Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2018/0173**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0714493

Dated: 13 July 2018

Appellant: Rural Payments Agency (an executive agency of DEFRA)

Respondent: Information Commissioner

Interested Party: Northway Mushrooms Ltd

Heard at: London

Date of hearing: 11 June 2019

Date of decision: 21 June 2019

Before

Judge Angus Hamilton

Marion Saunders

Pieter De Waal

Subject matter: Environmental Information Regulations 2004 12(5)(e)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal for the reasons given below and this judgment shall stand as the substituted Decision Notice.

Abbreviations used in the reasons:

IC: Information Commissioner
DN: Decision Notice
EIR: Environmental Information Regulations 2004
FTT: First Tier Tribunal
DEFRA: Department for Environment Food & Rural Affairs
RPA: Rural Payments Agency
NML: Northway Mushrooms Ltd

Please note that throughout the decision the Tribunal has used the terms DEFRA and RPA interchangeably.

REASONS FOR DECISION

1. Before dealing with the substantive matters in this Appeal the Tribunal was asked by the parties to deal with two matters of case management. The first is that, in the submission of all the parties, Northway Mushrooms Ltd (NML) had been incorrectly joined to the proceedings as a 'Second Respondent'. All parties indicated that this was incorrect for the reason that NML were not opposing but supporting the Appeal submitted by RPA/DEFRA. The Tribunal agreed that NML should be referred to as an 'Interested Party' in the judgement.

2. The second preliminary issue was that there was a lack of clarity over what information should be within the 'Closed Bundle' and what should be within the 'Open Bundle'. Typically a 'Closed Bundle' will contain the disputed information and closely associated supporting material – the placing of which in the public arena (by way of inclusion in the 'Open Bundle') might defeat the purpose of any appeal proceedings. The Registrar to the Tribunal had given very clear Directions in relation to this point but there had been a lack of compliance with those Directions, principally on the part of NML. However, before the start of the Appeal hearing the parties had reached a unanimous agreement as to what should be contained within the 'Closed Bundle'. The Tribunal considered the agreement and concluded that it was reasonable and struck the appropriate balance between not defeating the purpose of the Appeal and the principle of open justice. As a result the statement of Elaine Shaw from NML was treated as 'open' material but her supportive exhibits and the disputed information were treated as 'closed' material.

The Law Relevant to the Appeal

3. Regulation 5(1) of the EIR provides:

> *Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*

4. Regulation 12(5)(e) of the EIR provides an exemption to this general obligation:

> *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;*

5. If the Tribunal is satisfied that this exemption is engaged then consideration must be given to what is commonly referred to as the public interest balancing test (PIBT) – that is the Tribunal must consider whether:

> *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.* ***(Reg 12(1)(b) EIR)***

Background

6. As the chronology of events leading up to this appeal is not the central issue of dispute between the parties the Tribunal has adopted a chronology which represents an amalgamation of the chronologies provided by the IC and DEFRA.

7. NML is a supplier of compost to mushroom growers and was established in 2000 as a Producer Organisation under the EU Fruit and Vegetable Aid Scheme. It supplies compost to its own members. The Fruit & Vegetables Aid Scheme was first established by the EU in 1997. The aim of the scheme is to encourage growers to come together as Producer Organisations (POs) to strengthen their position in the market so as to combat the increasing concentration of demand i.e. the importance of supermarkets.

8. In order to be eligible for funding a PO must be a "recognised" PO under the scheme. The scheme supports activities of recognised POs by co-funding operational programmes. POs recognised under the Scheme can apply for approval of operational programmes that run for a minimum of three years and up to five years in length.

9. In the UK, the Scheme is administered by the RPA. The RPA is responsible for paying the European Union's Common Agricultural Policy Schemes in England and makes payments to farmers, landowners, tenants and traders; the Fruit & Vegetables Aid Scheme is one such scheme.

10. NML is a PO under the scheme. It made an application under the scheme relating to the construction of a compost facility ('the Project'). The application was specifically to amend an existing PO Operational Programme under the Scheme.

11. A company then requested information from the RPA initially on 4 August 2017 and subsequently on 16 August 2017. The information concerned the construction by NML of the compost facility. This appeal relates to the second request.

12. That request was made to the RPA by Taylor Vinters solicitors acting for Custom Compost Unlimited Company (CCUC) on 16th August 2017 for copies of:

    1. the request for funding (i.e. operational programme) or at least the parts of that request relevant to the Project;

    2. subsequent correspondence between the producer organisation and the RPA regarding funding for the Project; and

    3. any decision letter/correspondence from the RPA approving the operational programme at least insofar as dealing with the Project.

13. The RPA refused that request, in reliance on regulation 12(5)(e) EIR. The requester subsequently complained to the Commissioner about the RPA's response.

14. The Commissioner sought representations from the RPA about this matter. In her DN the Commissioner concluded that the RPA had not provided sufficient evidence to support its application of regulation 12(5)(e) EIR. She observed that, in particular, the RPA had not indicated that it had consulted NML about the harm that would result from disclosure.

15. DEFRA then appealed the IC's decision by way of an appeal dated 10 August 2018. As already stated that appeal is supported by NML.

16. The Appeal hearing took place in London on June 11. Mr Armitage represented the IC and Ms Michalos QC represented DEFRA. Ms Shaw gave evidence on behalf of NML. As an officer of that company she was also entitled to make submissions on behalf of NML but chose not to. DEFRA adduced evidence from Mr Barnes and Mr Howroyd. All parties had submitted detailed and helpful submissions prior to the hearing. Mr Armitage and Ms Michalos made further oral submissions at the hearing.

17. The two principal issues for the Tribunal to consider were whether the exemption in Reg 12(5)(e) was engaged and, if so, whether the PIBT favoured maintaining the exemption or disclosure.

18. The Tribunal noted some central points that were not in dispute between the parties in relation to whether the exemption was engaged.

19. First it was accepted that the IC was correct to adopt a four-stage test for determining whether the exception provided by Regulation 12(5)(e) applies:

> *Firstly, the information must be of a commercial or industrial nature. Secondly, the information must be protected by a legal duty of confidence. Thirdly, that confidentiality is required to protect a legitimate economic interest, and finally the disclosure of the information needs to adversely affect that confidentiality* ***(paragraph 13 DN).***

20. All parties were also satisfied that the first two tests were met. Where the parties differed was over the final two tests. In her DN the IC concluded that, lacking an indication that RPA had consulted with NML and that the information requested likely did not represent an up to date picture of NML's finances or operating model, the RPA had sought to withhold the information on a general basis which did not satisfy the third and fourth tests. Although by the time of the Appeal NML had provided considerable input as to why it considered the third and fourth tests to be satisfied the IC maintained the analysis adopted in the DN.

21. It was also accepted by all the parties that the requester in this case, CCUC, was a direct competitor of NML. The IC's assertion was, however, that the information being sought by CCUC did not have the characteristics that would allow it to gain any competitive advantage (and thus cause damage to NML's legitimate economic interests) from the sought disclosure.

22. Obviously the Tribunal has to show great care in explaining the decision it reached on the first issue (namely was the exemption engaged) given that that decision is based, to a large extent, upon material that cannot be described in detail in this decision. The Tribunal has therefore sought to emphasise those (arguably more general) points that were made in open session.

23. The Tribunal noted the evidence from Mr Barnes (one of the witnesses from DEFRA) who had a role in administering the scheme in question. Mr Barnes' evidence was not challenged by the IC. Mr Barnes took the view that the sought information was commercially sensitive and that disclosing it *'might open the floodgates so to speak and discourage my clients from providing all the info we need to make rational decisions. That would then make our work far more difficult.'*

24. The Tribunal in particular noted the evidence of Ms Shaw from NML. Ms Shaw explained that the information provided to the RPA was commercially confidential and its disclosure would have an adverse impact on NML's economic interests for a number of reasons:

- Disclosure would reveal how a successful application for this type of grant could be made. A competitor could simply copy the application without having to do any of the potentially costly preparatory work. On this particular point the Tribunal acknowledged that assistance in 'bid preparation' is a lucrative business with confidentiality at its core.

- Disclosure would allow a competitor to calculate (through, the Tribunal acknowledges, a fairly complex process) the likely ultimate mushroom costs (including the prices to be offered to large supermarkets) for members of NML's 'co-operative' and then to undercut those prices. This information could be used to drive a mushroom producer out of business. In particular this had the potential to allow an established company to make life very difficult for a new start up.

- The sought information set out NML's thinking, planning and strategy for a period of several years – it was not a mere narrative.

- It was not appropriate to view the information as in any way 'old' information – the compost yard funded by the relevant grant from the RPA had only been completed this year. During the period between the submission of the application to the RPA and the completion of the compost yard direct competitors had already started to mimic NML's strategy.

25. Ms Shaw was cross-examined by counsel for the IC but in the Tribunal's view this cross-examination was not successful in undermining these particular assertions made by Ms Shaw.

26. Based on this evidence the Tribunal unhesitatingly and unanimously concluded that the third and fourth elements of the IC's four-part test referred to above were fulfilled. The Tribunal were quite satisfied that the sought information was commercially sensitive and needed to be treated as confidential in order to protect NML's legitimate economic interests. Disclosure of the information would clearly adversely affect that confidentiality and risked damaging NML commercially. The Tribunal also considered that the IC's cross-examination of Ms Shaw was based on the suggestion that it was necessary to demonstrate that disclosure would result in specific financial information which would be of value to a competitor being disclosed. The Tribunal felt that this was too narrow an interpretation of the exemption which referred to '*commercial or industrial information',* which the Tribunal considered to cover a wider range of information than purely financial information and would include, for example, information about business plans and strategies.

27. The Tribunal then proceeded to consider the PIBT and whether it favoured maintaining the exemption or disclosure.

28. Because the IC did not find that the exemption was engaged in her DN the PIBT was not considered by the IC at that stage. Counsel for DEFRA had submitted that the IC was in error in failing to consider the PIBT in her DN but the Tribunal's view was that the IC's approach was correct and the PIBT only needed to be considered once a decision had been reached that the exemption was engaged.

29. In written submissions the IC made the following points in relation to the PIBT:

> *The correct legal approach to be applied in balancing the competing public interests is that described by the Upper Tribunal in **APPGER v Information Commissioner and FCO [2013] UKUT 0560 (AAC) at §76**, referring to the need for "appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice and (b) benefits that the proposed disclosure of the material would ...cause or promote" (with modifications to reflect the fact that, unlike s.27 of the Freedom of Information Act 2000, which was at issue in APPGER, there is a presumption in favour of disclosure under the EIR). Further, Defra and Northway must tailor their public interest arguments by reference to the specific information which they seek to withhold: **Department of Health v IC and Lewis [2015] UK.UT 0159 (AAC).***

30. In relation to the PIBT for the particular information which was the subject of this Appeal the IC submitted:

> *The Commissioner readily accepts that there is a public interest in ensuring that fair commercial competition is not unduly prejudiced by disclosure of environmental information, and that the extent to which disclosure will adversely affect [NML's] commercial interests is relevant at the 'public interest' stage of the analysis*

But the IC went on to submit that she did not consider that there had been a proper detailed and rational explanation as to why disclosure of the particular information would have a significant adverse impact on NML's commercial interests. On this point the Tribunal considered that this complaint was rectified by the open and closed evidence of Ms. Shaw.

31. In favour of disclosure the IC submitted:

> *The Commissioner agrees that there is a general public interest in favour of transparency. Further, that public interest must be afforded substantial weight in relation to environmental information, in the light of importance of effective public participation in environmental decision-making.*

32. At the Appeal hearing counsel for the IC submitted that in assessing the PIBT the Tribunal needed to give consideration to the strength of the evidence that confidential economic information might be disclosed and the type of harm that might flow from such a disclosure. The IC also emphasised that the PIBT needed to be considered in the circumstances existing at the time that the request was made.

33. DEFRA also made detailed written and oral representations in relation to the PIBT. DEFRA's written representations started by referring to the principles flowing from previous cases:

> *"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.":* ***Department for Education and Skills v Information Commissioner and the Evening Standard, February 19, 2007 at 75(i) (approved by the High Court in Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin) at §26)***
>
> *There is a public interest in maintaining trust, preserving confidentiality, and retaining the free flow of information to the public authority where this is necessary for the public authority to perform*

its functions serving the public: ***Bristol City Council v IC EA/2010/0012.***

34. DEFRA asserted:

> *The IC failed to consider the public interest and in particular: (i) the public interest in not prejudicing [NML's] commercial and economic fortunes; (ii) the potential commercial impact upon [NML's] Project given its stage of development; (iii) damaging effect of the revelation of the financial details of the Project to a potential competitor; (iv) the inherent public interest in commercial confidence being respected; (vi) the public interest in applicants to the RPA feeling able to be frank and open in the provision of commercial information and the potential chilling effect of disclosure; and (vii) the fact that [NML] was not a direct party to an EIR request and the only option open to [NML] to prevent disclosure would be through litigation. A requirement to litigate and/or public disclosure may disincline other applicants to apply to the RPA for aid contrary to the public interest.*

35. The Tribunal took the following points into account:

The Tribunal accepted the IC's submission that it must look at the PIBT in the light of the circumstances existing at the time the request was made. Although the Tribunal felt that this was entirely correct it also concluded that the risk of damage to NML's commercial interests was actually higher in 2017 than in 2019. The Tribunal noted in particular that NML was the first company in the UK to seek funding of this type for this particular type of project. Being the first meant that the contents of the application to the RPA were more sensitive rather than less sensitive when going back in time. The Tribunal also noted that NML had no competing producer organisation and was unique in this status until January 2019 when a competitor was granted producer organisation status.

36. The Tribunal considered the PIBT and the submissions from the parties carefully. The Tribunal agreed that the public interest would favour disclosure for reasons of transparency in relation to and accountability for such disbursements - which did after all represent the distribution of funds raised from taxpayers albeit via the EU – although the Tribunal noted that EU regulations already required certain information to be published in relation to such distributions. The Tribunal considered that those provisions already provided a certain level of accountability and transparency although the information provided as a result of EU regulations was at a higher and more general level than the very specific information sought about NML.

37. The Tribunal considered that the PIBT would, in particular, favour maintaining the exemption because:

- The Tribunal was satisfied based on Ms Shaw's evidence that the particular disclosure was highly likely to be advantageous to a competitor and highly likely to cause financial damage to NML. This in turn was likely to reduce competition. As stated already, the Tribunal felt that the IC had focused too narrowly in looking for financial information which might be of advantage to a competitor. The Tribunal's view was that the exemption was drafted widely enough to protect other types of commercial information such as business plans and strategies.

- The Tribunal also accepted the evidence from the DEFRA witnesses that The Fruit & Vegetables Aid Scheme could only function properly if applicants provided full and detailed information about their business plans and providing detailed information would be discouraged if it were established that competitors could easily seek disclosure of it. This was echoed by the evidence of Ms Shaw who told the Tribunal that if she had any idea that the information would be disclosed to a competitor she would simply not have provided it in as much detail. The Tribunal considered that there was a clear public interest in the Scheme operating successfully.

38. The Tribunal concluded that the public interest arguments in favour of maintaining the exemption were significantly more compelling than those in favour of disclosure.

39. The Tribunal's unanimous decision was therefore that the Appeal should be allowed and this judgment should stand as the substituted DN.

Signed: Angus Hamilton DJ(MC) Tribunal Judge
Date: 7 July 2019
Promulgation date: 10 July 2019