



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0133
Information Commissioner's Ref: FS50094592

Heard at Procession House, London, EC4
On 23 June 2008

Decision Promulgated
On 8 July 2008

BEFORE

CHAIRMAN
ANNABEL PILLING
AND
LAY MEMBERS
MICHAEL HAKE
AND
DAVE SIVERS

Between

NORTH WESTERN AND NORTH WALES
SEA FISHERIES COMMITTEE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: JAMES SEGAN
For the Respondent: JANE OLDHAM

Decision

The Tribunal upholds the Decision Notice dated 19 November 2007 and dismisses the appeal.

The public authority and the Information Commissioner should have dealt with the request for information by reference to the Environmental Information Regulations 2004 rather than the Freedom of Information Act 2005.

The Tribunal issues a substituted Decision Notice.

Information Tribunal

Appeal Number: EA/2007/0133

SUBSTITUTED DECISION NOTICE

Dated 8 July 2008

Public authority:

NORTH WESTERN AND NORTH WALES SEA FISHERIES COMMITTEE

Address of Public authority:

Lancaster University

Lancaster

LA1 4YY

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the authority did not deal with the request in accordance with the requirements of the Environmental Information Regulations 2004.

The authority was in error in its application of the exception under Regulation 12(5)(e) of the Environmental Information Regulations 2004.

Action Required

The authority must now disclose to the Requestor the information identified and referred to in the Tribunal's determination in order to ensure compliance. The authority must do so within 35 calendar days from the date of this Substituted Decision Notice.

Dated this 8 July 2008

Signed

Annabel Pilling
Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This is an Appeal by North Western and North Wales Sea Fisheries Committee (the 'Committee') against a Decision Notice issued by the Information Commissioner dated 19 November 2007. The Decision Notice relates to a request for information made to the Committee under the Freedom of Information Act 2000 (the 'FOIA'). The Committee had withheld the information on the basis that it was exempt from disclosure, relying on the exemptions in sections 41 and 43 of FOIA. The Information Commissioner (the 'Commissioner') concluded that the Committee was in error in its application of the exemptions claimed, and required the authority to disclose the disputed information.
2. In this matter, the Committee and the Commissioner agree that they both erred in failing to deal with the request under the Environmental Information Regulations 2004 (the 'EIR') and request that the Tribunal deals with the Appeal under the EIR.

Background

3. This case concerns an oyster and mussel fishery in the eastern Menai Strait in the County of Gwynedd. The Committee is, by article 5 of the Menai Strait Oyster and Fishery Order 1962 S.I.1962 No. 705 as amended (the '1962 Order'), made under the Sea Fisheries Acts 1868 to 1930, the Grantee of several mussel fishery in the Eastern Menai Strait.
4. The 1962 Order permits the Committee to allow private mussel farmers to exercise its exclusive right of fishery by providing the Committee with the power to delegate the performance of that right to other persons (termed a "lease" of a "reserve" or "laying" in the 1962 Order). By article 8 of the 1962 Order, the Committee may, subject to the consent of Welsh Assembly Government (the 'WAG'), grant leases of reserves or layings of mussels to such persons and subject to such terms and conditions as it may think fit.

5. By article 14 of the 1962 Order the Committee shall apply rents and revenues from the fishery to the purposes set out, which include maintenance of the mussel beds and areas for propagating, breeding, fattening, gathering and collecting the spat or young of mussels, destroying pests harmful to mussels, providing tanks for cleaning, sterilising and germ treatment of mussels.
6. By article 15 of the 1962 Order the Committee must account for all expenditure and income in respect of the fishery and provide all such other information and in such form as the WAG shall require, and shall allow the WAG to inspect the fishery and any books and documents in the Committee's possession.
7. At the relevant time and continuing to the present, the Committee has divided the Fishery into six layings, named Areas 1 to 6, the operation of which is leased to individual persons or companies. These Leaseholders currently comprise four commercial companies for the six fisheries, although there appears to be one individual whose interests overlap into other companies.
8. Under the terms of their leases, the Leaseholders have a legal obligation to provide, to the Committee, information relating to their activity within the fishery's area. The Committee thereafter collects and collates that information and completes a proforma Annual Report to the WAG. The relevant proforma used requires the Committee to provide aggregated information for the Fishery and does not require the information to be provided separately for each mussel lay.
9. Under the Lease,
 - the rights conferred (the 'rights') are the rights to work and maintain the Layings as lays or layings or breeding or fattening grounds for the cultivation of mussels, subject inter alia to the obligations to maintain the Layings and keep them from becoming dormant, choked or foul or from containing any creature such as starfish or limpet which may be detrimental to mussels, and not without the prior licence of the WAG to import into the Layings or any part of the Fishery any shellfish from outside the Fishery.

- The Leaseholder must not do or omit any act matter or thing on the Layings or in the Fishery which may constitute a contravention of the Order as far as such terms fall to be observed by the Leaseholder.
- The Leaseholder must at all times provide to the Committee “full and true accounts of all oysters and mussels sold by the Tenant and all other information required by the Landlord with reference to the Rights or the Layings in such form as the Landlord may require” and must do all things whatsoever which may be requisite or necessary to enable the Landlord to comply with the requirements of the WAG in so far as they affect or relate to the Rights or the Layings.
- Any dispute relating to the Lease is to be referred to arbitration.

10. Although not strictly relevant to this Appeal, there is a proposal to construct a marina in the Menai Straits which concerns the Committee and Leaseholders as it may impact upon the Fishery. The relevance arises because information of the type sought to be withheld by the Committee was disclosed in connection with legal proceedings in relation to this proposal.

The request for information

11. By letter dated 30 March 2005, Lt. Col. [Retd] Michael Burkham MBE (the ‘Requestor’) requested under FOIA that the Committee provide him with the following in relation to the Site of Special Scientific Interest (the ‘SSSI’) area of Traeth Lafan:

- i) copies of the licences to the four lay-holders;
- ii) copies of the returns showing imports and exports from each of the six fishery areas for the last ten years.

12. The Requestor also asked to be advised if the leases are transferable and whether a lease changed hands recently for a considerable sum of money. If so, he requested that the Committee provide him with a copy of the relevant minutes consenting to this.

13. The Committee failed to reply within 20 days as required by section 10 of FOIA. Although there appears to have been some interim communication between the Requestor and the Committee, the response to the request was provided by letter dated 20 May 2005 from the then Chief Executive of the Committee, Dr. Jim Andrews. The following was provided:

- i) Copies of the Committee's reports to the Minister for the past four years. He explained that the Committee did not have copies of reports for earlier years but advised that the National Assembly may have retained them.
- ii) A copy of a specimen lease for the Fishery Order.
- iii) A list of the names of the current leaseholders.
- iv) Information relating to the third part of the original Request, that there had been changes within the company that was the leaseholder to Area 5 which may have caused the Requestor to believe that a lease had "changed hands recently" but that the tenant of Area 5 remained the same.

14. By letter dated 1 June 2005, the Requestor asked for "the subsidiary documentation which is referred to in the summaries", which had not been sent, as "without these returns for the imports and exports of each lay it is not possible to understand what is going on in the Straits."

15. The Committee, by its new Chief Executive Dr. Stephen Atkins, responded by letter dated 8 June 2005 refusing the request for disclosure of information, stating that it would be incorrect to disclose the information requested on "the imports and exports of each lay". The Committee stated that the information it had related to the annual production of mussels from the fishery order area. The Committee claimed that the information was exempt from disclosure under sections 41 and 43 of FOIA. No reference to the EIR was made.

16. In relation to section 41, it was stated:

“The information that you have requested was supplied to us in confidence solely for the purpose of compiling a collated report for the area covered by the fishery order. This is an absolute exemption from disclosure.”

17. In relation to section 43, it was stated:

“I have fully considered the public interest in disclosing the information you have requested. However I believe that disclosure would prejudice the commercial interests of the lease holders and that in this case such prejudice outweighs the public interest.”

18. By letter dated 15 June 2005 the Requestor effectively asked for an internal review of the decision to withhold the information, setting out the reasons why he considered the exemptions in sections 41 and 43 of FOIA were not applicable.

19. The Committee responded by letter dated 26 August 2005 maintaining that sections 41 and 43 of FOIA applied and therefore that the information would not be disclosed.

The complaint to the Information Commissioner

20. There appears to have been further correspondence between the Requestor and the Committee between 26 August 2005 and 4 November 2005 which has not been provided to the Tribunal.

21. The Requestor complained to the Commissioner by letter dated 10 November 2005. He explained that to understand the degree of damage to Traeth Lafan [one of the sandbanks within the Menai Straits] and the risk of invasive species being imported, the Committee had been asked to provide copies of the annual statements of importation into and harvesting from each mussel lay on the East Menai Fishery and where the imports came from. He added that “(w)e knew this information to be available because the Committee had already published this data for the year 2001.” In conclusion, the Requestor stated that:

“It is hoped that your intervention will result in NW&NWSFC producing as much as their records can provide of the information requested originally and a clear statement of what information is not available and why it is not available, since

under the grant of the Fishery to it, the Committee has a duty to maintain such records.

22. Owing to the volume of cases before the Commissioner, no complaints officer was appointed to deal with this matter until June 2006, although the Requestor was kept informed of the position.

23. By letter dated 19 June 2006 the Commissioner asked the Committee to provide details as to how it had applied sections 41 and 43 of FOIA. In particular, the Commissioner asked the Committee:

(1) why it had concluded that disclosure of the information would constitute an actionable breach of confidence,

(2) in relation to the prejudice to commercial interests test, to provide any evidence of a significant risk of prejudice, and

(3) (in relation to the latter exemption) for the Committee's reasoning in concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.

24. By letter to the Commissioner dated 12 July 2006 the Committee provided a copy of a report from a leaseholder for the year 2002 by way of a sample. The Chief Executive stated that the reports and data are owned by WAG and the Leaseholders have a duty to provide the data relating to the returns from each of the lays, and that "it is this data giving the actual production figures of each company operating in the Order that I am advised is exempt from disclosure". The letter stated that the Committee had taken legal advice and had "consulted the leaseholders of the Order and I am convinced that action would be taken against the Committee for breach of confidence if the data was disclosed". As to section 43 and the Commissioner's request for details as to the alleged prejudice and public interest in respect of section 43 of FOIA, the Committee asked the Commissioner to clarify what evidence he required, and stated that:

(1) the companies operating in the Strait are in competition and the interests of each one would be prejudiced by disclosure of the others' results;

(2) the complainant was motivated by a dislike of the mussel industry and a wish to promote construction of a marina nearby, for which planning permission and the legality of such development under Fisheries Law was presently subject to legal challenge; if the development proceeded the Leaseholders may seek compensation and "all their legal challenges and compensation claims may be prejudiced by disclosure of this data";

(3) No public interest would be served by disclosure because the complete "summary results" for the Order "as a whole" had been disclosed, whereas no public interest would be served if the Committee had to defend an action for breach of confidence by the leaseholders;

(4) CEFAS publishes catch returns by port and species but does not publish the catch returns of vessels because that is commercially confidential and disclosure would interfere with proper competition between fishing businesses.

This letter made no reference to mussels imported into the fisheries, nor to their origin.

25. Subsequently, by letter dated 29 August 2006, pursuant to the Commissioner's enquiries, the Committee confirmed that it did not have legal advice separate from the letter it had initially written, upon oral legal advice, to the complainant in response to his request for the information.

26. On 25 January 2007 the Committee provided the contact details for one of the leaseholders. The Committee stated that it was sure that the operator of the company would be willing to confirm that he had stated to the Committee that he would take legal action for breach of confidence against the Committee for disclosure of the data and to adduce the evidence necessary to show that the data

is commercially sensitive and to protect his position. The Committee stated that its task in compiling the forms and reports containing the requested information was simply to convey aggregate figures to WAG and that its working relationship with the mussel industry would be damaged if the data were to be disclosed.

27. On 1 February 2007 the Commissioner wrote to the leaseholders requesting any comments or views as to why the information requested should not be disclosed.

28. No reply was received.

29. On 19 February 2007 the Commissioner gave the Committee his preliminary view on the withheld information.

30. On 7 March 2007 the Chief Executive responded by e-mail, disagreeing with the Commissioner's provisional conclusions and again asserting that the Committee would be sued for breach of confidence in the event of having to release the information. The Committee stated, in relation to section 41 of FOIA, that:

(1) it could not produce evidence that the Committee would be sued for breach of confidence if it disclosed the companies' production figures, but that the companies had made statements to that effect and would confirm those statements if the Commissioner asked them;

(2) the Committee was not willing to test the validity of their claims and did not consider that it had the right to disclose their confidential data and that the risk was significant and more than a remote possibility;

(3) The Committee stated that it was clear to the Committee that if the data was provided to the Committee solely for the purpose of submitting a return to the grantor of the order (WAG), a breach of confidence will occur if the data is passed on to a third party;

(4) Such information had not generally been released in previous years; a single year's data was released in order to support an Environmental Impact

Statement and to defend the mussel industry against a specific development proposal. It was the same developers who were now seeking to obtain this information by another route in order to undermine the objections to the same proposal and related judicial review proceedings.

(5) The Committee stated that it was not sure what evidence could be provided to show that something might happen but if the Commissioner would suggest the sort of evidence he would expect in this case, the Committee would work with the companies to see if it can be compiled.

(6) The Committee stated that it was entirely convinced that the companies would have grounds for an action for breach of confidence.

31. As to section 43 of FOIA, the Committee stated that it understood that the commercial interests of each layholder would be prejudiced if all the other layholders in the fishery order and all the other mussel growing operators in the UK and globally were to have sight of the production figures from each lay; and that the Committee was not sure what evidence of this could be presented but one would not normally expect a company to disclose its production figures.

32. The Chief Executive stated that the Committee would copy the e-mail to the main companies involved, so that the Commissioner had their details and could ask them for confirmation of their intention to seek redress for breach of confidence and damage to their commercial interests if the data were to be disclosed.

33. On 3 April 2007 the Commissioner wrote to the Committee asking it to ask the third party Leaseholders to contact him within the next 28 days with any evidence they may wish to submit, stating that if nothing further was heard the Commissioner would be forced to conclude that they were not unduly troubled by the release of the information in question.

34. The Commissioner attempted to obtain the views of those third parties details of which he had been given, but received no response.

35. A Decision Notice was issued on 19 November 2007. In summary, the Commissioner concluded that:

(1) Section 41 of FOIA was not engaged because

(i) the Leases did not contain express confidentiality clauses prohibiting the release of information;

(ii) given the absence of any express confidentiality clause, it was therefore necessary to consider whether an obligation of confidence had arisen;

(iii) to assess this, the Commissioner had taken into account the circumstances under which the information was provided to the Committee (namely a legal requirement), the nature of the information and how such information had previously been handled, and the Commissioner had specifically requested evidence of potential actionable breach from the third party, who had elected not to respond;

(iv) the Commissioner had not been provided with any evidence to suggest that disclosure of the information would constitute any actionable breach of confidence, and the Committee had failed to establish that the information is confidential ;

(2) Section 43 of FOIA was not engaged because

(i) none of the third parties involved had presented any arguments to demonstrate that their commercial interests would be affected by releasing the information,

(ii) the Committee had not been able to demonstrate how commercial interests would be detrimentally affected;

(iii) consequently the Commissioner was unable to establish any evidence of prejudice and was therefore unable to accept that section 43 of FOIA was engaged in this case;

(iv) in reaching his conclusion the Commissioner had considered the likelihood of prejudice arising from disclosure, and had had regard to the Tribunal's decision in John Connor Press Associates v The Information Commissioner EA/2005/005 in which the Tribunal interpreted section 43 of FOIA as meaning that the chance of prejudice must be more than a "hypothetical or remote possibility" and that there must a "significant" risk of prejudice to commercial interests;

(v) The Commissioner had endeavoured to obtain evidence from those third parties the Committee alleged would be affected by disclosure, but none of the third parties had elected to make representations to the Commissioner. In considering that fact, the Commissioner had had regard to the Tribunal's decision in Derry City Council v The Information Commissioner EA/2006/0014, in which the Tribunal concluded that "Ryanair (the third party) did not place before us any evidence of its commercial interest...In the absence of any such evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced"

(3) As the exemption in section 43 of FOIA was not engaged, the Commissioner was unable to consider any public interest arguments;

(4) The Committee had not dealt with the complainant's request in accordance with the requirements of Part I of FOIA and had therefore failed to comply with section 1(1)(b) of FOIA because it was in error in its application of the exemptions under, respectively, section 41 and section 43 of FOIA;

(5) Accordingly the Commissioner required the Committee to disclose to the complainant the information requested;

(6) The Commissioner found the Committee had not dealt with the complainant's request in accordance with section 10(1) of FOIA because it had exceeded the statutory time limit for responding to such a request made under section 1(1) of FOIA.

36. The Committee disagreed with the Decision Notice and requested that the Commissioner review his decision so as to avoid the need for an appeal to the Tribunal. The Commissioner responded by indicating that, if dissatisfied with the Decision Notice, the correct procedure would be for the Committee to appeal to the Tribunal, before which any further evidence concerning the merits of withholding the information should be placed, for consideration in conjunction with the Decision Notice.

The Appeal to the Tribunal

37. By Notice of Appeal dated 17 November 2007 the Committee appealed against the Commissioner's decision on the following Grounds:

(1) The information is exempt under section 41 of FOIA because it is the annual production data from four mussel growing companies in competition with each other and with other companies in the UK and worldwide; the data gives the annual tonnage produced from each lay and its value. Local and global competitors have a direct financial interest in the data because it would tell them how much each company is producing and its value to them. The information is commercially valuable and the companies provide it to the Committee for onward transmission to WAG "on the basis that it is not disclosed"; the Committee is concerned that if it discloses the information it would be "open to action" by the mussel growing companies which had informed the Committee that they would take legal action against the Committee;

(2) The information is exempt under section 43 of FOIA because it is commercially valuable as described in (1) above, and the Order could not be properly managed if the data was disclosed because the operators would be anxious about revealing their production;

(3) The information requested is material to a legal action brought by a developer and the local authority for a declaration as to the developer's right to build a marina on part of the fishery area, and should not be disclosed "other than through the Court procedure" .

38. The Commissioner served a Reply in which it was submitted that the information requested was, wholly or in part, environmental information for the purposes of the EIR but that the substantive result would have been the same and that the Committee should be directed to disclose the information, albeit that no substituted Decision should be issued.

39. The Committee served Amended Grounds of Appeal dated 8 April 2008, accepting that the EIR applied and relying solely on the exception to the duty to disclose environmental information contained in Regulation 12(5)(e).

40. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents.

41. In addition, the Tribunal was provided with a copy of an example of what is said to be the disputed information. This was a copy of the Annual Report of the Grantee, that is, the Committee, for the year ending March 2002 and a copy of the "Summary Statistics". We were not provided with a copy of any documentation that had been completed by the Leaseholders.

42. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

FOIA OR EIR

43. If the information requested is environmental information for the purposes of the EIR, it is exempt information under section 39 of FOIA and the public authority is obliged to deal with the request under the EIR.

44. The EIR implements Council Directive 2003/4/EC on public access to environmental information.

45. "Environmental information" is defined in Regulation 2(1) as having the same meaning as in the Directive, namely any 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 those 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;

(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 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).

46. We accept that the information requested falls within the definition in this Regulation and therefore agree that this matter should be dealt with under the EIR.

47. Regulation 5(1) creates a duty on public authorities to make environmental information available upon request.

48. Regulation 12(1) (2) and (5) EIR provides:

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if:

- i) an exception to disclosure applies under paragraphs (4) or (5);
and*
- ii) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

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

.....

(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;

49. The impact of these provisions was summarised by a differently constituted panel of this Tribunal in Archer v The Information Commissioner and Salisbury District Council (EA/2006/0037):

“There are several points to note here. First, it is not enough that disclosure should simply affect the [interest in question]; the effect must be “adverse”. Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure “would” have an adverse effect – not that it could or might have such effect. Fourth, even if there would be an adverse effect, the information must still be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”. All these issues must be assessed having regard to the overriding presumption in favour of disclosure. The result, in short, is that the threshold to justify non-disclosure is a high one.”

50. By Regulation 18(1) EIR, the enforcement and appeals provisions of FOIA apply for the purposes of the EIR, (subject to the amendments of such provisions as set out in the EIR).

The Powers of the Tribunal

51. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

52. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

53. The question of whether the Committee was entitled to refuse to disclose the information on the basis of the exception to the duty to disclose environmental information contained in Regulation 12(5) (e) is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

54. The Tribunal has concluded that the relevant issues in this Appeal are as follows:

- a) What is the “disputed information” sought to be withheld?
- b) Is the exception under Regulation 12(5) (e) engaged?
- c) In all the circumstances of the case does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

What is the “disputed information” sought to be withheld?

55. There appears to be some confusion between the parties as to the exact scope of the information sought to be withheld. We consider it prudent to set out precisely the information we regard as being the subject of this Appeal.

56. In the initial request, so far as the disputed information is concerned, the Requestor asks to be provided with:

“copies of the returns showing imports and exports from each of the six fishery areas for the last ten years.”

57. He was provided with the Committee’s reports to the WAG for the past four years, that is, the years ending March 2002, 2003, 2004 and 2005. At that stage he was informed, by the then Chief Executive, Dr Jim Andrews, that the Committee did not have copies for earlier years. It is not clear whether any efforts have been made to search for these earlier files. In a letter in relation to a separate request for information from another individual, a copy of which was provided to us, the current Chief Executive, Dr Stephen Atkins, suggests that data for previous years “if it exists, will be in our archived files which I have not examined.” There is no suggestion that the archived files have yet been examined.

58. The returns disclosed to the Requestor showed the “aggregate” figures for the six lays as a whole. The Requestor then clarified that he sought the “returns for the imports and exports of each lay” for the four years covered. This request was refused and it is this “disaggregated”, or separate, information relating to each lay that is being withheld.

59. In his complaint to the Commissioner, the Requestor identified the information sought as “copies of the annual statements of importation into and harvesting from each mussel lay on the East Menai Fishery and where the imports came from”. At that stage he did not specify a timeframe, but the Commissioner, in the Decision Notice, accepted that it was for the original ten year period.

60. It appears that the Requestor used the words “returns” and “annual statements” interchangeably but we consider that the information he sought has been clearly identified.

61. The information relating to each lay could be identified as consisting of the following elements:

- i) the quantity of imported mussels;
- ii) the origin of the imported mussels;
- iii) the quantity of exported mussels; and
- iv) the price at which the exported mussels were sold.

62. The Commissioner submitted that, in its Amended Grounds of Appeal, by referring to “production and sales figures”, the Committee appears to limit the scope of the Appeal to the quantity of exported mussels and the price at which they were sold. The Committee has clarified the position that it seeks to withhold all four elements of the information.

63. We are mindful of the fact that there appears to have been much further correspondence and other communication between the Requestor and individuals of the Committee that has not been copied for this Tribunal. There is, however, no suggestion that any efforts were made to clarify the scope of the request made. For example, the Requestor may have been satisfied with the information provided in a redacted form, that is, not attributable to a particular company or lay. We do not know whether the ownership of each lay is information that is readily available but we consider that this option could have been explored with the Requestor. We do not go so far as to conclude that the Committee was in breach of Regulation 9 of the EIR (duty to advise and assist akin to section 16 of FOIA), but we do observe that the Committee does not appear to have had proper regard to its obligations as a public authority, regarding disclosure of information.

64. It seems to us that the initial request was for elements i) to iii) only, that is, the quantity and origin of imported mussels and the quantity of exported mussels, in relation to each lay for the ten years between March 1996 and March 2005. It is this

information that we regard as being the subject of this Appeal. Whilst there is reference to values at different points in the correspondence, this does not appear to form part of the original request and was redactable from the returns.

Is the exception under Regulation 12(5)(e) engaged?

65. The parties are in agreement that the information requested is primarily commercial or industrial and we accept that conclusion.

66. The Committee submits that, although the aggregated information for the Fishery as a whole is not confidential or commercially sensitive, the disaggregated information is confidential and would cause prejudice to the commercial interests of the Leaseholders.

67. The Commissioner submits that the information requested did not have the necessary quality of confidentiality nor was it communicated in circumstances which gave rise to a reasonable expectation that confidentiality would be maintained and/or such that disclosure would cause detriment to the leaseholders.

68. There is no “definitive test” that we should apply in this case. The Tribunal has had the benefit of the decision of the High Court in Secretary of State for the Home Department v British Union for the Abolition of Vivisection and the Information Commissioner [2008] EWHC 892 (QB), an appeal from a differently constituted panel of this Tribunal. Although its focus was the interplay between section 41 and 44 of FOIA in the context of the Animals (Scientific Procedures) Act 1986, the High Court makes a number of helpful observations on the law of confidence which we have borne in mind, including its comments as regards the relevance of the European Convention on Human Rights.

69. We consider therefore that the well known statement in Coco v A N Clark (Engineers) Ltd [1969] RPC 41 should not be adopted as an exclusive statement of the “test” but is a relevant test in the context of this case. The Commissioner does not suggest a different test that we should apply.

70. We adopt what a differently constituted panel of this Tribunal stated in The Office of Communications v The Information Commissioner and T-Mobile (EA 2006/0078)

and proceed on the basis that in order for the exception under Regulation 12(5)(e) to be engaged;

“a party relying on it must establish that it has a right to protect the information in question under the law of confidentiality. This requires it to establish that the information has the necessary quality of confidence, that it was communicated to a third party in circumstances which gave rise to a reasonable expectation that confidentiality would be maintained and that unauthorised disclosure is either threatened or had occurred.”

71. We must therefore assess all the circumstances, including the circumstances in which the information was provided, the nature of the information and how such information has previously been handled.

72. We note again the apparent confusion between the parties and witnesses as to the scope of the request for information. In particular, there are little, if any, direct submissions made in relation to the quantity of imported mussels and their origin, as opposed to the quantity and price paid for exported mussels. The latter may be information relating to the profitability of a private company as the Committee asserts, but that is not the only matter to which it relates.

73. The information was provided by the Leaseholders under a duty arising from the lease. There is no express confidentiality clause in the leases in relation to the provision of and prohibition of disclosure of the relevant information. This fact is not determinative of whether the information is “confidential”, but may be a relevant consideration when determining whether the information sought has the necessary quality of confidence and whether any belief that any confidentiality would be maintain was reasonable in the circumstances.

74. The information was provided in order for the Committee to ensure that each lay was being properly managed and to comply with its own statutory obligations, including, but not restricted to, its obligation to provide the information to the WAG.

75. We regard it as particularly relevant that the information was provided to a public authority with obligations over a Fishery, designated both as a Site of Special Scientific Interest and as a Specially Protected Area, which was not privately

owned. This must indicate that information provided to it by the Leaseholders may be open to wider public scrutiny, particularly absent any indication of confidentiality.

76. We were provided with witness statements from the Chief Executive, Dr Stephen Atkins, and from one of the Leaseholders, Mr. Andrew Wilson. Mr. Wilson is the Leaseholder of Area 4 as well as being a co-founder a 25% shareholder in Deepdock Limited, the Leaseholder for Area 6. At present he has an informal arrangement whereby he makes Area 4 available for use by Deepdock Limited. Deepdock is also involved in a joint venture with Myti Mussel Limited (the Leaseholder of Areas 1 and 2) called Ogwen Mussel Limited, the Leaseholder of Area 5. He therefore has some connection with all but one of the lays within the fishery; that being Gannet Seafoods, the Leaseholder of Area 3.

77. Mr. Wilson set out in his statement a helpful and interesting background about the cultivation of mussels in the Menai Strait. Wild "spat" or "seed" mussels are harvested by vessels, generally from areas situated some considerable distance from the Menai Strait, and brought back to the lays where they are re-laid. The spat itself is very thin shelled and fast growing but vulnerable to predation, particularly from starfish and crabs. For this reason, the first relaying is on intertidal ground where the spats partially dry out. Relaying on intertidal ground slows the growth rate and encourages the mussel shells to thicken, making the mussels less vulnerable to predators, in a process known as "hardening". The spat remains on intertidal ground for approximately 12 months after which it is re-laid in subtidal areas until final harvesting some 12-16 months later.

78. Mr. Wilson is the only Leaseholder whose evidence we have been provided with. It is difficult to assess his evidence in light on the connections he has with all but one of the other lease-holding companies, in particular when assessing his evidence that disclosure of the information is valuable information for competitors, both locally and with other European businesses. He says that disclosing the "prices paid and received and the origin of the seed mussels would be of assistance to any competitor. I would consider it a trade secret."

79. Although he indicates that he would consider it "objectionable and a breach of mutual trust" if the information were to be disclosed by the Committee voluntarily,

he continues by saying that it is unlikely Deepdock Limited would take any action against the Committee as a) the damage would have been done and b) he would not want to prejudice any relationship between the Committee and Deepdock Limited. We agree with the Committee that it is not necessary for the Tribunal to be satisfied that the Committee would actually be sued before the requirement is met, but it is necessary to be satisfied that, in the event of disclosure, there would be a reasonable expectation that an action, if brought, would succeed.

80. Although the parties did not address us on the topic specifically, which may be an indication of how they regard Mr. Wilson's assertion, we do not consider that this information comes close to being regarded as a "trade secret". In his judgment, Mr Justice Eady outlined that the seed or spat mussels are collected from various areas such as Morecambe Bay and sites in South Wales. It seems to us that the collection of these spats would be a visible and open operation and the location of where they were collected from cannot be regarded as a "trade secret". The prices paid for the imported mussels is not part of the initial request for information, or any further clarification of the request, which was for the quantity of the mussels imports. This information and, had it been included, the prices paid for mussels exported do not come close to satisfying what we regard as a high threshold for a "trade secret". If the information concerned a novel method of growing mussels from spats to fully mature and ready for sale or a method of growing them much faster, that might amount to information that could be considered a trade secret.

81. Mr. Wilson did not address how disclosure of each individual element of the request would adversely affect confidentiality. This has not been addressed by the Committee in its submissions beyond the assertion that if the information was disclosed there would be considerable detriment to the interests of the Leaseholders and that it would be of advantage to competitors.

82. We are aware that there has been disclosure of the relevant information for the year ending 2001. This was done with the consent of the Leaseholders in relation to a consultation process for a planning application for the building of a marina in the vicinity. This was considered necessary, we are told by Dr. Atkins, "to strengthen the mussel industry's objection to the planning application for the proposed marina." We are not told that there was any detriment to their businesses caused as a result

or that any benefits accrued to their competitors. Once the Leaseholders had consented to the release of the information for these purposes, the case for reasonably regarding it as confidential, even if it had previously been so, was significantly weakened. A subsequent statement by Dr. Atkins, in his letter to Anglesey Boat Company Ltd dated 1 March 2006, that “the data we have seen for Lay 4 for the years ending March 2002-2005 is all of the same order of magnitude” (as for 2001) effectively removes any lingering suggestion that data for other years can still be regarded as confidential.

83. Taking all these matters into account, we do not consider that information as to the quantity and origins of the mussels imported and the quantity of mussels exported from each lay can properly be regarded as confidential, nor, even if that confidentiality could be shown, that the high threshold that disclosure “would” adversely affect that confidentiality has been met.

84. Although we have already indicated that we do not consider the price paid for the exported mussels to be within the scope of the request for information, we observe that on the same basis, arguments would be unlikely to be sustained that this information could properly be regarded as confidential, nor, even if that confidentiality could be shown, that disclosure “would” adversely affect that confidentiality.

85. We therefore do not consider that the exception contained in Regulation 12(5) (e) to be engaged.

In all the circumstances of the case does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

86. Even if the exception contained in Regulation 12(5) (e) was engaged, we would have to continue to consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

87. The Committee submits that there is little or no distinct public interest, over and above the general public interest in disclosure, in disclosing the disaggregated

information in addition to the aggregated Annual Reports. The Committee does accept that there is a public interest in local residents being able to “understand what is going on in the Straits” but submits that interest is met by disclosure of the aggregate Annual Reports. It further submits that the “figures” constitute a significant part of the balance sheets of six private businesses and the disclosure of this would cause such prejudice to their commercial interests that the limited public interest in disclosure is substantially outweighed.

88. We disagree. We note that we are concerned with public as opposed to private interests. The information concerns activities carried out in an area owned, in effect, not by a private company but by the public. We also have regard to the fact that the Fishery is designated both as a Site of Special Scientific Interest and as a Specially Protected Area.

89. We consider that there is considerable public interest in disclosing information that reveals how many mussels are being brought into each specific lay and where they came from, and how many mussels are exported from each lay, and arguably the prices paid for these mussels. This information would allow, for example, proper scrutiny of how productive each lay was, whether there were any identifiable risks in relation to any lay having regard to their productivity, whether that may be affected by, for example, the origin of the spat mussels, development, pollution, each lay’s proximity to those factors and the point from which such factors emanate.

90. Accordingly, even if we had found that the exception in Regulation 12(5) (e) was engaged, we do not consider that the public interest in maintaining the exception outweighs the public interest in disclosure.

Conclusion and remedy

91. We consider that the original request and complaint to the Commissioner should have been dealt with under the EIR and not FOIA.

92. For the reasons set out above, we conclude that the exception contained in Regulation 12(5) (e) was not engaged and that the Committee was wrong to

withhold disclosure of the information on that basis. Even if that were not the case, we consider that the public interest in maintaining the exception does not outweigh the public interest in disclosure.

93. Our decision is unanimous.

Signed

Annabel Pilling

Deputy Chairman, Information Tribunal

Date 8 July 2008