



Neutral citation number: [2025] UKFTT 112 (GRC)

Case Reference: FT/EA/2024/0184

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Heard by Cloud Video Platform
Heard on: 20 January 2025
Decision given on: 6 February 2025**

Before

**TRIBUNAL JUDGE MORNINGTON
TRIBUNAL MEMBER PALMER-DUNK
TRIBUNAL MEMBER SAUNDERS**

Between

IAN DRIVER

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: in person

For the Respondent: did not appear

Decision: The appeal is Dismissed.

1. The Council was entitled to rely on Regulation 12(5)(e) (confidentiality of commercial or industrial information) of the Environmental Information Regulations 2004 (EIR) to withhold the information requested by the Appellant.

REASONS

Background to Appeal

1. This Appeal dated 21 April 2024 and made by Mr Ian Driver (the “Appellant”) arises following a request for information (the “Request”) made by the Appellant to Thanet District Council (“the Council”) on 9 April 2023 in the following terms:

“Paragraphs 6.2 of Agenda item 4 which will be discussed at the council’s Cabinet meeting on 2 March 2023, states that the council has received a proposal for the extension of Brett Aggregate’s operations at the Port of Ramsgate. Please provide me with a copy of these proposals.

Please also advise me if the proposals will have to be considered and approved by Thanet or Kent County Council planning officers or their respective planning committees”

2. The Council responded to the request on 10 May 2023 and refused to provide the requested information on the basis that the information requested was exempt under regulation 12(5)(e) of the EIR.
3. Dissatisfied with the response of the Council, the Appellant requested an internal review of the decision on 17 August 2023 and submitted to the Council detailed submissions in support of his arguments as to why the exception did not apply.
4. The Council responded to Appellant’s request for an internal review of the decision on 31 August 2023 and confirmed that the original decision was upheld.

Reasons for Commissioner’s Decision

5. The matter was referred to the Information Commissioner's Office by the Appellant on 5 December 2023. Part of the Appellant’s complaint was that the requested information included information relating to emissions and accordingly, pursuant to regulation 12(9) of the EIR the Council were not entitled to refuse to disclose the information by relying on the exception contained within regulation 12(5)(e).
6. In a decision notice (“DN”) dated 26 March 2024, the Information Commissioner (“IC”) held that:

“The Commissioner’s decision is that the Council has correctly applied regulation 12(5)(e) to the request. The Commissioner does not require any steps to be taken.”

7. In summary, The Commissioner’s reasons for the Decision were that the IC was satisfied that the requested information was environmental information which did not contain information directly linked to emissions. The IC was satisfied that the information had the necessary qualities of confidence which is provided to protect the legitimate economic interests of the Council and Brett Aggregates (BA), and that that this confidentiality would be adversely affected by disclosure of the requested information.

8. The Commissioner recognised that there is a public interest in transparency and accountability of public authorities and any impact to the environment, particularly in relation to emissions. However, the IC also considered there to be a strong public interest in protecting the Council's commercial interests and ultimately, decided that the public interest in maintaining the exception outweighed the public interest in disclosure.

Appeal and Responses

9. This appeal relates to the application of the Environmental Information Regulations 2004.
10. In summary, the Appellant appealed the Decision Notice on the following grounds:
 - (a) The information relates to emissions and pursuant to regulation 12(9) cannot therefore be withheld under any exception contained within regulation 12(5) paras (d) to (g).
 - (b) It is not the Appellant's view that disclosure would harm the legitimate economic interests of BA.
 - (c) The information is already in the public domain as the Appellant considers that the withheld information to be the same or similar to an application made by BA previously which has been made public.
 - (d) It is not the Appellant's view that disclosure would harm the legitimate economic interests of the Council
 - (e) The public interest is in favour of disclosure particularly given the passage of time and that the government has highlighted the maritime industry as a considerable source of pollution.
11. The Commissioner's response to the appeal maintains that the Decision Notice is correct and that in all the circumstances, the council were entitled to rely on the exception provided at regulation 12(5)(e). It is the Commissioner's view that the balance of the public interest favours the maintenance of the exception, rather than disclosure and that the exception provided by regulation 12(5)(e) was applied correctly. Therefore, the Council is not required to disclose the requested information.

Applicable Law

12. The relevant provisions of the Environmental Information Regulations 2004 (“EIR”) are as follows:

2(1) ...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

5(1) ...a public authority that holds environmental information shall make it available on request

12(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.

12(2) A public authority shall apply a presumption in favour of disclosure.

12(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;

13. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. The tribunal is satisfied that this request falls within EIR.

14. **Regulation 12(5)(e)** is not limited to information provided by a third party. The information in question must be commercial or industrial. The information must be subject to confidentiality provided by law. An obligation of confidence can be implied, and the three-stage test in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 applies:

- (1) the information must have the "necessary quality of confidence", in that it is not publicly accessible and is more than trivial;
- (2) the information must have been imparted in circumstances that implied an obligation of confidence, whether this is explicitly or implicitly; and
- (3) disclosure of the information must be unauthorised.

The confidentiality must protect a legitimate economic interest, which would, on the balance of probabilities, be harmed by disclosure. Finally, it must be shown that the disclosure of the information would adversely affect the confidentiality.

15. The test under **Regulation 12(5)** is that disclosure "would" have an adverse effect. This means that it needs to be more likely than not. The Commissioner's detailed guidance on the EIR explains this as follows – *"For you to apply an EIR exception, you must show that disclosure is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect... The fact that EIR uses only "would" and not "would be likely" means that the test for engaging these exceptions is more stringent than FOIA prejudice-based exemption. A public authority cannot engage an exception if they cannot show that the adverse effect is more likely to happen than not (ie if there is a less than 50% chance)."*

Issues and evidence

16. It is accepted by both parties that the withheld information is environmental information under regulation (2)(1)(c) EIR.

17. Accordingly, the issues before this tribunal are:

- (a) Is **Regulation 12(5)(e)** engaged by the withheld information? – would disclosure adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest?

- (b) If so, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
 - (c) Is **Regulation 12(9)** engaged? Does the withheld information include information relating to emissions?
18. By way of evidence and submissions the tribunal has had the following, all of which has been taken into account when making this decision:
- (a) An agreed 707-page bundle of open documents.
 - (b) A closed bundle of documents containing the withheld information and a submission from the Council to the Commissioner including an explanation from the Council as to why the information is not in the public domain.
 - (c) Oral submissions from the Appellant.

Discussion and Conclusions

19. The withheld information includes an expression of interest from Brett Aggregates in relation to an expansion of its current operations in the Port of Ramsgate. The expression of interest is not a proposal. It is scant in detail and forms part of very early discussions between the Council and BA in relation to how BA consider their future at the Port may look. The information does not relate to emissions.
20. The first issue to be considered by the Tribunal is **whether regulation 12(5)(e) is engaged by the withheld information** – would disclosure adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest? The tribunal has considered the various elements of the test as follows.
21. *Is the information commercial or industrial in nature?* It is not disputed by the Appellant that the information is commercial or industrial in nature. BA already carries out commercial activity at the Port and so, it follows that any expansion of this activity is also commercial activity. The information contains an expression of interest for the purposes of trade.
22. *Is the information subject to confidentiality provided by law?* The information must have the "necessary quality of confidence", in that it is not

publicly accessible and is more than trivial. Having seen the withheld information, the tribunal finds that the withheld information meets this test.

23. It is more than trivial information and has not been made available to the public. The tribunal has considered the Appellant's argument that the information is already in the public domain by virtue of a previous application made by BA to Kent County Council for a certificate of lawful proposed use or development to expand its operation at the Port of Ramsgate. Such application was published on the Kent County Council planning website and was freely available to the public. The tribunal has considered the withheld information and finds that it is not already in the public domain. The application referred to by the Appellant does not contain any of the withheld information.

24. The information must also have been imparted in circumstances that implied an obligation of confidence. Having considered the closed bundle of documents, the tribunal is satisfied that the withheld information was imparted by BA to the Council in circumstances where there was an obligation of confidence.

25. *Does the confidentiality protect a legitimate economic interest which would, on the balance of probabilities, be harmed by disclosure?* For reasons disclosed by the Council in the closed bundle of documents, the tribunal is satisfied that there are legitimate economic interests of both BA and the Council which would be harmed by the disclosure of the withheld information.

26. The Council does not accept the Appellant's arguments that the threat from BA to withdraw its expansion expression of interest is an empty one based on the Appellant's assessment of there being little competition in the aggregate extraction industry.

27. The Appellant has advanced an argument that even if BA were to not proceed with any expansion plans, then this would have little impact on the Council. Whilst the tribunal does not accept this argument, it is the case that the closed bundle of documents provides information and reasoning in relation to the harm to Council's economic interests which do not form part of the Appellant's arguments.

28. It is the tribunal's view, having considered carefully the withheld information, and the information provided in the closed bundle by the Council and the IC that, on the balance of probabilities, the Council and BA's legitimate economic interests would be adversely affected by the release of the withheld material.

29. *Would the disclosure of the information adversely affect the confidentiality?*

The Council and BA are parties to an agreement which includes a confidentiality clause. The purpose of that clause is to protect the economic interests of both parties. The Council made enquiry of BA as to whether they would consent to the release of the information. BA did not provide consent. In the circumstances, it is clearly the case that disclosure of the withheld information would adversely affect the confidentiality of the discussions between the Council and BA.

30. **If so, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?**

The tribunal recognises that there is a statutory presumption in favour of disclosure under regulation 12(2). The Appellant makes various points about why disclosure is in the public interest, including the Appellant's expectation of increased pollution if BA's operations were to expand at the Port of Ramsgate. However, having considered all of the evidence and submissions carefully, the tribunal finds that the public interest in maintaining the exception does outweigh the public interest in disclosure in that the exception allows the Council to engage in commercially sensitive discussions and in turn make commercially sensitive decisions which are of benefit to public funds and the economy of Thanet.

31. *Is Regulation 12(9) engaged?*

The Tribunal has considered the Appellant's submissions in relation to his argument that any information relating to the expansion of the BA operation at the Port of Ramsgate is, in his view, clearly linked to emissions. The Appellant considers that the effect of any expansion of BA's operation will add to the existing emissions which are already produced by BA at the port. These include, noise, movement of ships, plant and materials which will be fuelled by diesel. However, the Tribunal have carefully considered the withheld information and are satisfied that it does not relate to emissions and accordingly regulation 12(9) EIR is not engaged.

32. For the reasons set out above, the tribunal dismisses the appeal.

Signed Judge Mornington

Date: 31 January 2025