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

Appeal No: EA/2014/0028

BETWEEN

THE DEPARTMENT OF FINANCE AND PERSONNEL FOR NORTHERN IRELAND

Appellant

and

INFORMATION COMMISSIONER

Respondent

Before

Brian Kennedy QC
Anne Chafer
Suzanne Cosgrove

Representation:

For the Appellant: **Richard Shields of counsel**
For the Respondent: **Eric Metcalfe of counsel**

Date of Hearing: 17 June & 14 July 2014.
Venue: Bedford House, Belfast.

DECISION

The Tribunal refuses the Appeal.

We direct that the requested information should be disclosed.

Introduction:

1. The appeal is brought under section 57 of the Freedom of information Act 2000 ("FOIA") as modified by regulation 18 of the Environmental Information Regulations 2004 ("the EIR"). The Tribunal and the parties worked from a Hearing Bundle ("HB") and a Supplementary Hearing Bundle ("SHB"), both separately indexed and paginated.

2. The impugned decision under appeal is the Decision Notice ("DN") from the Respondent, ("the Commissioner") dated the 13th January 2014: Reference FER0500873.

3. On 16 December 202, the European Parliament and Council adopted Directive 2002/91/EC on the energy performance of buildings ("the 2002 Directive"), (as amended and now set out in Directive 2010/31/EU). Among other things, it requires the making and display of energy performance certificates in respect of buildings. In order to implement the Directive in Northern Ireland, the Department of Finance and Personnel, being part of the Northern Ireland Executive, made the energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008 (SI 2008/170 ("the 2008 Regulations") in April 2008.

4. In particular, Part 6 of the 2008 Regulations provides for one or more registers to be kept of energy performance certificates and Regulation 24 specifically provides that the Department may nominate a person to keep a register on the Department's behalf. In respect of the Non Domestic Energy Performance Certificate Register, the Department has nominated Landmark plc ("Landmark"), a private company.

Background to the Appeal:

5. The background to the Appellant's request is best described in the DN which we consider worthy of rehearsing herein. The Complainant has requested information contained in the Northern Ireland Non Domestic Energy Performance Certificate Register. The Appellant, ("the Department") relied on the exception at regulation 12(4)(b) of the EIR on the grounds that the request was manifestly unreasonable. Following his consideration of the public authority's representations, the Commissioner reached the decision that the Department is obliged to comply with the request.

6. On 28 March 2013, the complainant requested the following information from the Department: *"For each building on the Northern Ireland Non Domestic Energy Performance Certificate Register, please supply the following information (in the form of an Excel spreadsheet or as a CSV file):*

    1. Organisation name
    2. Address
    3. Certificate reference number

4. Energy performance operational rating
5. Energy performance band (A - G)
6. Useful floor area
7. Total CO2 emissions
8. Date certificate was issued
9. Most recent pervious operational rating (where available)"

7. The Department responded on 1 May 2013. It stated that the request was manifestly unreasonable and cited the exception at regulation 12(4)(b) of the EIR to refuse the request.

8. The complainant requested an internal review on 3 May 2013. Following the review the Department wrote to the Complainant on 3 June 2013 and stated the outcome of the internal review upheld the decision to refuse the request.

9. On 10 June 2013 the Complainant contacted the Commissioner to complain about the way her request for information had been handled. The Complainant did not accept that the request was manifestly unreasonable and contested that even if it was, there was a strong public interest in disclosure.

The requested information:

10. As stated above, in this case the Department has nominated Landmark to maintain the register. Regulation 3(2)(b) of EIR states that information is held by a public authority if it is held by another person on the authority's behalf. Therefore in this case the register is "held" by the Department for the purposes of the EIR.

11. The Department initially argued that compliance with the request would be burdensome "*based on a perceived need*" to redact personal data from the information contained within the register under regulation 13 of the EIR. Regulation 13 of the EIR states that a public authority us not obliged to disclose information if to do so would: constitute a disclosure of third party data, and this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ("the DPA"). As can be seen from the DN §15 - 27, the Commissioner considered the relevant data protection principles and came to the view that none of the data protection principles would be contravened by disclosure of the requested information under EIR. The Commissioner therefore found that regulation 13 is not engaged and proceeded to consider the Department's reliance on regulation 12(4)(b) of the EIR. The Department does not appeal this finding but for the avoidance of doubt this Tribunal accept the Commissioners conclusion as set out at DN §27, for the reasons set out in the DN and referred to above.

12. In November 2013 - (i.e. following the complaint but prior to the DN concerning it) - Landmark launched an online search facility (www.eppbniregisternd.com), enabling members of the public to access energy performance certificates, recommendation reports, display energy certificates, advisory reports and other information concerning specific buildings.

13. In relation to it's reliance on the exemption under regulation 12(4)(b) the Department had identified two methods that it could retrieve and extract the requested information: (i) collation by departmental staff and (ii) collation by Landmark. In respect of the former, the Department noted that the register contained some 23,958 certificates of which some 14,497 were relevant to the request but that the Department did not itself have access to the raw data contained within. Based on a 2 hour sampling exercise,

it concluded that it would take 3 minutes to produce each record or 725 hours for all 14,497 relevant records. The Commissioner accepted that the request would likely exceed 24 hours in total and therefore the exception under regulation 12(4)(b) was relevant to departmental collation (See DN §35 -3).

14. The Commissioner also considered the applicability of regulation 12(4)(b) to collation by Landmark, who had provided the Department with a quotation of £3,922.94 plus VAT to collate the requested information (DN §39), being 5.5 days work "*broken down by the time required for contract management, project management, report development and processing, testing and data delivery"* (DN §42), as well as a "*per record set"* price of £0.10 per record. Unlike the corresponding regulations in England and Wales, however, the Commissioner noted there was no provision in the 2008 regulations allowing the nominated keeper to charge for access to bulk data, nor were there any contractual arrangements between the Department and Landmark governing such disclosure. Nor was there any provision in the EIR for a public authority to pass on to the applicant the cost of retrieving the requested information from a third party (DN §44). From this, the Commissioner concluded that *"the public body ought not to be able to use that cost as a reason for refusing the request".* The Commissioner also did not accept that the Landmark quote reflected either a *"reasonable charge"* for producing the requested information, or its *"true cost"* (DN §45). He therefore did not consider these as relevant factors in concluding whether the request was manifestly unreasonable under regulation 12(4)(b).

15. Having accepted that regulation 12(4)(b) was engaged insofar as departmental collation *"would be extremely burdensome in terms of the time required",* the Commissioner then considered the public interest test under regulation 12(4)(b). Among the public interest arguments in favour of disclosure, both the Department and the complainant had agreed that increasing public access to the data would have a significant effect in reducing energy consumption, both by encouraging owners and occupiers to improve energy efficiency of their buildings. (DN §50 - 52).

16. Against this, the Commissioner noted the Department's *"overriding concern"* the *"sizeable cost involved"* in dealing with the request and the distraction from its core duties it would involve, as well as the fact that the complainant would shortly be able to obtain most of the requested information online (DN §53). The Commissioner also accepted that the requested information provided only a "snapshot", whose usefulness to the public would decline relatively quickly (DN §57). The Commissioner, however, attached only "limited weight" to the Department's concern that disclosure would lead to businesses and individuals receiving unwanted contact from energy efficiency suppliers. Nor did the Commissioner accept the fact that the Department would have no onward control over how the information was used as a relevant factor (DN §56).

17. Weighing these factors, the Commissioner found that there was a "strong public interest in the Department making environmental information available to the public" (DN §58), but he attached "significant weight" to the Department's argument concerning the "one-off" nature of the disclosure. On this basis, the Commissioner accepted the Department's arguments that the public interest in maintaining the exception under regulation 12(4)(b) was engaged in relation to Departmental collation (DN §60), but he did not accept that it was engaged in relation to collation by Landmark, since: *"Landmark has no legal authority to charge the Department, particularly in light of the provisions of the EIR"* (DN §61).

18. Accordingly the Commissioner directed the Department to disclose the requested information to the Complainant (DN §61).

The Legal Framework:

19.
a) The EIR regulations are engaged.

b) Regulation 12(1)(b) provides that a public authority may refuse to disclose environmental information requested if an exception to disclosure applies under paragraphs 4 & 5. and: "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

c) Regulation 12(2) requires the public authority to apply a presumption in favour of disclosure. Regulation12(4)(b) further provides that a public authority may refuse to disclose information under 12(1)(a) to the extent that "the request for information is manifestly unreasonable".

The Issues:

20. The issue before the Tribunal is whether the Department is entitled to rely on the quotation for collation given by Landmark is manifestly unreasonable for the purposes of the exemption under regulation 12(4)(b) of EIR, and if so, does the public interest test under regulation 12(1)(b) favour disclosure in all the circumstances of this case.

The Evidence:

21. The Tribunal had the benefit of evidence from two witnesses on behalf of the Department who were subjected to comprehensive cross examination.

22. We heard evidence called on behalf of the Appellant, from Andrew Richards (SHB pages 1 - 2), and from Orla Clarke, (SHB pages 3 - 36).

23. Andrew Richards is Head of Managed Services within Landmark Solutions Business Unit and is the Contract Manager in respect of "*keeper of the EPC Register/Register Operator"*. He confirmed that during 2006/8 Landmark successfully bid via competitive tender for the HCR/EPC Domestic Register for England and Wales in 2008. The contracting authority for both contracts is now the Department of Communities and Local Government ("DCLG"). He explained how during 2008, DCLG authorised Landmark to include services for Northern Ireland, both Domestic and Non Domestic Registers.

24. He confirmed that there is no formal contracted requirement for Data services to be supplied to the Department, rather the relevant contractual relationship was the Services Agreement between Landmark DCLG. Clause 30 of the Services Agreement permitted the Secretary of State and his staff to access (whether in person or electronically) all information held by Landmark on the Secretary of State's behalf. Clause 31 of the Agreement further required Landmark to assist the Secretary of State with meeting his obligations under EIR and FOIA, including providing all requested information according to a cost model operated to govern this element of the Agreement. He confirmed that Landmark would not provide either DCLG or the Appellant with bulk data (such as the requested information) for free.

25. He confirmed that throughout 2013 several e mails were exchanged between the Department and Landmark with regard to the requested information and in September 2013 Landmark provided the department with a quotation for the provision of the requested information. The quotation given by Landmark for bespoke software was a one-off and the costs of processing similar requests in the future would be minimal. He explained the methodology that would be used to provide the requested information and the cost of same as quoted on the basis of the discounted day rates available through the Register contracts with DCLG at £2,473.24.

26. He informed the Tribunal that this was the second time a request for information like this in Northern Ireland but that they were well used to requests like this in England and Wales. He explained that there would be no difference in the methodology used in England and Wales where we would have this kind of request on many occasions. The difference, he explained "*is that in Northern Ireland we would have to start from scratch, because Northern Ireland doesn't have the information recorded in the same manner. They would need special software.*" He explained how unlike England and Wales there is no routine set up in Northern Ireland. He confirmed that DCLG pay Landmark for this work but was unable to explain on what basis or identify any contractual provision for payment on the grounds that this would be commercially sensitive information. In any event he was unable to point to any provision in the Services Agreement which entitled Landmark to charge the Secretary of State for fulfilling its obligations under either clause 30 or 31.

27. He confirmed that the provision of the necessary software in this case would be a once off cost and when asked if a further request on this data but in a different form was made there would be additional costs but that these would be minimal. He also confirmed that civil servants could use the software once provided and that this is an option.

28. Questioned by a panel member about the cost of the provision of the necessary software he confirmed it would be the same whether 1,000 items or just a few. He further confirmed that in the event that a bespoke request such as the instant one was repeated 12 months later, that that would be what they refer to as an update and would be provided for a fixed fee of £200, what he referred to as a minimal fee.

29. Orla Clarke from the Department gave evidence. She outlined the background to the history of the creation of the Non Domestic Register for Northern Ireland, for Energy Performance Certificates (SHB pages 3 - 36). She informed the Tribunal that although she was not the person initially dealing with the requested information, she had ultimately done so. When asked if any consideration had been given by the Department to having someone trained to provide access to this information, she stated no and *"we didn't consider it at the time but we may do now"*. She confirmed that they hadn't needed access until now although she also stated that there had been one such previous request before, by a Public Housing Association. When asked about the cost of providing the requested information, she said "*We thought that the Third Party costs were reasonable, when compared with dealing with requests internally."*

Reasons:

30. The Department do not take issue with the general Public Interest factors cited in favour of disclosure. They argue the costs in providing the requested information are manifestly unreasonable and in that regard they argue that it is absurd that it is argued that it is in the public Interest to allow cost to the public purse that are mani-

festly unreasonable. As decided in this Tribunal in an earlier case, EA/2013/0008, Yeoman V IC, *" - - - the criteria for arguing that the public interest favoured non-disclosure should be something distinct from the reasons for arguing that the request was manifestly unreasonable. Otherwise the public interest test, which is clearly something additional to the manifestly unreasonable hurdle becomes synonymous with rather than distinct from that hurdle".* For this reason we do not accept the argument put forward by the Department in this regard.

31. The Tribunal agree with the Commissioner in his analysis of the Public Interest Test both in the DN and further in his submissions to this Tribunal in light of the evidence at this oral hearing, in that we too recognise a very significant public interest in favour of disclosure of the requested information based on its subject matter and the public interest factors set out below.

32. The Department argue there is a contradiction between the Commissioners finding at DN § 60 & 61. They argue that if the costs were manifestly unreasonable for the Department then it should be so if the department are liable to Landmark, and therefore indirectly liable for the costs. This Tribunal accepts the distinction made by the Commissioner through the words: *"- - - in this manner"* (DN §60). The distinction being that there is an alternative manner, i.e. through Landmark, who as the keeper of the register is in a better position to produce the information more quickly. We are of the view that the Commissioner was correct in his finding that regulation 12(4)(b) is not engaged and the Department, the Public Authority herein should disclose the requested information to the complainant. The evidence form the witnesses before this Tribunal support this contention and further demonstrates that "this manner" is likely to be, not only a more efficient, but also a more effective means of collation in the circumstances of, and on the facts relating to, this case.

33. This Tribunal reminds itself of the overriding obligations on a Public Authority under EIR in Part 2 on the Dissemination of environmental information (regulation 4) and their duty to make available environmental information on request (regulation 5). The evidence of Andrew Richards and Orla Clarke confirms that the Register in England and Wales is accessed regularly for this type of information which is provided and done so at minimal cost as the provision of software has been set up and is available. Repeat requests for such bulk data are provided on an annual basis, or updates as they are known, can be provided for a minimal cost and for as little as £200. Orla Clarke confirms that they had not considered setting up the provision of software as they only had one previous similar request, but *"we may do now".* This Tribunal are of the view that this amounts to an implicit recognition of non-compliance by the department. Andrew Richards confirmed setting up the software is a "once off" expenditure and clearly indicates that it has been done in England and Wales but confirms the issue had not been addressed in Northern Ireland. Accordingly we find that in this case any cost incurred (either by DCLG or the Department) is not a true measure of the cost arising from this individual request, but a cost arising from the initial outlay in providing the software to facilitate access to this important information. In these circumstances the costs discussed by the Department, in our view, are not manifestly unreasonable and cannot be fairly attributed solely to this one request. It is foreseeable given the regular requests made in England and Wales, and the previous request made in Northern Ireland. Even if there were only one request a year, the public authority should have anticipated the need. In deed, according to Orla Clarke, through her, they do now. In these circumstances and on the facts of this particular case we are of the view that the Commissioner was correct in his finding that regulation 12(4)(b) is not engaged and the Department, the Public Authority herein should disclose the requested information to the complainant.

34. If we are wrong in the above finding, and in any event, we agree with the Commissioner that the Department have failed to establish that there is such a contractual relationship between Landmark and the Department that require them to pay Landmark for the provision of the software in question and we are of the view that the Commissioner was correct in his finding that regulation 12(4)(b) is not engaged in the circumstances of this case and the Department, the Public Authority herein should disclose the requested information to the complainant.

35. Even if there were legal basis for Landmark's quotation, however, it is more reasonable for the Department itself to meet any such costs as part of its duty under regulation 4(1) to progressively make information available to the public *"by electronic means which are easily accessible"*. Since the register does not itself facilitate requests fro bulk data, the only way for members of the public to obtain such data is to make a request under the EIR. If the Department is correct, it would be entitled to refuse each successive request for bulk data by relying on Landmark's commercial costs to make out the exemption under regulation 12(4)(b) which cannot be compliant with regulation 4(1) and certainly is not in the public interest.

36. If we are wrong in any of the above and for any reason Regulation 12(4)(b) is engaged we are of the view that the public interest in disclosure outweighs any public interest in non -disclosure. There is a presumption in favour of disclosure under regulation 12(2) EIR. As stated above any suggestion that the cost of provision of the requested information being manifestly unreasonable is not a ground in itself to be considered in the public interest balance. Again as stated above the Department does not argue against the public interest factors cited in favour of disclosure. The Department have acknowledged that disclosure of the requested information would promote accountability and transparency by the public authority and that disclosure would allow individuals and companies to understand issues and decisions that affect them. On their website, the Department state: *"Even comparatively minor changes in the energy performance of, and the way we use, each building would have a significant effect in reducing energy consumption, and hence, carbon emissions."* The Department further identified that increasing public access to this type of environmental data should increase public awareness of energy efficiency, booth generally and with regard to buildings. Both the Department and the Complainant suggested that disclosing the requested information would encourage organisations to take steps to improve the energy efficiency of their buildings (see DN §49 - 52). Further we accept and adopt the Commissioner's reasoning and conclusions on his further analysis of the Balance of public interest factors; (see DN §53 - 59).

37. With the benefit of the oral evidence and the helpful submissions before us we refer to further factors to which we give significant weight in favour of disclosure that we have taken into account.

    a) The disclosure of bulk data contained on the register would enable the identification of broader patterns in the data, which would be more meaning flu to members of the public.

    b) that the requested information is a data-set containing environmental information, including some spatial data and therefore engages the obligations under INSPIRE Regulations 2009 (SI 2009/3157) as well as its duty under regulation 4(1)(a) EIR to consider whether to make such information proactively available.

c) While disclosure would provide a “one - off” picture of the energy efficiency of buildings, even disclosure of a “snapshot” could prove highly useful, enabling broader trends to be identified over time.

d) Where public bodies took the decision to outsource relevant information to the custody of private bodies, there was an obvious public interest in ensuring that those outsourcing arrangements were cost-effective and did not unduly prevent the disclosure of requested information to the public.

e) Citizens in England and Wales enjoy the facility of access to this type of information and it is in the public interest that there is parity throughout the United Kingdom.

38. In the factual circumstances outlined above and for the reasons given the Tribunal refuses this appeal

Signed:

Brian Kennedy QC 31st July 2014.