**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2016/0253**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50623577**
**Dated: 28 September 2016**

**Appellant:** **Cumbria County Council**

**Respondent:** **The Information Commissioner**

**Heard at:** **Carlisle Court**

**Date of Hearing: 18 September 2017, consideration 27 November 2017**

**Before**

**Chris Hughes**

**Judge**

and

**Marion Saunders & Paul Taylor**

**Tribunal Members**

**Date of Decision:** **1 March 2018**

**Promulgate Date** **2 March 2018**

**Attendances:**

For the Appellant: Robin Hopkins

For the Respondent: Peter Lockley

**Subject matter:**

Freedom of Information Act 2000

Environmental Information Regulations 2004

**Cases:**

*Department for Business, Energy and Industrial Strategy v Information Commissioner and Alex Henney* [2017] EWCA Civ 844

*Office of Communications v Information Commissioner and T-Mobile (UK) Limited EA/2006/0078*

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the appeal.

**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2016/0253****
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

# SUBSTITUTED DECISION NOTICE

**Dated:** **1 March 2018**

**Public authority:** **Cumbria County Council**

Address of Public authority: The Courts, Carlisle Cumbria CA3 8NA

**Name of Complainant:** **Ian Fisher**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 28th September 2016.

Dated this 1st day of March 2018

Judge Hughes

## REASONS FOR DECISION

Introduction

1. The perceived slow pace of rolling out of high-speed broadband services across the UK and the perception that UK consumers and businesses are significantly disadvantaged compared with those in other developed economies means that the provision of such services is a matter of significant public interest, especially in those communities where such services are not yet available. A government initiative Broadband Delivery UK (BDUK), part of the Department for Culture, Media and Sport is tasked with expanding broadband services and in 2013 its aim was to achieve superfast broadband coverage to 95% of the UK by December 2017. Local authorities have a role in this funding programme, which provides state aid as a subsidy to support the installation of services in areas where market demand for services is insufficient to stimulate commercial providers to provide the service. Cumbria, with its low population density and rugged terrain is one area where market failure has been particularly acute.

2. On 9 February 2016 Cumbria received a request for information concerning its programme to improve broadband in the County:-

   *"This request is for a report prepared for Cumbria County Council by Analysys Mason in connection with Phase 2 of the Connecting Cumbria programme. The request is also for:*

   *The date the report was commissioned*

   *The date the report was delivered*

   *The number of copies of the report distributed inside and outside Cumbria County Council*

   *The number of copies of the report which remain in the possession of Cumbria County Council*

   *Email correspondence between Cumbria County Council and BDUK/DCMS regarding the report"*

3. The Analysys Mason report "Cumbria – State-aid assessment – Monitoring Plan Phase 2" dated 28 September 2015 was prepared for the Council to assist it in rolling out the programme in a way compliant with the regulations governing state-aid to

industry. The particular issue addressed in this report related to the existing provision of services in parts of the county by two commercial operators, Solway and Lonsdale NET and, in the light of the analysis of their services, clarification of those areas of the County where the Council's provider would or would not be allowed to receive a subsidy to provide a service. The report gives information as to those areas where these two operators state that it is possible to use their internet services which are provided by radio transmissions. The report gave indications of the approximate locations of the transmitters used by the operators. In oral evidence it was indicated that the power outputs of each those transmitters was approximately 4W (about one three-hundredth of the power output of a domestic electric kettle).

4. The Council resisted the request to provide the report relying on s43(2) FOIA arguing that release of the information would prejudice the commercial interests of the two operators. The Council also resisted the provision of the email correspondence relying on s12(1) FOIA – the cost of compliance with the request would exceed the cost limit provided by regulations. The Council maintained this position on internal review and the requester complained to the Information Commissioner (ICO). The ICO investigated and was not satisfied by the Council's explanations and directed the Council to provide the information requested. The Council appealed against the direction to provide the report relying on s43(1) and also s41 - information provided in confidence to the Council by the operators. The ICO resisted the appeal.

5. The hearing was scheduled for 17 March. On 14 March the ICO fundamentally changed her position to argue that the information constituted environmental information and should be considered under the Environmental Information Regulations (EIR). She correctly stated that in principle information which engaged the two exemptions claimed by the Council would be likely to engage similar exemptions (contained in regulations 12(5)(e) and (f) of EIR) and the arguments advanced by either side would therefore be similar; however since she argued that the information under consideration related to emissions and regulation 12(9) of EIR disapplied the exemptions relating to commercial prejudice and confidential information, if her analysis was correct there were no grounds for resisting a request to disclose the information. In the light of this fundamental change to the nature of the case the hearing was adjourned to September. The tribunal heard evidence from the Council and the contractors relating to the claimed exemptions and the prejudice

they feared would flow from disclosure as well as evidence as to the nature of the "émissions". There were four issues for the tribunal to consider, whether or not the information fell to be considered as relating to emissions, if it did not whether it fell within EIR or FOIA, if so whether the exemptions claimed were engaged and if they were where the balance of public interest lay.

The legal framework environmental information or FOIA

6. The Aarhus Convention is an instrument agreed by the UN Economic Commission for Europe (UNECE) which came into force in 2001. Article 1 of the Convention sets out its objective: -

*"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."*

7. The EU adopted the environmental information provisions in Council Directive 2003/4/EEC on public access to environmental information. This was transposed into UK law by EIR. Regulation 2 of EIR defines environmental information: -

*"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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 these 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 the 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);*

8. Regulation 12 makes provision for circumstances in which the duty to disclose environmental information does not arise, however within this regulation there is a specific provision for information on emissions which limits some of those exemptions from the duty to disclose: -

*(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).*

9. The exemptions are: -

*5 (d)the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;*

*(e)the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;*

*(f)the interests of the person who provided the information where that person—*

*(i)was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*

*(ii)did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*

*(iii)has not consented to its disclosure; or*

*(g)the protection of the environment to which the information relates.*

10. It is clear that those responsible for drafting the Convention saw "émissions" as a matter of particular importance so that the public value of information about emissions over-rode the concerns about commercial confidentiality which could in other circumstances over-ride the duty to disclose.

11. In *Office of Communications v Information Commissioner and T-Mobile (UK) Limited EA/2006/0078* the Information Tribunal (the predecessor to this tribunal) considered whether the location of mobile telephony masts fell within the category of environmental information. The power output of such installations was 40W. The tribunal concluded, having considered the Stewart Report for the National Radiological Protection Board on Mobile Phones and Health (an inquiry was set up in response to widespread public debate about whether there were such health effects) that:

    *"Stewart also concluded that it was not possible to say that exposure to such radiation was totally without potential adverse health effects…we are not prepared to conclude, in the light of Stewart's recommendation of a precautionary approach pending further investigations, that the test of "likely to affect" in subparagraph (b) has not been satisfied in the context of current knowledge of the issue."*

12. The tribunal notes that the public concern about such masts has somewhat diminished over the last 16 years in the absence of robust research evidence of such harm, which might suggest that were the case decided today that element of the reasoning (the application of the precautionary principle) would no longer be appropriate.

13. The Aarhus Convention is an instrument agreed by the UN Economic Commission for Europe (UNECE) which came into force in 2001. Article 1 of the Convention sets out its objective: -

    *"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*

14. In this case what is sought is a document which provides information about the extent of the internet service provided by two companies. This is clearly not information about matters falling within Regulation 2(1)(a). While the ICO has argued that it falls within Regulation 2(1)(b) there are multiple difficulties with this interpretation. To fall within the regulation, it must be information on *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*. This is patently not so. The information is information about the availability of internet services in Cumbria (which is why the information was requested) with a view to determining where state aid may be deployed to improve them; it is not information on *substances…emissions.* It is a report **on** state aid. It is not a report on *energy...radiation ...emissions* or any other factor. Furthermore, even were it to be such information it is not information on a release to the environment *affecting or likely to affect the elements of the environment.* Any electromagnetic radiation has some potential to interact with physical objects (as was explored in the *Ofcomm* case - how else would a radio transmission be detected?) so for example, the internet services under consideration would be likely to be ineffective at the bottom of Thirlmere or Crummock Water since water of such depth absorbs the energy of the radio transmission. However, that interaction with water (one of the elements of the natural environment in (a)) is de minimis and entirely hypothetical.

15. The chain of reasoning is tenuous and remote: the ICO argued that information about masts is information about emissions because masts emit radio waves. That approach is too inclusive. The net effect would be that any information held by the Council would be within scope of EIR – the staff the Council employs in its offices make a contribution to the amount of carbon dioxide coming from Council premises; the logic of the ICO's position would therefore be not merely that staff numbers are environmental information, but that they are information on emissions. The failure to perceive relevant distinctions leads to a nonsense where the purpose of the Aarhus regime to make available information relevant to a healthy environment and its contribution to health and well-being is brought to ridicule.

16. The Court in *Department for Business, Energy and Industrial Strategy v Information Commissioner and Alex Henney* [2017] EWCA Civ 844 drew attention to the policy intention which led to the Aarhus Convention and the Directive which was to give access to information in environmental matters and not *"to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned."*

17. It is clear therefore that this information is not information about emissions; nor is it information on the environment at all.

<u>Engagement of the exemptions</u>

18. The witnesses for the internet companies gave persuasive and compelling evidence with respect to the competition risk from BT and with respect to the risk of criminal damage to their installations and the IC accepted that the exemption with respect to commercial harm was engaged by much of the information contained in the report. In addition to the risk of criminal activity the harm would include making information available to competitors of how the companies deployed different technologies in the provision of services, their actual and projected customer numbers and their future business plans.

19. It is also clear that the contents of the report were given to Analysys voluntarily and in the expectation of confidence; the report is marked "Commercial in confidence". The report authors' exploration and testing of the information and claims made by the companies is fundamentally rooted on the confidential information. The tribunal is satisfied that both exemptions are engaged.

20. The public interest balance is also clear in that disclosing the material would distort the market in favour of a major supplier and diminish competition which would impede the optimal roll-out of superfast broadband in Cumbria. The public interest in the disclosure of this information is minimal. Substantial information on the roll-out of broadband is provided by the Council including a website detailing the programme of roll-out and enabling individuals to enter their postcode and see where that is in the programme. A redacted version of the report has been issued. The public is already being informed not only about broadband rollout in the county generally, but also about the State Aid issue with which the Report is actually concerned. The balance of public interest lies decisively in upholding the exemptions.

Conclusion and remedy

21. The tribunal is therefore satisfied that the ICO's decision notice is wrong in law and this tribunal decision stands in substitution for it.

22. The appeal is allowed.

Judge Hughes

Date: 1 March 2018