

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 August 2024

Public Authority: Warrenpoint Harbour Authority
Address: Warrenpoint
County Down
BT34 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to Regen Waste Limited's (Regen) commercial agreements with Warrenpoint Harbour Authority. Warrenpoint Harbour Authority (WHA) disclosed part of the information but relied on the FOI and EIR access regimes to refuse to disclose the remainder of the information citing sections 43(1), 43(2), 43(3) of FOIA (commercial interest) and regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information).
2. The Commissioner's decision is that WHA should have dealt with the entire request under the EIR access regime and therefore was entitled to rely on regulation 12(5)(e) to withhold the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request at (i)(b), (i)(c), (vi) and (vii)(b-c) to confirm whether or not it holds the information.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 14 September 2023, the complainant wrote to WHA and requested information in the following terms:
6. We have been instructed by a client to write to you to request the following information:
 - (i) Confirmation of whether REGEN WTE Limited ("Regen WTE") or Regen Waste Limited are a party to the lease/licence with Warrenpoint Harbour Authority ("Warrenpoint Harbour") over:
 - a. the area within the red line boundary of WML 22/59 LN13/35/V3 and the date it commenced;
 - b. the area outside the red line boundary of WML 22/59 LN13/35/V3 and the date it commenced;
 - c. the area within the red line boundary of WML 38/31 LN/20/18 and the date it commenced. (see plan at appendix 1 for ease of reference)
 - (ii) A copy of the lease/licence referred to at (i).
 - (iii) Copies of any maps which show the area covered by the lease/licence referred to above;
 - (iv) Copies of all correspondence between Warrenpoint Harbour and Regen WTE and/or Regen Waste Limited regarding the following:
 - a. Stacking of bales in compliance with NIEA fire risk guidance or any other risk assessment guidelines;
 - b. Breach of licence regarding the amount of waste permitted through the site each year;
 - c. Breach of licence regarding the storage of waste beyond the licence red line boundary;
 - d. Breach of licence regarding the storage of waste for longer than the 3-month maximum period permitted under the licence;
 - e. Details of any corrective measures put in place to ensure odour is managed;
 - f. Confirmation of the existence, quantum, and structure of Regen WTE's financial provision to NIEA regarding the site;

g. Details of any risk assessment regarding the stacking of bales to a level over 4 bales high; h. Details of the proximity of waste storage to port edge.

(v) Copy of the schedule of weighbridge transactions for the last 12 months showing the following information for every vehicle that has delivered or collected RDF/SRF by Regen WTE and/or Regen Waste Limited (or any subcontractors) to or from the leased area indicated at appendix 1:

- i. Weighbridge transaction number;
- ii. Delivery date;
- iii. Delivery time
- iv. Gross weight;
- v. Net weight;
- vi. Number of bales;
- vii. Vehicle registration number;

b. Copy of the schedule of shipping details for last 12 months showing the following information for every vessel that has collected RDF/SRF from Regen WTE and/or Regen Waste Limited (or any affiliated party) from leased area indicated at appendix 1;

- i. Name of vessel
- ii. Date of departure
- iii. Net tonnage carried
- iv. Bales loaded

(vi) Details of any other leased areas or extensions to existing leased areas which Regen WTE or Regen Waste Limited may hold, have previously requested or are in current discussions over with Warrenpoint Harbour.

(vii) In respect of any extensions to existing leased areas agreed with Regen WTE or Regen Waste Limited, please provide the following:

- a. Copies of any correspondence advising Arc21 that the storage area was changing;

- b. Confirmation as to whether this extended area is covered by the licence;
- c. Confirmation as to whether NIEA has approved an amendment to the licence and copies of all correspondence relating to this approval.
7. WHA responded on 25 October 2023. It stated that it had given consideration to each request to determine which statutory access regime applied. It provided a response to the complainant's request at point (i)(a) and some information relating to their request at (iv)(a), (iv)(e) and (iv)(g). It also provided a response to the complainant's request at (vii)(a), stating that it did not hold any correspondence with Arc21.
8. In relation to the complainant's request at (iv)(h), WHA requested further clarification from the complainant, but this was not provided. WHA withheld the following information:
- The complainant's request at (i)(b), (i)(c), (vi) and (vii)(b-c) under section 43(3) of FOIA.
 - The complainant's request at (ii) under sections 43(1) and 43(2) of FOIA.
 - The complainant's request at (iii) under section 43(2) of FOIA.
 - Other correspondence pertaining to the complainant's request at (iv)(a-g), (v)(a-b) under regulation 12(5)(e) of EIR.
9. Following an internal review, WHA maintained its original decision to withhold the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 13 February 2024 to complain about the way their request for information had been handled.
11. During the Commissioner's investigation, WHA provided its submission in support of its position as well as the withheld information. Having considered the withheld information the Commissioner decided that all the withheld information falls under regulation 12(5)(e).
12. Having regard to the parts of the complainant's request which WHA has applied section 43(3) of FOIA, it is the Commissioner's view that all the requests should be dealt with under the EIR. The Commissioner notes that there is no NCND (neither confirm nor deny) provision under

regulation 12(5)(e) of the EIR. Therefore, WHA must issue a fresh response confirming whether it holds the information.

13. The scope of his investigation is to determine whether WHA was correct to rely on regulation 12(5)(e) of the EIR to withhold the information.

Reasons for decision

Environmental Information Regulations

Is the requested information environmental?

14. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
15. Having reviewed all the withheld information, the Commissioner determines that the requested information is environmental information falling within the scope of regulation 2(1)(a) of the EIR as it relates to

waste substances affecting or likely to affect the elements of the environment. He has therefore assessed this case under the EIR.

16. The Commissioner has already determined that WHA must confirm or deny whether it holds information under (i)(b), (i)(c), (vi) and (vii)(b-c). The Commissioner has considered that if the information is held, that information is also being considered under regulation 12(5)(e) and included in the Commissioner's decision.

Regulation 12(5)(e)- confidentiality of commercial or industrial information.

17. This reasoning covers whether WHA was correct to withhold the requested information under Regulation 12(5)(e) of the EIR.
18. Information can be withheld under Regulation 12(5)(e) if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
19. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e), the authority must demonstrate that:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
20. Regulation 12(5)(e) is also subject to a public interest test if the exception is engaged.

Is the information commercial or industrial in nature?

21. Having viewed the withheld information the Commissioner is satisfied that the information is commercial in nature. The withheld information primarily relates to the WHA and Regen's waste management and commercial operations.

Is the information subject to confidentiality provided by law?

22. The Commissioner is satisfied that the withheld information is subject to both a contractual and an implied duty of confidence. He understands that the relationship between WHA and Regen is akin to that between a commercial landlord and tenant which benefits from expectations of confidentiality between both parties.

23. In this case, the Commissioner is satisfied that a duty of confidence exists between WHA and Regen with whom it has a private and commercial arrangement for the use of Port land to conduct its business operations. This would extend to contractual terms between the parties including correspondence between them which relates to their operations at the Port.
24. WHA has informed that Commissioner that very few of Regen's senior staff are aware of the extent of the agreements and arrangements within the Port. It added that staff members are subject to confidentiality provisions within employment contracts in order to protect this information. In this case the Commissioner is satisfied that the information is subject to an implied and/or contractual duty of confidence.

Is the confidentiality provided required to protect a legitimate economic interest? Would the confidentiality be adversely affected by disclosure?

25. WHA has argued that confidentiality is required to protect its own commercial interest as a licensor as well as Regen's commercial interests as a licensee. WHA argued that if it was required to disclose confidential information, there would be a real and significant risk that current and future customers of the Port would move their business elsewhere, thereby adversely affecting its economic interest. It also argued that it would be of interest to Regen's competitors to gain advantage over them which would cause damage to their economic interests.
26. WHA has informed the Commissioner of ongoing litigation between Regen and the complainant and the existence of a confidentiality ring between the lawyers in that action. It says that it is concerned that any disclosure of confidential and commercially sensitive information could have an impact on the ongoing proceedings where the court is best placed to determine what information should be disclosed to the parties in the matter.
27. WHA has drawn the Commissioner's attention to paragraph 36 of the of *Warren Harbour Authority v Information Commissioner (Allowed) [2020] UKFTT 2019_0240 (GRC)*¹ in which the tribunal accepted that there is a significant weight in WHA's argument that the information would be of no use or relevance to the wider public and determined that disclosure

¹ [Warrenpoint Harbour Authority v Information Commissioner \(Allowed\) \[2020\] UKFTT 2019_0240 \(GRC\) \(29 April 2020\) \(bailii.org\)](#)

of details of a pattern of business activities would cause prejudice to that business and to WHA.

28. The Commissioner has noted the argument before him. He recognises that there is a real and significant risk that the disclosure of the withheld information could lead to current and future customers of the Port to move their business elsewhere which would adversely affect WHA's economic interests.
29. The Commissioner has decided that the exemption at regulation 12(5)(e) was correctly engaged. He has therefore gone on to consider the public interest test required under regulation 12(2) of the EIR.

Public interest test

30. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.

The complainant's arguments

31. The complainant's public interest arguments relate to their request for information under parts (i)(b) and (i)(c) of the request.
32. To summarise their arguments, they contend that information requested at (i)(b) and (i)(c) is not likely to prejudice the commercial interests cited as it does not require WHA to disclose any financial information such as pricing or costs.
33. They argue that information requested is mundane information relating the area covered by the lease/licence between WHA and Regen and that the existence of a lease/licence between the parties is in the public domain via the NIEA Register.
34. They stated that WHA has not produced any evidence to substantiate its assertion that the basic information requested could be used by its customer's or competitors to their detriment or how disclosure would be likely to damage its own commercial interests.

Public interest arguments in favour of disclosure

35. WHA has considered the general public interest in transparency and accountability around practices that could have an impact on the environment, upholding standards of integrity at the Port in terms of commercial operation and the interest to the local community.

Public interest argument in favour of maintaining the exemption.

36. When considering the public interest in favour of maintaining the exemption, WHA stated that it took into consideration the harm that would be suffered by Regen and WHA itself, the expectation of confidence between the parties and the public interest in maintaining the commercial viability of the Port.
37. WHA says that on balance it believes that the prejudice that would be caused by disclosure was greater than any potential benefit in the public good. It argued that the Port makes an important contribution to the local economy with over £10 million gross value added (GVA) contributed annually to an economically deprived area.
38. It argued that the Port supports over 400 jobs indirectly and 65 directly. It says that the risk of potentially losing a major customer and jeopardizing future commercial relationships would undermine that commercial viability which it depends on to remain successful. WHA maintains that the public interest in maintaining the exception outweigh that in disclosing the withheld information.

The Commissioner's view.

39. The Commissioner has taken into account the argument before him. He accepts WHA's arguments of the nature of harm that would be caused by the disclosure of the withheld information to its viability and to the relationship it has with its existing and potential future customers.
40. The Commissioner has given consideration to the impact on WHA of any disclosures of the information that has been requested by the complainant. He agrees that this would adversely affect WHA's viability considering that it is subject to FOI/EIR access regimes whilst other ports are not. The Commissioner agrees that it would potentially harm its commercial relationships if it was to disclose commercially sensitive information relating to its customers.
41. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly.

Other matters

42. In their complaint to the Commissioner, the complainant stated that the public authority did not provide a target date for a response to the internal review and were not advised that it required more than 20 working days to respond to the internal review.

43. Regulation 11 of the EIR states that:

“(3) The public authority shall on receipt of the representations and free of charge—11

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.”

44. In this case, the complainant submitted their request for internal review on 8 November 2023. WHA informed them of the outcome of the internal review on 5 January 2024, 40 working days later.

45. While the Commissioner notes that the response was provided on the fortieth day, WHA failed to notify the complainant and therefore did not comply with regulation 11(4) of the EIR.

Right of appeal

46. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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