



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice IC-47139-Y8M9**

Appeal Reference: EA/2020/0360

Considered on the papers

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

AIMÉE GASSTON & SUSAN WOLF

Between

THOMAS WHITE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

SUBSTITUTED DECISION NOTICE

To: Department for the Economy (Northern Ireland)
Netherleigh
Massey Avenue
Belfast
BT4 2JP

The tribunal directs the public authority to disclose the requested information (subject to redaction of personal identifiers of junior or former civil servants) within 35 days.

Dated 23 June 2021
Judge C Hughes OBE

REASONS

Background

1. Mr White made a request for information from the Department for the Economy of the Northern Ireland Executive (the "Department") in March 2017 about an application for an extension to a petroleum exploration licence held by Tamboran Resources UK ("TRUK"). In a decision notice FER0671821 of 21 December 2017 the Information Commissioner had ruled on the previous request, ordering the disclosure of certain information and so giving rise to redacted documents in the public domain. In that decision notice she had held that EIR exceptions to disclosure in 12(5)d (confidentiality of proceedings) and 12(5)e (confidentiality of commercial or industrial information) were engaged.
2. With respect to 12(5)d she identified the confidential proceedings as:- *In this case the Commissioner considers that the Department's consideration of petroleum licences can be interpreted as proceedings within the meaning of regulation 12(5)(d). She accepted the department's explanation that "The application and licensing process is underpinned by regulations which, among other things, set out the arrangements for making and determining applications, permissible terms and conditions for granting a Petroleum Licence and the model clauses which may be incorporated in a Petroleum Licence."*
3. She concluded that the information was protected by a common law duty of confidence:-
 21. *Having inspected the withheld information the Commissioner is satisfied that it comprises correspondence between the Department and TRUK. The Commissioner is further satisfied that the information has not been placed in the public domain. TRUK has not consented to its disclosure and in the Commissioner's opinion this demonstrates that TRUK considers the information important and not trivial. The Commissioner accepts that both parties understood the information to have been shared in confidence and would not expect it to be disclosed. Accordingly the Commissioner is satisfied that a common law duty of confidentiality applies.*
 22. *The Department did not explicitly state how it believed that confidentiality would be adversely affected by disclosure. However, since disclosure under the EIR in effect means disclosure to the world at large, it is clear that the confidentiality of proceedings would be adversely affected if the information were to be disclosed because that confidentiality would necessarily be lost. Accordingly the Commissioner is satisfied that the exception at regulation 12(5)(d) is engaged, and has gone on to consider the public interest.*
4. She considered that this covered the majority of the then withheld information and upheld the Department's position. With respect to 12(5)(e) she considered that the specific information not covered by 12(5)d was not protected from disclosure by this provision.

The Request

5. After a period of time, on 28 May 2019, Mr White wrote again to the Department seeking to obtain the material which had originally been redacted.:-

"Please forward to me an unredacted version of this document (Redacted Annex B to Response to ICO letter of 23 October 2017 - information to be released withheld.PDF)

This is a redacted version of correspondence between the Department and Tamboran Resources UK and its then parent company Tamboran Resources Pty from 2014.

In light of the new application by TRUK for a Petroleum Licence over approx 630 sq KM of Fermanagh, I believe this redaction needs to be removed as the Public Interest Test has now been elevated.

The Department is under a duty to consider previous operations under licences held under 4(1)(d) of the regulations. Therefore I believe the public interest test now outweighs any company confidentiality or otherwise in this case."

6. On 24 June 2019 the Department refused relying on exemptions from the duty to disclose contained in the Environmental Information Regulations (EIR) 12(5)d, 12(5)e and 13. On internal review of 3 September 2019 the Department maintained that position. On 25 September 2019 Mr White complained to the Information Commissioner who launched an investigation into the handling of the request set out at paragraph 5 above.
7. In parenthesis the tribunal notes that Mr White had also made a third request for information, which, when on internal review his request was refused, he sent the internal review on 19 November 2019 to the Information Commissioner stating *"attached is an internal review which was relevant to this particular case"*. Mr White contends that this should have been treated as a formal complaint to the Information Commissioner and therefore the third request for information is within the scope of the appeal. However the Information Commissioner did not understand the correspondence in this way and her decision notice does not address the third request. The scope of this appeal is therefore restricted to the second request.
8. In her decision notice she considered the issue of the personal data of individuals. She categorised them in three groups: the personal data of junior Departmental staff, the personal data of former Departmental staff and the personal data of TRUK personnel. She considered the GDPR requirement that *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"* She identified the only relevant lawful basis for processing as Article 6(1)f:-

"...processing is necessary for the purposes or the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject and which require protection of personal data, in particular where the data subject is a child"

9. She noted that:-

"Disclosure of personal data under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question."

10. She considered that disclosure of personal data of officials would not assist in the understanding of the department's decision-making in respect of the licence and therefore was not necessary. Her reasoning did not address the issue of individuals within TRUK.

11. With respect to the confidentiality of proceedings she found:-

36. The Department confirms that all of the above continues to be the case and, upon further inspection of the withheld information, the Commissioner is also satisfied that this continues to be the case. The Commissioner also accepts that both parties understood the information to have been shared in confidence and would not expect it to be disclosed and is accordingly satisfied that a common law duty of confidentiality applies. She is content that there has been no change to the Department's position or to the circumstances of the case, and that the confidentiality of these proceedings continues to be provided by law in line with the Commissioner's previous decision.

12. She considered the arguments with respect to public interest and concluded:-

The Commissioner has inspected the remaining withheld information and on this basis she is satisfied that there is a strong public interest in maintaining the exception. The Commissioner finds that there is a significant public interest in protecting the confidentiality of the Department's licensing proceedings, which outweighs the public interest in favour of disclosure.

13. In his appeal Mr White raised questions about the handling of his complaint by the Information Commissioner, including the third request (see paragraph 7 above), the delay of the Information Commissioner in dealing with the complaint, and the impact of not having the information on his Aarhus right to participate in proceedings relating to the environment. The tribunal does not have jurisdiction to consider any of these matters, the issue for this tribunal is the balance of public interest in the disclosure of environmental information within the scope of the request of 28 May 2019.

14. In his submissions Mr White argued that the confidentiality of the petroleum licensing process was at odds with the public's rights to information under the Aarhus Convention. He argued that the company "lost its licence" and was

now applying for a new licence. The Department had indicated that the differences between it and TRUK which had led to threats of seeking a judicial review had been amicably resolved, he was concerned that the Department had inappropriately committed itself to the granting of a new licence.

Consideration

15. The tribunal notes that the material in issue is certain sections of letters passing between the Department and TRUK in the second half of 2014 in connection with the termination of a licence to drill for petroleum and the threat of judicial review proceedings if the licence was terminated. The redacted letters were ordered to be disclosed in December 2017 and this request was made in May 2019 – nearly five years after the dates of the letters and a year and a half after the framework of the letters was disclosed.
16. The Information Commissioner has relied on an exceptionally broad interpretation of 12(5)(d), arguing that to disclose the material would breach the confidentiality of the Department’s proceedings. The difficulty with this argument is that the letters are pre-litigation exchanges between the Department and a licence holder which is losing its licence, each side seeks to set out and justify the position. While such correspondence is under usual circumstances confidential, it is not a proceeding of the Department.
17. The tribunal finds it exceptionally difficult to accept that disclosure of this exchange, five years old at the time of the request, would affect the parties in any meaningful way, either impacting on the ability to attract investment or discouraging this company or others from seeking to explore for oil or gas. If there is a reasonable prospect of gaining a licence and making a profitable investment then relevant companies will not be discouraged by this. The information is essentially trivial, old and, it is likely, already in the public domain.
18. Mr White claims that the circumstances in which the previous licence came to an end are a relevant consideration for the grant of any new licence. Whether or not this is so the withheld information falls within EIR and the tribunal applies the presumption in favour of disclosure.
19. The tribunal accepts that some redactions of personal data should be made, specifically civil servants graded below the Senior Civil Service. However such considerations do not arise with respect to the names of serving Senior Civil Servants or of the corporate officers of Tamboran Resources UK or Tamboran Resources Pty Ltd (individuals identified as CEO or Director in the correspondence) who under the provisions of the Companies Act have an expectation that they will be accountable for the actions of their companies.
20. The appeal is allowed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 23 June 2021

Promulgated: 23 June 2021