



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

Appeal Reference: EA/2017/0064

**Decided without a hearing
On 15 November 2018
Representation:**

Proulagation Date 19th Febuary 2019

Before

JUDGE BUCKLEY

NARENDRA MAKANJI AND JEAN NELSON

Between

LONDON BOROUGH OF SUTTON

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FER0690359 of 23 February 2018 which held that London Borough of Sutton Council (the Council')

had incorrectly applied regulation 12(5)(e) of the Environmental Information Regulations 2004 ('the EIR').

2. The Commissioner required the Council to disclose the withheld information to which regulation 12(5)(e) had been applied.
3. We have read and taken account of a bundle of documents, including a closed bundle containing closed written submissions from the Council and a copy of the disputed information. We have read and taken account of submissions from all parties and witness statements on behalf of the Council from Rebecca Peck, Head of Customer Experience at the Council and from Amanda Cherrington, Managing Director of Sutton Decentralised Energy Network Limited and Head of Economic Renewal and Regeneration (employed by the Council).

Factual background to the appeal

4. SDEN is a company wholly owned by the Council. It was set up in 2016 as a sustainable energy supplier to provide low-carbon energy to homes and businesses in Sutton. SDEN has a contract with Viridor under which it purchases energy at an agreed price. SDEN sells this energy on. At present it only sells some of the energy it purchases because it only has contracts relating to the new Barratt Homes development in Sutton. It has a contract with Barratt Homes and with the individual residents of the development who are required by covenants on the properties to use SDEN as their energy supplier.
5. The Council's intention is that SDEN will secure other customers in the future. In doing so, it will be competing with other energy suppliers. A Financial Model for the SDEN business was commissioned by the Council. The model has been refined, particularly through the Financial Model Review by KPMG which is the subject of the request.

Requests, Decision Notice and appeal

6. This appeal concerns a request made on 27 April 2017 by Councillor Nick Matthey. The Council provided much of the information requested. The request is set out in full in the Decision Notice, but the part of the request which was refused and therefore relevant to this appeal is:

I would like to request information on Sutton Decentralised Energy Network (SDEN) Financial Model Review...

The Council have paid £30,000 of tax payers money to pay for a Financial Model Review. Can I see it?

This was advertised via: <https://procontract.due-north.com/Advert?advertId=7502b4a4-6c60-e611-8114-000c29c9ba21>

Also see: <http://contracts.contractsadvance.co.uk/tender-opportunity/215736/UKCarshalton-Sutton-Decentralised-ENergy-Network-SDEN-Financial-Model-Review>

I would like to put in a freedom of information request to receive a copy of this information so that I can if this project has any chance of providing value for money or rescuing people from fuel poverty.

Can you tell me when the report was written and who has seen its contents?

7. The Council replied on 25 May 2017 refusing to provide the Financial Model Review on the basis that it was commercially confidential.
8. Mr Matthey applied for a review. On 27 June 2017 the Council upheld its decision. It stated that the request was for environmental information that fell within reg. 12(5)(e) and that the public interest favoured withholding the information.
9. In a decision notice dated 23 February 2018 the Commissioner decided:
 - 9.1. The information was environmental.
 - 9.2. The information was commercial.
 - 9.3. The information was imparted in circumstances importing an obligation of confidence.
 - 9.4. Confidentiality is not required to protect a legitimate economic interest. The Commissioner did not accept that the Council or third parties would, on the balance of probabilities suffer damage to their economic interests if the information were disclosed.
 - 9.5. It was not necessary to consider the public interest.
10. The Council's grounds of appeal are:
 - 10.1. Reg. 12(5)(e) was not properly applied by the Council.
 - 10.2. The public interest in maintaining the exception outweighed the public interest in disclosure.

Legal framework

11. The EIR applies the provisions of Directive 2003/4/EC of the European Parliament and the Council on public access to environmental information to England and Wales. The relevant parts of reg. 12 are:

Regulation 12:

Exceptions to the duty to disclose environmental information

12. – (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –
- (a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(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;

12. There is a presumption in favour of disclosure under the EIR under reg. 12(2). The result is that the threshold to justify non-disclosure is a high one.

13. Under reg. 12(5)(e), subject to the public interest test, a public authority may refuse to disclose information to the extent that 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. This has four elements:

1. Was the information commercial or industrial?
2. Was the information subject to confidentiality provided by law?
3. Was that confidentiality to protect a legitimate economic interest?
4. Would disclosure adversely affect that confidentiality?

14. In **Elmbridge Borough Council v Gladedale Group Limited** EA/2010/0106 in paragraphs 18-19 the Tribunal considered the approach to the third question above, namely whether confidentiality was to protect a legitimate economic interest and concluded that disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect and that this requires consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure.

15. The Tribunal in **Elmbridge** accepted that, taking into account the duty in paragraph 4.2 of Directive 2003/4 EC to interpret exceptions in a restrictive way, the wording “where such confidentiality is provided to protect a legitimate economic interest” (as opposed to “was provided”) indicates that the confidentiality of this information must be objectively required at the time of the request in order to protect a relevant interest and that it is not enough that some harm might be caused by disclosure. It is necessary to establish (on the balance of probabilities) that some harm to the economic interest would be caused by disclosure.

16. The Tribunal in **Elmbridge** noted that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gave the following guidance on legitimate economic interests: “Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors”. They found that this

was consistent with the general scheme of Regulation 12(2) EIR which states that “a public authority shall apply a presumption in favour of disclosure” and with the EIR 12(5) exceptions, which require that “disclosure would adversely affect” the relevant interests identified in each exception.

17. ‘Would adversely effect’ should be interpreted in the sense that the adverse effect has to be identified and the Tribunal must be satisfied that disclosure “would” have that adverse effect, not that it “could” or “might”. (See **Mersey Tunnel Users v ICO and Halton Borough Council** EA/2009/0001).
18. If the conditions of 12(5)(e) are met, the information must only be disclosed to the extent that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.
19. Having due regard to previous decisions, we consider that the relevant time for the application of the public interest test is the time of the initial request and refusals by the public authority not the time when the Tribunal hears the Appeal.

Issues

20. It is accepted by both parties that the information was commercial and that it was subject to confidentiality provided by law.
21. The issues we have to determine are:
 - 21.1. Was that confidentiality to protect a legitimate economic interest?
 - 21.2. Would disclosure adversely affect that confidentiality?
 - 21.3. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

The role of the tribunal

22. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Discussion and conclusions

Is the exception engaged?

23. There is no challenge to the Information Commissioner’s conclusion that the information is commercial or that it is subject to a common law duty of confidence.

24. We therefore need to consider the question of whether or not the confidentiality was required to protect a legitimate interest and whether that confidentiality would be adversely affected by disclosure. We adopt the approach in Elmbridge and therefore the question is whether or not, on the balance of probabilities disclosure would cause some harm to the economic interests of the relevant parties.

25. The Council identified the following harm:

1. SDEN plans to secure future customers in addition to Barratt Homes. Negotiations with these future customers would be prejudiced by the release of the information.
2. There are a number of existing private sector owned and operated Energy Services Companies developing similar schemes in the UK. They would be direct competitors if they were to attempt to enter the SDEN target area and attempt to develop rival schemes. Disclosure of the information in the review would give these competitors a competitive advantage.
3. Disclosure would affect Viridor's ability to negotiate higher prices with other customers if the price agreed to sell the energy to SDEN was made public.
4. Disclosure would reveal Viridor's commercial and operational drivers and would put Viridor at a serious disadvantage to its competitors because they would have a better understanding of how Viridor operates its business.
5. There are ongoing negotiations with Barratt Homes and residents of that development where they are seeking to renegotiate their contractual terms. Knowing the price that SDEN had paid Viridor would prejudice SDEN's position in those negotiations.

26. In relation to (1) above, we do not accept that the evidence shows that on the balance of probabilities disclosure would cause the identified harm. There were no potential other customers in existence at the time of disclosure. Without any suggestion of when these potential future customers might be approached or any indication of their identity we cannot conclude, on the balance of probabilities that those negotiations would be affected. We accept that there is a potential risk that this harm might arise, but that is insufficient.

27. In relation to (2) above, we do not accept that the evidence shows that on the balance of probabilities disclosure would cause the identified harm. There is no suggestion that SDEN currently has any direct competitors or that any other company has any intention to either attempt to enter the SDEN target area and develop a rival scheme. We accept that there is a potential risk of this harm occurring but that is not sufficient.

28. In relation to (3) above, we accept, on the balance of probabilities that some harm would be caused to Viridor's legitimate economic interests if the price that was paid by SDEN at that time was released. This is more likely than not to negatively affect their negotiating position with other customers.
29. In relation to (4), other than the prices details covered in (3) above, the letter from Viridor is insufficient to persuade us, on the balance of probabilities, that such harm would result from disclosure. The letter is referring to the SDEN Financial Model rather than the review. It does not identify which specific information in the Review would reveal Viridor's commercial and operational drivers and on reading the Review the Tribunal is unable to identify what that information might be.
30. In relation to (5) above we accept that the disclosure of the price paid to Viridor would, on the balance of probabilities, have some negative impact on the Council's negotiating position in ongoing contractual negotiations with Barratt Homes and the residents.
31. On the basis of the above we find on the balance of probabilities that some harm would be caused to the economic interests of SDEN or Viridor by disclosure and therefore we accept that confidentiality was required to protect a legitimate interest and that confidentiality would be adversely affected by disclosure.
32. In the light of the above findings, we do not find it necessary to make findings on whether or not the financial model review amounted to a trade secret.

Public interest balance

33. We do not accept the Appellant's submissions that the presumption in favour of disclosure in reg 12(2) is in practice 'displaced' in relation to reg 12(5)(e) because of the inbuilt interest in protecting trade secrets and confidential information. This is contrary to the clear wording of the statute which applies reg 12(2) to 12(5)(e).
34. We do not think it is helpful or necessary for the purposes of the public interest balance to identify whether this information should or should not be classed as a 'trade secret'. Instead we have factored into our consideration of the public interest the characteristics of the information which might lead to such a classification.
35. We accept that there is reasonably strong public interest in this case in maintaining the exemption. We accept that the Council has invested significant intellectual effort in producing the Financial Model itself. We have not seen the Model, but we accept, in the absence of any contradictory evidence, the evidence of Ms Cherrington that the Review contains all the material elements of the Financial Model. We accept that there is a potential risk that the release of the review in June 2017 could have been used by potential competitors, but we do not put a lot of weight on this risk, because there were no direct competitors operating in that area

at the time. Similarly, we do not place a lot of weight on the potential risk to potential future negotiations with potential future customers. Further we accept the Commissioner's argument that these potential risks, are to some extent, the inevitable consequence of the Council and its subsidiaries competing with private companies that are not subject to the same obligations.

36. We accept that Viridor's other customers would be aware of a snapshot of the prices agreed with SDEN at a particular point in time, and that this would have some impact on Viridor's negotiating position for a limited period. We find however that Viridor would have been aware that the Council was subject to responsibilities to disclose information under the EIR and therefore would have been aware of the risk of disclosure of this type of information. Finally, we accept that there would be some effect on ongoing negotiations with Barratt Homes and its residents by the release of the prices paid to Viridor. In the absence of any information as to the content of this negotiation or any evidence on the nature or extent of the suggested effect, we do not place a significant weight on this consequence.
37. We find that there is a very significant public interest in disclosure in this case. A very large sum of public money is being invested in a long-term scheme lasting more than 25 years. Local residents purchasing properties in the Barratt development enter into contracts for energy supplied from SDEN for 25 years. It is a matter of important local significance. It has been publicly stated by the Council that the scheme would help alleviate fuel poverty. There is therefore also some public interest in the public knowing whether or not fuel poverty is referred to in the financial model review.
38. If the scheme fails there are significant risks to public money. There is a strong public interest in the public having access to information on how the project is proposed to function and how, if at all, it is eventually intended to make a profit. There is a strong public interest in the public being properly informed and therefore being able to make a more informed decision in both challenging and supporting the proposed scheme.
39. For the reasons set out above we conclude that despite the reasonably strong public interest in maintaining the exemption, it does not outweigh the very significant public interest in disclosure.

Judge of the First-tier Tribunal

Date: 23 January 2019