



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2011/0156

BETWEEN

**ROY JONES
(On behalf of Swansea Friends of the Earth)**

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

THE NATURAL RESOURCES BODY for WALES

Second Respondent

and

S I GREEN (UK) LIMITED

Third Respondent

Before

**Brian Kennedy QC
Anne Chafer
Jacqueline Blake**

Representation:

For the Appellant:	Royston Jones & Ray Davies
For the Second Respondent:	Gerry Facenna of counsel
For the Second Respondent:	Jeremy Hyam of counsel

DECISION

The Tribunal refuses the Appeal.

We direct that the requested information should not be disclosed and the Closed Bundle should remain confidential.

Introduction:

[1] The appeal is essentially on the interpretation of the evidence on the balancing of the public interest test under regulation 12(1)(b) of the Environmental Information Regulations 2004 ("EIR").

[2] The impugned decision under appeal is the Decision Notice ("DN") from the First Respondent dated the 29th June 2011: Reference FER0317507 which sets out clearly the issues engaged, the scope of the case and the detailed analysis and reasons for the Decision reached.

REASONS

[3] Background to the Appeal:

1. The factual background to the Appeal is set out in paragraphs 2 - 9 of the DN and the outcome was that the First Respondent, (with detailed reasons set out therein), found that the Second Respondent had appropriately applied Regulation 12(5)(e) EIR to the withheld information.
2. The original Appeal herein was heard by the First Tier Tribunal ("FTT") at a hearing on the papers and in its decision dated 27 April 2012 the FTT allowed the Appeal directing disclosure of the withheld information. We refer to the detailed Judgment and reasoning therein.
3. The Second and Third Respondents herein lodged appeals to the Upper Tribunal ("UT") and these appeals, GIA 2932 and 2941 2012, were heard together at an oral hearing before the UT on 12 March 2013. The UT allowed these appeals. Again a comprehensive and detailed Judgment with reasons is provided to this Tribunal and is not addressed in detail herein.
4. The UT held at Paragraph 51 of its Judgment that: "*The FTT was correct in focusing on regulation 12(5)(e) of the EIR in seeking to decide whether the figures should be released. And It was right in doing so to adopt from the Commissioners' decision the questions to be considered in applying that regulation. It erred in law in its approach to what in the context of these appeals was the most important strand of that test. This is that disclosure of the relevant information would adversely affect confidentiality, where such confidentiality is provided by law to protect a legitimate economic interest.*" The UT held that the balancing of interests required by regulation 12(5)(e) EIR becomes the essential next step in the decision and for the reasons set out in paragraphs 60 – 68 of the Judgment the UT directed that this Tribunal hear the evidence on this aspect of the appeals.

5. On the 1st April 2013, The Natural Resources Body for Wales (Functions) Order 2013 provided for the functions of the Environment Agency in Wales to be transferred to Natural Resources Wales (NRW). NRW therefore replaced the Environment Agency as the second Respondent from 1 April 2013.

[4] The Issues: The issue as identified by the UT and in the DN is whether the information redacted in the two documents received by the Appellant was appropriately withheld under regulation 12(5)(e) of the EIR and if engaged where the public interest lies.

[5] The public interest arguments in favour of maintaining the exemption are dealt with by the First Respondent at paragraphs 65 to 69 of the DN and the public interest arguments in favour of disclosing the withheld information are at paragraphs 70 – 75 of the DN and his conclusions at paragraphs 76 – 78 of the DN. This Tribunal recognises the weighing balance conducted by the First Respondent and is not persuaded that the Appellant has established that the adverse effects of disclosure are conjectural and exaggerated as they submit and will refer to the evidence at the oral hearing in this appeal to support our view on this. In contrast, the Appellant fails to demonstrate little or any benefit to the public interest by disclosure of the withheld information.

[6] The First Respondent further argued that the Public Interest has been met by disclosure already in the public domain and again this Tribunal accept this submission in light of the evidence we have heard at this appeal.

[7] The Second Respondent maintains that this particular site is currently polluting the environment and requires a great deal of work to be done to bring it up to modern standards. Even a small reduction in business could have serious consequences for the business, for operations at the site and consequently for the protection of the environment. The second and third respondents are concerned to ensure that the public interest in ensuring that this site is rehabilitated and brought up to modern standards of environmental protection is not undermined by an unnecessary disclosure of confidential financial information.

[8] The Evidence:

1. The Appellant in their submissions to this Tribunal assert that there is little or no evidence to justify withholding the disputed information. They submit that the degree of confidentiality that should be ascribed to the bond figures, in the disputed information, is a relatively low one. They assert that the “back-calculation” exercise referred to by the Respondents provides no evidence that one can work back from spreadsheets to arrive at meaningful information about operating costs. Specifically the Appellants criticise the exercise, submitting that ; *“The individual results are clearly very variable and therefore inconclusive.”* and while they do give their own analysis to criticise the evidence given at the hearing, they notably failed to call any evidence, either expert or otherwise, in support of their submissions or to rebut the evidence given to this Tribunal on behalf of the Respondents.

2. Further the Appellant has failed to submit or call any evidence to demonstrate how the disclosure of the disputed information would be in the public interest by enhancing in any way the information already in the public domain. The Appellant argues that; *“There would be an understandable expectation by residents that the financial provisions would be adequate to cover the protection of the environment and human health from pollution and harm is a clear public interest in knowing the extent of the financial provisions which are covered by the Bond”*. This is not in dispute and the Respondents have at all times recognised it. However the Appellant has singularly failed to demonstrate to this Tribunal, through evidence or otherwise, how the very

limited figures that are within the withheld information would make any difference to the substantial and significant information already in the public domain.

3. The Tribunal have had sworn evidence at the hearing of this appeal from Mr Balmer, Mr Walters and Mr Titman and have also the advantage of a witness statement from a Mr Corp on behalf of the second Respondent. We also have the disputed information in the closed bundle of documents before us.

4. Mr David Balmer: Gave evidence on behalf of the second Respondent. He is an accountant within the National Permitting Service of the Environment Agency, having joined the organisation in April 1997. He manages the National Financial Provision (FO), team based in Warrington and is a member of the Waste Management Financial Provision Standing Group (FPSG) which is an expert group covering technical, permitting, legal and financial matters in respect of Financial Provision for waste sites. He has provided detailed evidence about the adequacy of financial provision for an operator to discharge the obligations of their permit for as long as the landfill poses a hazard and how the provision has to be sufficient in monetary terms, secure, and available when required. He explained how the most popular method of making Financial Provision is a bond which is a form of guarantee.

He confirmed that he was involved in this case when considering the claim for commercial confidentiality and confirmed that all discussions with Landfill operators are held on the basis of confidentiality and as such implied in subsequent agreements. He confirmed he was consulted in relation to the on going decision to refuse to disclose information under EIR in this case. His evidence is that were they to disclose the withheld information competitors could use the standard spread-sheet available on their website to back calculate or interpolate and work out reasonably accurately the make up of the costs. He confirmed they could make reasonable assumptions in doing so. They could work out the cost of the Bond to cover the required FP each year and the effect of that cost on cash flow for the business. He explained that the cost of the bond directly relates to the cost of running the site in respect of specific costs; other costs would have to be inferred. In this particular case, he indicated, there are very specific costs which would be of invaluable assistance to competitors in targeting their local marketing strategy and in trying to undercut the Second Respondent at the gate price in order to prevent them from obtaining contracts to take waste for disposal. He indicated that this information is not trivial and it is kept confidential and was provided in confidence and in the full expectation that it would remain confidential. Larger companies could accept lower gate costs if they knew the margins and therefore the ability of the second respondent to lower their price.

Mr Balmer regarded this site as having specific features which further justified non disclosure inter-alia; The operator is a small company with only one site in the UK. The landfill has six landfills close by. He opines that this means the landfill operator is particularly vulnerable to predatory competitors and were this operator to be put out of business on this site significant delays in carrying out the necessary work occur. The third respondent is in a position to do necessary works in accordance with the terms of the licence and there is a very high level of public interest in ensuring that this landfill is sorted out. He gave further and convincing evidence about the public interest in non-disclosure in this particular case.

At hearing, the Appellant failed to undermine the pertinent evidence given on the issues herein and on the basis of this evidence alone this Tribunal is satisfied on the balance of probabilities that disclosure of the relevant information would adversely affect confidentiality, where such confidentiality is effectively provided by law to protect a legitimate economic interest.

5. Mr Jeremy Walters: Gave sworn evidence to the Tribunal. He is a Pollution Prevention and Control Compliance Officer based in the South West Area of Natural Resources Body for Wales. He has been working with the site in question since 2003 in the role as a regulator of environmental permits. He confirmed from his own knowledge and experience that there is a competitive market for waste in this area there are many sites in the area including some run by very large operators. He gave cogent and pertinent evidence about the importance of the gate price to competitors in this area. He opined that there is a very high level of public interest in getting this site improved so that low-grade contamination is prevented. He confirmed he had been involved as a Liaison officer with the local community including Friends of the Earth representatives. He explained in detail his views on the public interest factors herein recognising that public authorities should be open, transparent and accountable in decision-making and that there was concern about the landfill in question. He accepts the very high level of public interest in ensuring that landfill sites are constructed properly and monitored and that an appropriate amount of money is guaranteed to deal with contingencies that might arise. This, he explained ensures that if the regulator has to get involved in making the site safe in the future that sufficient financial provision for doing so is in place. He explained that the permit and the conditions required by the permit are all available to the public. He also opined that there is also a very high level of public interest in operators being able to take on landfills in a competitive but fair market and in not having their commercially sensitive information released in a way which makes them vulnerable to local and larger markets who can take unfair advantage of this information and being undercut on gate price so that they go out of business and their operation of the site is uneconomical. They may not be able to earn the sources necessary to comply with the conditions of their permit, so increasing the risk to the environment. His opinion was that there should be a level playing field. There is a high level of public interest in the site being operated and taken to a safe and completed stage..., rather than the operator being put out of business and the regulator having to step in. If all operators had to release similar figures, in his view, this would make the smaller ones vulnerable to the larger ones and if smaller companies are put out of business then this reduces competition in the landfill sector. This could lead to more control by bigger operators who in that event would have greater lobbying power in driving down the regulatory effort put in to landfill sites. Eventually, he suggested, this would have a negative effect on the environment and public health. This evidence was persuasive and in our view not rebutted by the Appellant. Mr Walters told the Tribunal that in his view releasing the redacted documents to the Appellant meets the public interest in ensuring that the second respondents have adequately considered the various elements of cost in running the site so as to assess what the FP should be, without disclosing the actual figures which were confidential information. He described how there is a huge amount of information about the site, how it is managed, monitoring of many aspects of the site available on the public register , and it is only a very limited amount of financial information that is being withheld. He avers that he is of the opinion that the release of the withheld information would not assist the public debate about the issue of disposal of waste. He suggested that it is the data about the environment operations and monitoring at the site adequately serve that purpose.

6. Mr Guy Titman gave sworn evidence to the Tribunal. He is the technical Director of Planning Services with MJCA for over six years and holds work related qualifications including a BSc in Environmental Science and Technology. He has more than sixteen years experience in providing advice to the waste management industry. Key to his permitting work is the calculation of the appropriate level of financial provision in respect of waste management operations including discussions with the Environment Agency with respect to FP.

His evidence is detailed and thorough and he has personal knowledge and experience in all aspects of the issues in this appeal. In explaining the rationale for the commercially confidential nature of the FP documentation he explained that the Third Respondent have highlighted, inter-alia the following factors;

a) "The waste management industry is a private sector industry which operates in a competitive market and where financial information on operating and other costs is of immediate and direct value to competitors. If the expenditure plan comprising the FP calculations presented in the Performance Agreement and Bond or component thereof are read in part or in total or used by any potential or current competitor and/or customer this is likely to result in commercial disadvantage to the Operator.

b) The gate price charged for waste accepted at the site will be determined in large part, by the operating costs associated with the site. These operating costs are the basis on which the FP has been calculated. Consequently the expenditure plan on which the FP quantum is based has a direct relationship with the gate price for waste hence the reason why the FP should be excluded from the public register, as the information is confidential information. If it is possible for any potential or current competitor and/or customer to determine the operating costs of the site this may result in commercial disadvantage to the Operator.

c) If the FP information is released and the legitimate economic interest of the Third Respondent is affected it is likely that the ability of the Third Respondent to operate competitively hence to earn the resources necessary to comply with the conditions of the permit would suffer hence there would be an increased risk to the environment. In addition, if as a result of the disclosure of the commercial information waste is attracted to other facilities at more competitive rates the time that will be necessary to complete restoration of the site will be extended which is not in the public interest.

Mr Titman referred to the covering letter to the permit application sent by the Third Respondent (at pages 696 to 698 of the open hearing bundle) wherein it requested that: *"In accordance with Regulation 31(2) of the Pollution Prevention and Control (England and Wales) Regulations 2000 we request that the expenditure plan is excluded from the public register on the grounds that it is commercially confidential with the emanating of Regulation 31 (12)".* He explained that the justification for the request provided was consistent with that used for numerous other permit applications for landfill development and as stated was that: *"The information included in the expenditure plan includes figures that have been derived exclusively from the resources of S I Green (UK) Limited which, if made available on the register would prejudice to an unreasonable degree the commercial interest of S I Green (UK) Limited. If the expenditure plan is read and used by any potential or current competitor this may result in commercial disadvantage to S I Green (UK) Limited."*

Mr Titman makes further references to the correspondence in the open bundle including the letter from the Environment Agency dated 17 February 2011 (pages 156 to 164) which the Tribunal have read and which support the case made in evidence by this and the earlier two witnesses.

Mr Titman, in his evidence to the Tribunal clearly indicated in his opinion and experience that a local competitor, given the withheld information, not only “may” but certainly “would” use this to work out their gate price”. He confirmed that all the competitors he had spoken to say they would like this information and he had spoken to five operators.

Again he indicated not only was it possible that competitors would use this information to the disadvantage of the Third Respondent but it is likely that they would do so.

Mr Titman was cross examined comprehensively by Mr Davies on behalf of the Appellant and robustly maintained his assertions.

This Tribunal were satisfied on this evidence that disclosure of the withheld information would adversely affect confidentiality, where such confidentiality is provided by law to protect a legitimate economic interest.”

[9] Conclusions:

The Tribunal have substantial information in the open bundle herein, and have heard extensive evidence, in support of the stance taken by the Respondents in withholding the disputed information. The evidence establishes that the withheld information is commercially sensitive and its disclosure would undermine the Third Respondent and further this would not be in the public interest for the reasons outlined above. The Appellant at the hearing has not rebutted this evidence.

The Appellant has failed to provide any significant evidence that disclosure of the withheld information would enhance the public interest any further than it has already been by the disclosure of the relevant information pertaining to the subject matter already in the public domain. The Tribunal have seen that there is substantial information in the public domain that provides adequate transparency and accountability about the permit granted in this case and we are satisfied on the balance of probabilities that disclosure of the withheld information would not add to that in any significant way. We are satisfied that the First Respondent has properly addressed the issues herein and given appropriate weight to the Public Interest factors in the DN .We agree with his reasoning therein and his conclusions at paragraph 78 therein.

[10] In the factual circumstances outlined above and for the reasons given the Tribunal unanimously refuse this appeal.

Signed:

Brian Kennedy QC

20th June 2014.