclose to him the non-contentious portions of his request; he had not received fulsome disclosure. In particular, he complained that the information that had been disclosed would not enable him to identify which organisations had contracts with the Harbour Authority, distinct from those with licensed agreements. At the oral hearing he also stated that in the information he had been given, two companies had been left out. The Harbour Authority disputed this and maintained that it had been given all relevant information held by the authority.

[18] Mr Ellison also confirmed that the instant request followed from a previous request of 17th July 2018, in which he named eight companies as being his subjects of interest. He stated that he was not interested in information about Quinn Cement (NI) or Re-Gen, and his focus was concentrated on customers in the steel industry. In response, Mr Egan for the Appellant pointed out that the published figures relates only to Quinn Cement (NI) at a limited point of time, and the information for the preceding and subsequent years had not been published. As to why the information had been published he stated that it would be difficult to find out why as there had been a change in staffing, however in light of the fact that Mr Ellison had effectively excluded Quinn Cement from his request, the fact of publication did not arise. Mr Egan assured the Tribunal that the Harbour Authority no longer publishes information on tonnages.

[19] On Thursday 9 January 2020 the Tribunal sat to hear the oral appeal including an application for an Adjournment by the Appellant. After much discussion on the issues in the case generally and exchange between the parties, who found some common ground on reducing the issues between the parties, the Tribunal agreed to adjourn the Appeal to permit the Harbour Authority to investigate Mr Ellison's submissions about the publication of examples of the requested information in the Annual Reports. The Tribunal directed the

Harbour Authority to seek further information from any customers who may, or may not give consent to disclosure of information sought in the part 4 of the request (referred to in the Decision Notice under appeal) and to come to an agreement on the legislative framework (F.O.I.A. or E.I.R.).

ADDITIONAL SUBMISSIONS:

[20] Following the oral hearing, the Harbour Authority canvassed the views of two customers in the steel industry. My Metal Ltd strongly resisted disclosure of the material, citing it as commercially sensitive insofar as it could lead to specific targeting of its company's market and business. Following Legal advice, Barrett Steel, declined to partake in proceedings.

[21] Mr Ellison explained that he had withdrawn his request in relation to Quinn Cement (NI) Ltd and Re Gen only insofar as it related to part 4 of his request. He took issue with the Harbour Authority's compliance with the direction, stating that it had only canvassed the views of two current steel customers and none of the eight other companies that were mentioned in the disclosed material as having used the port between 2008 and 2018. He also urged the Tribunal to discount the evidence from Mymetal Ltd as according to the Harbour Authority it did not have a licence to occupy during the period covered by the request, and so its commercial interests are not affected by the request. Mr Ellison took great issue with any suggestion that he had any "*personal and malicious motive"* against the Harbour Authority or any of its customers.

[22] The Harbour Authority also provided to the Tribunal a letter sent from Richard Ballantyne, Chief Executive of the British Ports Association, initially sent to the Commissioner following the issue of the Decision Notice. In that letter he raised concerns about the decision, pointing out that during the drafting of the 2002 Freedom of Information (Additional Public Authorities) Order the industry received assurances that the commercial activities of Northern Irish ports would not be subject to FOIA. This would keep it in line with the other ports in GB and RoI. Mr Ellison argued that no such limitation can be found in the statute, and no confirmation has come from government to that effect.

TRIBUNAL FINDINGS:

Applicable Legislative Framework

[23] All parties now agree that the appropriate statute under which the request should be considered is the Freedom of Information Act 2000. The Commissioner referred to *BEIS v IC and Henney* [2017] EWCA Civ 844 and *DfT, DVSA and Porsche Cars GB Ltd v Information Commissioner and John Cieslik* [2018] UKUT 127 (AAC), noting that while the definition at Reg.2 EIR is to be construed broadly, it must not be extended to information which has only a minimal or nominal connection to the environment. In the context of this request, the Commissioner's view was as follows:

> *Adopting a purposive construction in accordance with the Directive and Aarhus Convention, and considering the guidance provided in the authorities above, the Commissioner does not consider the recorded turnover in tonnes to fall within the purpose of the EIR. This is on the basis that the present request falls more within the scope of the Upper Tribunal's considerations in Cieslik, rather than Henney, and that the information requested only has a minimal connection with the environment and is therefore not environmental information. The Commissioner considers that whilst other information relating to the transportation of goods could arguably be environmental information, such as information relating to the fuel efficiency of tankers or their emissions, the actual tonnes transported over a contractual period are too remote to amount to environmental information. This is particularly the case given the number of variables that may have a bearing on the environmental impact of the shipping industry. For example the recorded volume in tonnes does not appear to give an accurate indication of the number of tankers used to transport the goods, or the fuel efficiency of the tankers or any discharges into the ocean. The Commissioner therefore considers the recorded turnover in tonnes to not be environmental information, particularly in the context of the request.*

[24] This approach was adopted by the Harbour Authority and conceded by the requester. We, the Tribunal, also agree with the Commissioner's reasoning, and will proceed to consider the request under FOIA.

Information Disclosed

[25] Between the issuing of the Decision Notice and the lodging of the Grounds of Appeal, the Harbour Authority agreed to release information pertaining to the majority of the Appellant's request and appeal only against part 4. The Commissioner's Decision Notice therefore against parts 1 to 3 and 5 still stands and has not therefore been appealed. Mr Ellison's legal representatives noted that: "*In accordance with good practice and transparency it would be expected that all of the requested information would be recorded in WHA's documentation…*"

[26] The Tribunal has observed in other decisions that the fact that a person expects information to be held does not necessarily mean that it actually is or should be. However, following the hearing in Belfast, Mr Ellison clarified that the companies missing from Warrenpoint Harbour Authority's spreadsheets, as alluded to previously, were Barretts Steel Ireland and Mymetal. The Tribunal note that no response has been made by the Harbour Authority confirming, whether or not information falling under parts 1-3 & 5 in relation to these companies is held. Consequently the Tribunal requires the Harbour Authority to so confirm within 28 days of the date of this decision and to disclose all relevant information where held.

[27] The Tribunal also note that Mr Ellison argued before us that he was not able to differentiate between contract information and license information in the Harbour Authority's disclosed spreadsheets. We note that the request clearly refers to 'each specific contract/license'; we also note that Mr Ellison had set out an example of the format in which he would prefer to receive the information. The Harbour Authority claims to have disclosed all information held; however, we agree that the spread sheet does not appear to differentiate between contracts and licenses and nor is clear what the start and end dates are for each. The Tribunal therefore requires the Harbour Authority to disclose the requested information in the format indicated by Mr Ellison at p.64; and this should distinguish between contracts and licenses, showing the requested information for both.

Section 43(2) Commercial Interests

[28] The Tribunal received three-witness statements from three firms whose information would have fallen to be included in the request: Quinn Cement (NI) Ltd, Re-Gen and My Metal Ltd. The first two were chosen by the Harbour Authority to provide information, as

they were "*substantial customers"* of the harbour's facilities. It is of course reasonable to consider these statements, as they will be indicative of the impact on smaller companies.

[29] The statement from Mr O'Reilly of Quinn Cement raised the following concerns:

xiii. Minimum volumes of goods are required for an operation to be economically viable;

xiv. These minimum volumes can be calculated or at least estimated by competitors;

xv. Disclosure of the tonnage information could allow competitors aggressively to target customers in specific locations to make other firms' volumes fall to a level that would not be viable, thereby forcing their withdrawal from the harbour;

xvi. The businesses at risk of such targeting are already under significant pressure occasioned by the weakening of the pound, fluctuations in demand and uncertainty surrounding Brexit.

[30] Re-Gen shared those concerns and explained how they would have effect on the recycling market. Mymetal Ltd stated that information on tonnage would be expected to remain confidential, and if disclosed could affect competitors' future commercial strategy and potentially break UK or EU competition laws.

[31] Mr Ellison disputed the relevance of Quinn Cement and Re-Gen's concerns, as he stated that he was not interested in obtaining their information. However, he pointed out that the Harbour Authority had itself published some of the information in its Annual Reports.

[32] This Tribunal do not completely accept Mr Egan's argument that the exclusion of Quinn Cement from the refined request meant that publication no longer had any bearing on the considerations. Vociferous assertions by both the customer and the Harbour Authority that any publication of such information would be damaging to their business must inevitably be weakened by the fact of voluntary publication. This therefore would give rise to doubts about the same assertions being made on behalf of other customers in the absence of industry-specific submissions. However, Mr Egan's point that what was published was a single year's tonnage, rather than an unbroken ten-year data set, carries

more weight. We note that Mr Ellison's request was for tonnages over the duration of each contract/licensed agreement rather than annual figures. What was published was not the same information.

[32] As for the Harbour Authority itself, the concerns boiled down to an assertion that disclosure would make it a less attractive business partner. The Harbour Authority is an independent entity that is not dependent on public funding. Mr Grant explained that the profits of the venture are reinvested in the harbour for maintenance, development and improvement. We found Mr Grant's evidence particularly persuasive. It is clear that the commercial success of the harbour is essential to ensure its continued operation. The clarity provided by Mr Grant and Mr Ballantyne about the unusual position faced by Northern Irish trust ports being the only trust ports in the UK and Ireland subject to FOIA is a powerful factor in considering whether this would result in unfair 'asymmetric' disclosure

[Just for clarity, the links to the sites that confirmed that other ports in UK/RoI are not subject to FOIA are :
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684839/ports-good-governance-guidance.pdf at 2.28
https://www.rte.ie/news/special-reports/2014/0129/501005-freedom-of-information/]

It is neither fanciful nor unclear how this could lead to potential customers and investors being reluctant to begin or continue commercial relationships with the Harbour Authority if their contractual arrangements are likely to become public.

[33] When determining whether prejudice is likely to be occasioned, the Commissioner and the Appellant referred the Tribunal to the *Hogan* three-point analysis of identifying firstly the interests, then the causal link between disclosure and prejudice, and finally the likelihood of that prejudice. The Tribunal in that decision determined that the phrase "likely to prejudice" means a "*more than a hypothetical or remote possibility; there must have been a real and significant risk"* (*Hogan* at [34]). This three stage approach and the explanation of the meaning of 'likely to prejudice' was approved by the Court of Appeal in *Department for Work and Pensions v Information Commissioner and another* [2016] EWCA Civ 758 at [27].

[34] For the Commissioner's part she remained unconvinced that turnover or capacity could be easily derived from tonnage, or how competitors could use the information.

[35] The requester had cited in support of his application the *Derry City Council* case. This case involved a request for release of a contract between Ryanair and the Council who own the City of Derry Airport. The request was made in 2005, and the contract had been signed in 1999. At para.12, the First Tier Tribunal stated as follows:

> *"As we have already stressed, this decision is limited to its particular facts. We do not accept that, in the context of those facts, disclosure, in February 2005, of the redacted detail from a contract entered into in March 1999, would have caused the Airport to gain a reputation as an untrustworthy counterparty in commercial transactions; one that would disclose, or be forced to disclose, the contents of agreements in which it enters. Any person or organisation contracting with it would already know that it was publicly owned and that its commercial dealings would therefore be subjected to greater public scrutiny than those of a private company. Moreover, the disclosure that the Council was asked to make was limited to the release of limited information in respect of a single contract entered into almost six years previously in circumstances where the industry would have been well aware of the interest of both the public and the regulators in agreements with low cost airlines."*

The Tribunal went on to find that even with these caveats, the exemption at s43 (2) *was* engaged, and turned then to consider the public interest test.

[36] The present request seeks disclosure not of a single agreement but rather a pattern of the business activities of the harbour's customers over a ten-year period. Such long-term data would provide a valuable insight into those businesses for their competitors, and as such we consider that there is a real and significant risk of prejudice to the companies whose information would be disclosed. Attendant to that risk to the companies, there is a real and significant risk that companies would seek to avoid such disclosure by turning to the Harbour Authority's competitors and thereby damage the commercial viability and success of the harbour. We are therefore satisfied that the exemption at s43 (2) is engaged, and turn then to consider the public interest in disclosure.

Public Interest:

[36] The Appellant Harbour Authority submitted that the information would be of no use or relevance to the wider public, and Mr Ellison had requested it in the course of a commercial negotiation/dispute with the Harbour Authority. In its view the public interest weighs more heavily in favour of maintaining the exemption because, *inter alia*, "*there is a public interest in encouraging and avoiding undermining, economic activity and growth in the area in which the Appellant is based".* The Tribunal accept there is significant weight in this submission. The Appellant also properly argued that the fact that the exemption was engaged meant that it was in the public interest to maintain the exemption. The Commissioner did not make any submissions on the public interest test as in her view the exemption had not been engaged.

[37] The Requester made a general point regarding the need for transparency and accountability in the management of publicly owned facilities, especially because at the time of his request there had been no devolved government in Northern Ireland. He described the purpose of his request as being to ensure that the relevant by-law prohibiting use of the port for unauthorised trading was being applied consistently. He emphasised the need to "*secure an optimal return on public funds"* and to scrutinise the "*public/private interface*" at the harbour. We have not been provided with any tangible evidence to demonstrate grounds for these concerns being currently live or pressing. Mr Ellison also argued that disclosure would allow the public to ensure that there was open competition amongst private providers where they operate alongside the publicly owned Harbour Authority, and measures were being taken to protect the environment and wildlife within the harbour estate. Again we have no evidence of actual concern in these regards.

[38] With regard to the last assertion about the environmental protection measures, we do not agree that disclosure of the information would be of relevance. Nor, on the evidence before us, do we consider that the absence of a functioning Northern Ireland Assembly had any bearing on part 4 of this request. On the evidence before us we are of the view that the requested information would not be of any live or pressing interest or use to the wider public beyond the competitors of the Harbour Authority and its customers.

[39] Instead, we consider that the need to ensure the commercial viability of the port has a compelling public interest both for the port itself but also to Warrenpoint and the wider Northern Ireland economy. On the evidence before us, we have been persuaded that Commercial confidence in the port ought not to be dented by disclosure of material that would otherwise be of such limited use.

CONCLUSION:

[40] For the above reasons we allow the appeal. The withheld information at part 4 of the request is, on the evidence before us, exempt by virtue of s.43 (2) and accordingly the Appellant is not required to disclose it. However, the Appellant must within 28 days confirm to the Second Respondent and the Tribunal whether or not information falling under parts 1-3 & 5 in relation to the identified companies is held and to disclose the information where held. The Appellant must also disclose the information in the format suggested by the requester, distinguishing between contracts and licenses.

Brian Kennedy QC 10 April 2020.

Date Promulgated 29 April 2020.