



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

Appeal Reference: EA/2020/0156 P

**Decided without a hearing
On 4 January 2021**

Before

**JUDGE HAZEL OLIVER
PIETER DE WAAL
PAUL TAYLOR**

Between

ALAN SAGAR

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CANAL AND RIVER TRUST

Second Respondent

DECISION

The appeal is upheld.

SUBSTITUTE DECISION NOTICE

The Canal and River Trust did not act in accordance with the law by withholding the information requested by Alan Sagar under regulation 12(5)(e) of the Environmental Information Regulations 2004 in relation to the fees in a lease agreement dated 25 April 2013 with the Pike Anglers Club. The Canal and River Trust is to disclose a copy of this agreement without redaction of the fees shown in paragraph 4.1 by 16 February 2021. All personal data including names and addresses should be redacted from this copy of the agreement.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 16 March 2020 (FS50869216, the “Decision Notice”). It concerns information sought from the Canal and River Trust (“CRT”) about lease agreements with the Pike Anglers’ Club (“PAC”). The applicable law is the Environmental Information Regulations 2004 (“EIR”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).
3. CRT is a charity regulated by the Charities Commission, which looks after waterways around the country. It grants leases to private angling clubs for specific stretches of waterway.
4. On 14 June 2019 the appellant made a request for information under the Freedom of Information Act 2000 (“FOIA”) to CRT as follows (the “Request”): “...*all lease agreements granted between the CRT to the PAC for the period from March 2013 to present day, including the lease costs.*”
5. CRT responded on 10 July 2019. It refused to provide the requested information under section 14(2) FOIA on the grounds it was a repeated similar request, as it had already provided the appellant with a copy of the only lease agreement with PAC. A reply from the appellant was treated as an internal review, but no review outcome was provided.
6. The appellant complained to the Commissioner on 27 August 2019. CRT eventually provided a review outcome on 2 October 2019. It provided a further copy of the lease agreement. CRT redacted personal details under section 40 FOIA. It also redacted the lease costs paid by PAC under section 43 FOIA (prejudice to commercial interests). These costs are the issue in dispute in this appeal (the “disputed information”).
7. The appellant complained to the Commissioner on 2 October 2019 about the way his request for information had been handled. During the Commissioner’s investigation, she advised that the Request should have been considered under EIR. She therefore considered regulation 12(5)(e) EIR (adverse effect to the confidentiality of commercial information), which is similar to the commercial interests exemption in section 43 FOIA.
8. The Commissioner decided:
 - a. On the balance of probabilities, no further recorded information is held.
 - b. CRT was entitled to rely on regulation 12(5)(e) EIR to withhold the disputed information on lease costs. The information is commercial in nature and has the necessary quality of confidence. Knowledge of prior rent would adversely affect the legitimate economic interests of CRT, as it would erode its bargaining power and ability to obtain the best terms for similar leases.
 - c. The public interest in maintaining the exemption is the maintenance of CRT’s ability to negotiate and secure the most favourable terms and rents for its waterways. This outweighs the public interest in disclosure, which is based on the general interest in transparency and accountability.

The Appeal and Responses

9. The appellant appealed on 16 March 2020. The grounds of appeal can be summarised as follows:

- a. He believes there has been wrongdoing and alleges that CRT gave a free lease to PAC for the first year, charged only £1,000 per year payable in arrears after that, and altered the standard angling agreement accordingly. He alleges that CRT knowingly hid their wrongdoing.
- b. He questions CRT's claim to have no further agreements after 2015 (although he also states he can confirm there is no new agreement in place).
- c. He questions CRT's assertions that there are bidding wars for parts of the canal. He says that more clubs are giving up their leases, CRT are being forced to give discounts to keep clubs, and thousands of miles of waterway are unleashed.
- d. He says that he requires the lease details in order to challenge the alleged wrongdoing through the Charities Commission.

10. The Commissioner's response maintains her decision.

- a. She was satisfied from her investigations that agreements between CRT and angling clubs provide a valuable source of income which can be used for charitable purposes and assist in maintaining oversight of the waterways.
- b. She accepted that disclosure of the information would enable other clubs/competitors to gain an advantage when negotiating with CRT, and that this would erode its ability to secure the most favourable terms for this particular stretch of waterway should it need to go out to tender. She was also correct to rely upon the representations that CRT made during the course of her investigation.
- c. There is public interest in protecting commercially confidential information, and in ensuring a fair market and open competition. The appellant advanced minimal public interest grounds for disclosure of the information, and so the public interest balance favours maintaining the exemption.

11. CRT was made a party to the appeal on 19 June 2020, and has also provided a response. CRT agrees with the Commissioner's decision and makes the following points:

- a. It is not in the public interest to disadvantage CRT when negotiating licence fees with other clubs across the network. For this particular stretch of waterway, it is not in the wider interests of the public to prejudice CRT's ability to negotiate future rents. Disclosure would reduce CRT's bargaining position and potentially result in less favourable terms for CRT and the wider public. It would also prevent CRT from maximising revenue, which is required to spend on charitable purposes.
- b. Disclosure would disadvantage other clubs in the local area with similar agreements as they would be able to compare their terms with those of PAC. It could potentially lead clubs to feel they have secured less favourable terms.
- c. Disclosure would disadvantage PAC if CRT did go out to tender and it wished to submit a bid. Other interested clubs would have prior knowledge of the rent previously paid by PAC and work out what their bid is likely to be.
- d. There is public interest in disclosing the information as it would facilitate the accountability and transparency of CRT's spending. However, the public interest

factors in favour of withholding the information and maintaining the exception are much stronger. The appellant has given little evidence as to why the disclosure of this information would benefit the wider public.

12. The appellant has provided a reply to CRT's response on 9 September 2020. This maintains that PAC is profiting from the arrangement and this is in breach of charity rules. He states, "*Without the information I seek, it is impossible for me to prove my case. I am hopeful the GRC will be able to access the information at the CRT and make a judgement on it, not simply dismiss my request without actually investigating whether my claims are true. I would be more than happy for the information to be given directly to the Charities Commission to make judgement upon, I do not in reality need the information releasing to the public.*"

Applicable law

13. The relevant provisions of EIR are as follows.

2(1) ...*"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;

.....
5(1) ...*a public authority that holds environmental information shall make it available on request.*

.....
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.

12(2) *A public authority shall apply a presumption in favour of disclosure.*

.....
12(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;

14. Requests for environmental information are expressly excluded from FOIA in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that EIR rather than FOIA applies to the Request.

15. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority’s records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority’s record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority.

16. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). Although this case related to FOIA, the same approach applies to whether information is held under EIR. In discussing the application of the balance of probabilities test, the Tribunal stated that, “*We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*”

17. 12(5)(e) is not limited to information provided by a third party. The information in question must be commercial or industrial. The information must be subject to confidentiality provided by law. An obligation of confidence can be implied, and the test for confidentiality in ***Coco v A N Clark (Engineers) Ltd*** [1969] RPC 41 applies: (1) the information must have the “necessary quality of confidence”, in that it is not publicly accessible and is more than trivial; and (2) the information must have been imparted in circumstances that implied an obligation of confidence, whether this is explicitly or implicitly; and (3) disclosure of the information must be unauthorised. The confidentiality must protect a legitimate economic interest, which would, on the balance of probabilities, be harmed by disclosure. Finally, it must be shown that the disclosure of the information would adversely affect the confidentiality.

Issues and material before the Tribunal

14. The issues are:

- a. Did CRT hold further information within the scope of the Request at the time the Request was made? It is unclear whether the appellant is appealing on this basis, although the appeal questions whether there are further agreements after 2015.
- b. Is the exception in paragraph 12(5)(e) EIR engaged in relation to the disputed information?
- c. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

15. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the disputed information, some example lease agreements with other parties, and unredacted versions of correspondence in the open bundle between the Commissioner and CRT.
- c. An additional document provided by the appellant on 15 September 2020 with a copy of a letter from his MP and some final submissions.

Discussion and Conclusions

16. We deal in turn with the issues.

17. Did CRT hold further information within the scope of the Request at the time the Request was made? On the balance of probabilities, we find that CRT did not hold further information. CRT's response to the Commissioner of February 2020 (page D146, open bundle) explains the searches carried out for the information. This states that, "*The Trust's National Fishing & Angling Manager, who has been in that role since 2009 and employed by the Trust since 1988, has confirmed since he has been in his current role any Fisheries or Angling agreement would have been made with his knowledge and confirmation. He is not aware of any other Fisheries or Angling agreement, apart from the attached, that the Trust has with PAC. The Trust has also checked its paper and electronic records for any agreements with PAC and this has not returned any records apart from the attached.*" We are satisfied that this was an appropriate search. We note that a new agreement was offered to PAC on 15 February 2015 (page E230 open bundle), but it appears this was never concluded. There were negotiations with PAC for a new lease at the time the Request was made, but no new lease agreement was in place. We do find it unusual that no further written agreements were in place, as the original 2013 agreement was only for 3 years. However, on balance and based on the facts available to us, we find that CRT did not hold further information within the scope of the Request at the time it was made.

18. Is the exception in paragraph 12(5)(e) EIR engaged in relation to the disputed information? This can be broken down into the following questions.

19. Is the information commercial or industrial in nature? We find that the disputed information is commercial in nature. It relates to the leasing of angling rights, where an angling club pays certain fees for access to a stretch of waterway.

20. Is the information subject to confidentiality provided by law? The lease agreement itself is not stated to be confidential. The Commissioner found that the disputed information did have the necessary quality of confidence, as it was more than trivial and not publicly available. We also find that the disputed information has the necessary quality of confidence. It is more than trivial, as it shows the amounts negotiated for a lease, and CRT says disclosure would affect its commercial interests. It is not publicly available information - we are not aware of this information being available elsewhere. The Commissioner does not appear to have specifically considered whether the information was imparted in circumstances that implied an obligation of confidence. The appellant has not raised this issue in his appeal. Under the EIR, there is no need for the information to have been provided by a third party in order for this exception to apply. This is information about pricing in a document mutually agreed between CRT and PAC. A commercial agreement would generally contain terms that the parties would expect to be confidential, and pricing is one of these terms. We therefore find that, although

there is no express contractual term on confidentiality, the disputed information is subject to an implied duty of confidentiality.

21. Is the confidentiality required to protect a legitimate economic interest which would, on the balance of probabilities, be harmed by disclosure? CRT's main position is that it would be disadvantaged when negotiating other licence fees if the disputed information were to be publicly available. CRT says that this would damage its bargaining position. CRT has an economic interest in maximising licence fees, which provides it with income. We accept that CRT does have a legitimate economic interest in the level of licence fees that it is able to charge to angling clubs. We also accept that, on the balance of probability, this economic interest would be harmed to some extent by disclosure. Publication of the licence fee previously charged to PAC will affect the amounts other clubs are prepared to offer if there were to be a future tendering process, or in negotiations for new leases or lease renewal. It could also cause private organisations which manage other waterways to undercut CRT's pricing. We address the likely extent of this harm in the discussion on the public interest balancing test below.

22. CRT has also referred to disadvantage to other clubs in the area with similar agreements, and disadvantage to PAC in future tendering process. This is speculative and CRT has not provided any evidence of the other clubs' views on this issue. We note that the Commissioner's decision was based on harm to CRT, not harm to other parties.

23. Would the confidentiality be adversely affected by disclosure? The confidentiality of the disputed information would be adversely affected by the disclosure.

24. Does the public interest in maintaining the exception outweigh the public interest in disclosing the information? We start with the public interest in maintaining the exception.

25. CRT relies on the effect on its own bargaining power if the disputed information were to be available to other angling clubs and to CRT's competitors who also offer fishing rights, albeit on other waters i.e. waters not controlled by CRT. As noted in the Commissioner's response, there is public interest in ensuring a fair market and fair open competition. We have accepted that CRT's legitimate economic interest in maximising income from lease fees would be harmed to some extent by disclosure of the fees charged to PAC in the 2013 lease agreement. Other angling clubs could use that knowledge to argue for lower fees, or to limit the amount of their bid in any tendering process for that stretch of waterway. Competitors could also offer lower fees on other waterways to attract custom away from CRT, particularly in the local area.

26. However, we find that the extent of that harm is limited.

- a. The lease agreement dates from 2013 and was for an initial period of three years. CRT says that it shows rates applicable at the time of the Request, as the agreement had continued to roll over until 2019. We accept that the age of the information would not prevent other angling clubs from relying on it in future bids or negotiations. However, CRT would also be able to justify a future increase in pricing, based on the fact these figures are now eight years old.
- b. CRT has confirmed that all agreements are negotiated on a separate and individual basis, and the factors involved are numerous and complex in nature (page D172 open bundle). The list of factors runs to two pages (pages D176 to D177 open

bundle). This indicates that knowledge of the current licence fee for one stretch of waterway would not allow angling clubs to rely solely on this when negotiating fees for another stretch of waterway. As CRT has said, no one stretch of waterway is the same as another. We have seen other example licence agreements in the closed bundle. It seems that each licence agreement is negotiated individually and is likely to involve individual licence fees. This means that disclosure of the disputed information would not allow angling clubs to drive down prices or enable lower bids for other stretches of waterway. The only likely harm is to pricing for the waterway currently leased to PAC.

- c. It also appears that the economic value of the licence agreement is not the only relevant factor for CRT. They refer to the importance of “bailiffing” – day to day management of the relevant waterway by the angling club who holds the fishing licence. This was sufficiently important to CRT that they did not insist on the level of payment set out in the licence agreement with PAC, as they had no means to pay (page D172 open bundle). Disclosure of the disputed information would only potentially affect the fees chargeable for this stretch of waterway, and not the bailiffing function. It is therefore questionable how much economic value the lease fees actually have for CRT, at least in relation to the stretch of waterway leased to PAC.
- d. As stated in the Commissioner’s response, there is a recognised need to protect commercially confidential information. However, the cases relied on by the Commissioner (open bundle page A28) involved different issues from this case – disclosure of a private organisation’s business plans (*Visser v Information Commissioner* EA/2011/0188), and the award of a public contract without the tender required under procurement law (*Edenred (UK Group) Limited v HM Treasury and others* [2014] EWHC 3555). It is clearly established that confidential information provided by a contractor during a procurement process may be protected from disclosure, due to the commercial damage this may cause to the contractor and the importance of facilitating fair competition (although under the Public Contracts Regulations 2015 the prohibition on disclosure is expressly without prejudice to FOIA). This case involves information about the price actually paid to CRT under a concluded commercial agreement. This type of information is less commercially confidential, and also attracts a higher level of public interest as discussed below.
- e. CRT expresses concern about being held to a higher level of accountability than its competitors (page D172 open bundle). They say that their competitors are under no obligation to publish any charging information under any fishing and angling agreements that they operate. However, CRT is a public authority which is subject to the EIR regime. As a public authority, there is a clear public interest in disclosure of information about their income and use of public funds, which does not apply to their competitors. Being held to a higher level of accountability is an inevitable effect of being a public authority rather than a private body.

27. Turning to the public interest in disclosure, this would clearly promote accountability and transparency. Disclosure of the fees charged in the lease agreement would enable the public to better understand what rents had been charged to CRT for this stretch of waterway. This in turn would enable the public to scrutinise and question whether best value for money was being sought and achieved by CRT.

28. Disclosure of this type of information is important because CRT's commercial agreements involve use of charitable funds. This is exactly the type of information that both EIR and FOIA are designed to cover – transparency about the income of a public authority and how this has been obtained. We are not considering a procurement situation, where information has been provided confidentially during a tender process. Such information is likely to cause significant commercial damage if disclosed and is of limited public interest. This is information about a concluded commercial agreement and is key information about the terms of the agreement itself. There is a significant public interest in this information. The public is unable to scrutinise CRT's use of lease agreements for this stretch of waterway unless it knows the fees charged.

29. The appellant says that he requires this information for the purposes of a complaint to the Charities Commission. We note that disclosure under EIR is not necessary for this purpose, as the Charities Commission have their own investigatory powers. The appellant has also made various allegations about wrongdoing by CRT. We make no findings on these allegations.

30. As discussed above, we find that disclosure would cause some harm to CRT's ability to maximise its income from this stretch of waterway in the future, but the extent of that harm is limited, particularly taking into account the age of the original agreement. The information can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosure. We have applied the presumption of disclosure under Regulation 12(2) EIR. On balance, we find that the significant public interest in understanding the fees charged by CRT under its lease agreement for this stretch of waterway is not outweighed by the limited harm to CRT's ability to maximise its income.

31. We uphold the appeal. CRT was not entitled to withhold the information about fees under regulation 12(5)(e) EIR. CRT is to disclose to the appellant a copy of the licence agreement with PAC dated 25 April 2013 without redaction of the fees listed in paragraph 4.1 of that agreement – as set out in the Substitute Decision Notice above.

32. We note that the agreement originally disclosed to the appellant redacted some but not all of the personal information relating to third parties. The new disclosure of the agreement should redact all personal names and addresses, including of witnesses to the agreement (pages D119 and D131 open bundle).

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 11 January 2021
Date Promulgated: 12 January 2021