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IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2014/0137**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0516280
Dated: 6 May 2014

Appellant:	**Gareth Clubb**
Respondent:	**The Information Commissioner**
Heard at:	**Cardiff**
Date of Hearing:	**6 October, consideration 14 October and 2 December**

Before

Chris Hughes

Judge

and

Jacqueline Blake and Alison Lowton

Tribunal Members

Date of Decision: **6 January 2015**

Date of Promulgation: **7 January 2015**

Attendances:

For the Appellant:	**Ms Julianne Kerr Morrison (instructed by Ms Gita Parihar)**
For the Respondent:	**Ms Laura John (instructed by Mr Richard Bailey)**

Subject matter:

Environmental Information Regulations 2004

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings, Mr Clubb, is the Secretary of Friends of the Earth Cymru and a former civil servant with the Welsh Government. A consortium of Welsh local authorities, including Cardiff City Council ("the Council") has been developing a waste incineration plant in Cardiff and on 17 June 2013 Mr Clubb made a detailed request of the Council for information about the decision making process to develop the facility, the information used in making the decision. The final part of the request read:-

   "The Final Business Case states that "the R1 ratio for the Viridor facility has been calculated to be 0.675, based on initial design data and operational assumptions. The Partnership's technical advisors are satisfied that this assessment has been undertaken on a reasonable basis"

   14. Please provide the technical assessment underpinning this calculation."

2. The Council replied on August 15, it supplied some information, confirmed that other information was not held and with respect to the final request stated:-

   "As part of the submission received from Viridor, the Waste Framework Directive calculation of the R1 value for the facility was received and evaluated. Evaluation was undertaken by the Partnership's technical advisors using the data submitted and bench marking this against assumptions and values for the type of plant proposed. Their evaluation concluded confirmed the calculations for the plant proposed is a Recovery Operation."

3. The significance of this reply is that, according to the amount of useable energy which the plant extracts from the waste incinerated, the plant is categorised within EU law as a waste disposal operation (relatively low amounts of energy recovered) or a Recovery Operation, with higher amounts of recovered energy. The classification of the plant as being a recovery operation made it eligible to receive a public subsidy of £4,264,000 each year from the Welsh Government for an operating period of 25 years.

4. In its internal review of its handling of the request, the Council's Information Governance Manager criticised parts of the response. However with respect to the final part of the request; which it numbered 15 it stated:-

   "In respect of Question 15, the Council is unable to supply the information requested. The R1 calculations were submitted by Viridor as part of their bid and are marked as commercially confidential. As we are still in the procurement process release of such information would prejudice the outcome of the fine tuning exercise and Viridor's position in the market.

   Section 12(5)(e) of the Environmental information Regulations allows a public authority to 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. The public interests arguments in respect of the exemption weigh in favour of non-disclosure as this forms part of an on-going procurement process."

5. Mr Clubb was dissatisfied by this response and appealed to the Respondent in these proceedings, the ICO. During the course of his investigation he was supplied with a letter to the Council from Viridor dated 26 February 2014 setting out its views on the requested disclosure:-

   "<u>Viridor's View on Disclosure</u>

   As you will be aware, the Requested Information contains Viridor's unique approach and methodology to an industrial process, ensuring the most energy efficient outcome possible in respect of the Project. In fact the R1 level that Viridor is able to achieve in respect of Prosiect Gwyrdd was, as you will be aware, a significant contributing factor to the company's success in being awarded the contract for the project.

   The requested information is designated as commercially sensitive and confidential in the contract between the village or and the Council dated 10th of December 2013. Both at the time when the contract was entered into and now, our expectations are and have been that the information would be kept confidential. We are strongly of the view that the requested information remains both confidential in nature (it has not been placed into the public domain or in any other way disseminated) and commercially sensitive.

We are of the opinion that disclosure of the requested information would cause significant prejudice to Viridor's economic interest due to the following reasons:-

1. *Disclosure of the requested information into the public domain is very likely to lead to our competitors obtaining and utilising it for their gain. The requested information clearly demonstrates the application of Viridor's technical knowledge. Whilst the requested information relates specifically to Project Gwyrdd, as specialists in this field we have legitimate concerns that it is capable of being adapted and used for similar future projects.*

   There is a strong possibility of our competitors using the requested information in this way. If this were to happen, Viridor would be placed at a commercial disadvantage, in future competitive exercises when bidding for similar work.

2. *More generally, disclosure of the requested information discourages innovation and development by companies such as Viridor. Development will be dis-incentivised where companies have concerns that there is a strong possibility of detailed aspects of their unique technical solutions being disseminated into the public domain, and more importantly to their competitors."*

6. The letter then agreed to the disclosure of a "Pro-Forma" stating:-

"we considered that to be a noticeable difference in disclosure of the pro forma as against disclosure of the requested information. The requested information comprises all detailed aspects of the R1 calculation, disclosure of which gives rise to a significant risk of economic harm to be readable. The pro forma, however is a high-level document with less detail. It does not provide an in-depth explanation of the way in which the R1 efficiency level is achieved.

In particular, we think that it is relevant to note that NRW (Natural Resources Wales) only publish a certain level of R1 information on its website, rather than all of the detail which underpins it. We believe that this is because N RW appreciates the commercial sensitivity of the information."

7. In his decision notice the ICO concluded that confidentiality of this information was provided by law (DN para 31) was not trivial and was not in the public domain. He

considered the arguments advanced by Viridor to the Council that the disclosure would:-

"very likely lead to Viridor's competitors obtaining and utilising the methodology for their own gain. The withheld information clearly demonstrates the application of Viridor's technical knowledge….

A strong possibility of Viridor's competitors using the withheld information in bidding for future similar projects…

Disclosure would discourage innovation…"

8. The ICO acknowledged that the scheme was potentially controversial and high profile and involved large sums of public money; however the calculations had been independently checked by the Council's advisers and that the public interest in disclosing the R1 calculation was thereby lessened. He noted the importance of the points Viridor had raised, that at the time of the request the tender process had not concluded (although Viridor were the preferred bidder) and decided that the public interest lay in maintaining the exception.

9. In his appeal against this determination Mr Clubb argued that the ICO had incorrectly treated the request as not relating to emissions (which would mean that the information could not be withheld under Regulation 12(5)(e)) and he emphasised the public interest in disclosure. In his response the ICO re-affirmed his view that the information was not information on emissions:- *"As set out in DN 22 in particular, the Commissioner considered energy, heat and steam; however , he correctly concluded that the disputed information does not relate to the loss of energy, heat or steam but to their recovery, and on that basis that the information is not emissions."* He reaffirmed his view of the public interest.

<u>Questions for the Tribunal</u>

10. There were three questions for the Tribunal to consider:-

- Whether the information fell within Regulation12(9) as information "relates to information on emissions" and which therefore had to be disclosed even if it would have an adverse effect on "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest" (Regulation 12(5)(e)

- If the information was not within Regulation 12(9) whether the disclosure would indeed adversely affect such an interest; and if so
- If the exception in 12(5)(e) applied where the balance of public interest lay between disclosure and maintaining the confidentiality.

11. In his evidence Mr Clubb set out the policy background of the Waste Framework directive and the Climate Change Act and the role of energy from waste. He explained that the R1 calculation enabled discrimination between waste and recovery facilities and in his view "determines the environmental outcomes of incinerators including emissions". He was critical of what he saw as obfuscation of his request and detailed the criticisms that Friends of the Earth had of the project. He argued that the information related to emissions and that the financial viability of the project could be threatened if it did not meet the R1 criteria and attract £105 million subsidy over its lifetime. Publication of the requested information would open up the matter to the public properly and enable the public to be satisfied (if such is the case) that the facility was indeed properly categorised.

12. The Tribunal adjourned to verify that it had been provided with the entirety of the withheld information. The withheld information is a short report prepared for Viridor by a firm of consulting engineers. It sets out the figures used in the calculation of R1 for this facility, the energy input from waste and other sources, how the energy produced is apportioned, and carries out the calculation laid down by the Waste Framework Directive which justifies the categorisation of this facility as R1.

13. The withheld information, in short, does not disclose any information which demonstrates how the Viridor plant works or what technological innovations enable it to function in a way possibly superior to its competitors' designs. What the withheld information discloses is that the Viridor plant is predicted to work in a certain way which meets the requirements for the contract. Within its assumptions it demonstrates **that** it meets the requirements; it does not demonstrate **how** it meets the requirements. In reality it remains a very high view document which does disclose confidential industrial information. The assertions made by Viridor in their letter are of a general nature and not related to the specifics of the information. Nor has the Council properly addressed the question of how the disclosure could have an impact; rather it has relied uncritically on the assertions of its commercial partner.

Consideration

14. In approach its consideration of the case the Tribunal decided as its starting point to explore the issue of harm arising from disclosure; before considering whether or not the information could be properly characterised as "information on emissions", or whether the ICOs contention that calculations about the recovery of energy heat and steam were not "information on emissions". In order for the information to be protected from disclosure there has to be an adverse effect on *"the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest"*. The Tribunal is satisfied, having scrutinised the information that on the balance of probabilities there will be no adverse impact on any legitimate economic interest. The information will neither give advantage to a competitor in future tendering exercises, nor assist it in developing a rival product. What the information does is give an underpinning to a claim by Viridor and advanced by the consortium of which the Council is a member, that the installation will have a performance which will attract public subsidy. This information has been widely used in the decision-making of various public bodies about this substantial project; the projected performance of the facility is key to its acceptability and viability. That is a matter of considerable legitimate public concern.

15. The Tribunal is therefore satisfied that the ICO erred in law in his decision notice. The exemption in Regulation 12(5)(e) is not engaged as it would not adversely affect the protected interest by the disclosure. Even if there were an adverse impact any conceivable impact would be outweighed by the strong public interest in transparency about this important decision. In these circumstances it is not necessary for the Tribunal to consider whether the information falls within Regulation 12(9).

16. The ICO's decision notice is set aside and this decision stands in its place.

17. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 7 January 2015