IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0052
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0314344

Dated: 31 January 2011

Appellant: MATTHEW SINCLAIR

Respondents: (1) INFORMATION COMMISSIONER

(2) DEPARTMENT OF ENERGY AND CLIMATE CHANGE

Heard at Audit House, London EC4

Date of hearing: 7-8 September 2011

Date of decision: 8 November 2011

Before

Andrew Bartlett QC (Judge)
Pieter de Waal
Narendra Makanji

Attendances:

The Appellant: in person

For the First Respondent: Holly Stout

For the Second Respondent: Eleanor Grey QC

Subject matter:
Environmental Information Regulations – disclosure of information - exception for internal communications - regulation 12(4)(e) – exception where adverse effect on international relations – regulation 12(5)(a) – public interest balance

Cases:
R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323
Társaság a Szabadságjogokért v Hungary (Application no. 37374/05) 14 July 2009

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the conclusion of the decision notice dated 31 January 2011 that the Second Respondent was not required by the Environmental Information Regulations to disclose the requested information.

The Tribunal dismisses the appeal.

REASONS FOR DECISION

The request for information

1. On 8 February 2010 Mr Sinclair, research director of The TaxPayers' Alliance, made the following request to the Second Respondent ("DECC"):

> Freedom of information request for any analysis of the potential cost of strengthened climate change commitments at Copenhagen
>
> During the Copenhagen conference, it was reported ... that the British delegation was working to secure an ambitious deal that would involve the UK committing to a 42 per cent reduction in emissions from 1990 levels by 2020. I am writing to enquire about any analysis that might have been undertaken of the potential cost of honouring such a commitment.
>
> In particular I am requesting: any and all documents concerning the potential financial and/or economic cost of Britain meeting a pledge to cut emissions by 42 per cent from 1990 levels by 2020. Or, any such analysis provided to the delegation by e-mail.

2. DECC responded on 4 March 2010, confirming that it held information within the scope of the request but declining to provide it, in reliance on the Environmental Information Regulations 2004 ("EIR") regulation 12(5)(a) (disclosure would adversely affect international relations). After internal review, DECC relied also upon regulation 12(4)(e) (internal communications).

The complaint to the Information Commissioner

3. Mr Sinclair complained to the Information Commissioner. After investigation the Commissioner upheld DECC's refusal to disclose the information. He found that DECC held seven relevant items:

   a. Extracts from a paper of September 2009

   b. Extracts from a paper of November 2009 prepared for the Prime Minister's ad hoc committee on climate change

c. Extracts from an internal note by DECC economists December 2009

d. Extracts from a further internal note by DECC economists December 2009

e. A table sent to the Copenhagen delegation

f. Internal paper November 2009

g. Three extracts from material sent to the Copenhagen delegation

4. The Commissioner held that both exceptions relied on were engaged in relation to all items. As regards the balance of public interest, he made three findings:

a. He decided that the public interest in maintaining the internal communications exception outweighed the public interest in disclosure of item b, because of its impact on collective cabinet responsibility, but this did not apply to the other items.

b. He decided that for all items the public interest in maintaining the international relations exception did not outweigh the public interest in disclosure.

c. He decided that for all items the composite aggregated weight of the public interest factors in maintaining the two exceptions outweighed those which favoured disclosure.

5. The Commissioner therefore declined to order any disclosure.

The appeal to the Tribunal

6. Mr Sinclair appealed to the Tribunal. He summarised his grounds of appeal in three points, which were:

a. the public interest in disclosure of the requested information was given too little weight by the Commissioner,

b. the public interest in maintaining the international relations exception was given too much weight by the Commissioner, and it was unclear that it was even engaged,

c. the public interest in maintaining the internal communications exception was given too much weight by the Commissioner.

7. We have considered these grounds with the benefit of the Commissioner's decision and the material that was available to him and also with the benefit of additional evidence that was adduced before us.

Evidence and primary findings

8. In addition to the documentary evidence, we heard evidence from two DECC witnesses: Mr Mackenzie, the Deputy Director responsible (among other responsibilities) for the EU Emissions Trading Systems and EU Effort Share Decision, and Ms Alsop, the Acting Head of Negotiations. We found them both to be truthful witnesses. They were careful to distinguish between what they were able to say from their own direct experience and what was information which they had gathered from others indirectly in the course of their duties. Inevitably, because of the nature of the issues, some of their evidence was opinion and speculation concerning the possible results of certain courses of action; we have had to form our own view on those matters as best we can, based on the totality of the evidence. The material which fell within the scope of the request was the subject of evidence and argument in closed session to which Mr Sinclair did not have access.

9. The background to and outcome of the Copenhagen conference was largely uncontroversial between the parties and is well known. We can sufficiently simplify and summarise the evidence on it as follows:

a. International climate change negotiations take place within the framework set by the UN Framework Convention on Climate Change. The Copenhagen conference in December 2009 was one of many follow up conferences.

b. In this process the UK negotiates as part of the European Union. In March 2007 the EU announced a target to reduce emissions by 20% on 1990 levels by 2020, and offered to increase this target to 30% under certain conditions – the increase was to depend upon what was offered by other countries.

c. The 20% commitment required burden sharing negotiations between EU members. The European Commission published draft legislation in January 2008 which would affect how each state would contribute to the overall target and the cost of doing so. This was dependent on many factors, including (among others) the split between the EU Emissions Trading System ("ETS") and the non-traded sector, the degree of free allocation of ETS allowances to the industrial sector, the split of auctioning revenue between states, the split of effort between member states in the non-traded sector, and the many differences in the economies and energy resources of the member states. An allocation that is good for one state may be bad for another. With the draft legislation the Commission published its own cost analysis of how it would affect member states. After various negotiations, the legislation was amended and approved. Member states did not reveal their own estimates of how they would be affected.

d. At Copenhagen a live issue under discussion was whether, in view of what other states were then offering, the EU would or would not agree to make the conditional increase to 30%. In the event the EU did not so agree. The issue of whether the EU, and the UK, will increase its 2020 target remains live.

e. If the EU were to agree at a political level to move to the 30% target, the process of EU burden-sharing negotiations would need to be repeated and the legislation further amended.

f. The 42% figure quoted in Mr Sinclair's request came from a report by Lord Turner's non-Governmental Committee on Climate Change, published in December 2008. An article in the Daily Telegraph misinterpreted this figure as the UK Government's own estimate of the emissions reduction which the UK would have to contribute as part of an EU target of 30%.

g. The cost to the UK of contributing its share to a potential EU target of 30% would depend upon the outcome of the further burden-sharing negotiations.

10. Mr Mackenzie and Ms Alsop recognised that there was a strong public interest in having a debate about the merits and costs of moving to a 30% target. They considered that the figures from Lord Turner's committee provided a robust basis for public debate. In their view premature publication of Government estimates of a range of scenarios would not add very much to the debate, but would

significantly prejudice the UK's position in the on-going negotiations and its relationship with certain other countries. We accept this evidence. In particular, they were able to explain in detail how revealing the UK Government's own internal estimates and views on the costs and their acceptability would weaken the UK's position, and thereby the position of certain other states whose interests were affected by the UK's position, and would strengthen the position of other states. This evidence was mainly given in open session; in closed session they were able to add to it by giving us specific examples. On the evidence, we reject Mr Sinclair's contention that other states could obtain substantially the same information from existing public domain sources.

Analysis

11. The starting point of the analysis is that the EIR contain a presumption in favour of disclosure: regulation 12(2). In addition, to the extent that there is doubt exceptions are to be interpreted restrictively: see recital (16) and article 4.2 of the Directive and the concluding words of article 4.4 of the Aarhus Convention. The relevant time for consideration of the engagement of the exceptions and the public interest balance is the time when the request was dealt with by DECC.

Public interest in disclosure

12. Mr Sinclair made eloquent submissions concerning the public interest in disclosure of the requested information. In particular:

    a. The cost of meeting potential climate change commitments is a matter of high public interest. The figures involved are very large.

    b. The Government's own figures would have unique authority in public debate over policy and costs. The figures from the Turner committee or from the European Commission are of significantly less value.

    c. Publication of the Government's figures would result in the debate being significantly better informed.

    d. Publication of the figures used at Copenhagen would promote democratic accountability, by enabling the public to see whether the negotiation was conducted on a sound basis and whether it was properly handled.

e. Publication needs to take place while the negotiations are continuing; if publication occurs only after commitments have been made, that is too late to enable the public to be effectively involved in environmental decision making.

13. The other parties agreed that there was a strong public interest in disclosure, but DECC pointed out (as noted above) that the Government's internal figures were less important than they otherwise would be because the Turner report figures provided a robust basis for public debate. DECC also explained that any fresh draft legislation would be accompanied by an impact assessment to facilitate public debate, albeit at a relatively late stage in the process.

14. Mr Sinclair also argued that, if the Government's figures were much the same as those that could be derived from the Turner report, then the interests protected by the exceptions would not be much affected by disclosure, whereas, if the Government's figures were very different, then it was imperative that the public should know that. It seemed to us that this argument erected an artificial analysis which only applied in extreme circumstances and did not recognise the possibility of a wide range of middle positions involving both similarities and differences.

15. Mr Sinclair advanced a very interesting further argument that disclosure of the information was required by the freedom of expression guarantee provided by Article 10 of the European Convention on Human Rights. He referred us to a number of Strasbourg cases on this topic. The high point of his argument was the Second Chamber decision in *Társaság a Szabadságjogokért v Hungary* (Application no. 37374/05). After a series of cases in which the Grand Chamber had rejected claims that Article 10 included a right to obtain official documents, in Társaság the state conceded that Article 10 rights were engaged where a civil liberties pressure group sought to obtain details of a parliamentarian's complaint to the Constitutional Court.

16. We remind ourselves that our duty is to follow any clear and constant jurisprudence of the Strasbourg court, keeping pace with it as it evolves over time: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [20] (Lord Bingham). There is as yet no clear decision that Article 10 extends as far as Mr Sinclair submitted. Even if it does extend that far, we do not consider that it assists him on the facts of the present case. Given the further analysis which we set out

below, we consider that on the present facts the restrictions inherent in the relevant exceptions and the public interest balance are prescribed by law, serve a legitimate aim, and are necessary in a democratic society.

The internal communications exception

17. It was not in dispute that the internal communications exception applied to the requested information. The evidence which we received, relevant to the internal communications exception, did not add significantly to the material before the Commissioner on that topic. The Commissioner analysed the public interest in maintaining the internal communications exception and the balance of public interest arguments in relation to that exception in paragraphs 49-71 of the Decision Notice. Subject to some reservations about the strength of the argument based on the 'chilling effect', which we consider was a little overstated, we agree with his reasoning and with his conclusions, namely, that the public interest in disclosure was not outweighed by the public interest in maintaining the exception, save in relation to item b, because of its impact on collective cabinet responsibility.

The international relations exception

18. The evidence which we received on the public interest in maintaining the international relations exception was more extensive and more powerful than that which was before the Commissioner. We have indicated its nature above. We have no doubt that the international relations exception was engaged.

19. There was an argument before us concerning the scope of the exception. Mr Sinclair drew attention to the precise wording ('disclosure would adversely affect ... international relations') and sought to draw a distinction between disclosure which would annoy other states and thereby harm UK relations with them (which he accepted would engage the exception) and disclosure which would merely weaken the UK's position in international negotiations (which he said would fall outside the exception, since other states would not be likely to complain if their position was strengthened and the UK's weakened).

20. We were not persuaded by Mr Sinclair's argument. On the facts of the present case, a weakening of the UK's position in international negotiations would not be welcomed by certain other developed states, whose national interests are affected by arguments similar to those which affect the UK. More fundamentally we consider that, despite the requirement to read exceptions restrictively, the exception is not limited to disclosure which would harm international relations by annoying other states. The phrase 'would adversely affect international relations' seems to us to encompass the principal type of harm described by the witnesses, namely, the adverse effect on the UK's relations with other states by weakening the UK's bargaining position. We do not consider that the term 'international relations' can properly be confined to how favourably or otherwise other states view the UK; rather, it covers all aspects of relations between the UK and other states or international organisations.

21. We were impressed by the strength of the evidence concerning the harm that would ensue if the requested information were disclosed. On the balance of probabilities, we consider that the UK's international relations would be seriously harmed, to the detriment of the UK and of UK taxpayers.

22. Mr Sinclair strongly pressed the point that the European Commission had chosen to make disclosure of its figures, which he said showed that the UK could do the same. We do not accept his point. The Commission had particular reasons for making that disclosure, despite the potential prejudice to the EU's position by so doing, because there were other policy considerations which were of greater weight. Disclosure by a single state of its own figures is not comparable. No EU state has chosen to make such disclosure.

23. He further emphasized the UK's choice to disclose figures concerning the costs of military operations in Iraq and Libya. We did not find this a sufficiently close analogy to be persuasive.

24. In the event we disagree with the Commissioner's decision to the extent that we consider that insufficient weight was given to the public interest in maintaining the international relations exception in this particular case. In our judgment the public interest in maintaining the exception outweighed the strong public interest in disclosure.

Conclusion

25. In the result, we uphold the Commissioner's decision that DECC acted correctly in not disclosing the requested information, but for slightly different reasons informed by the additional evidence which we received concerning the strength of the public interest in maintaining the international relations exception.

26. In the circumstances it is unnecessary for us to consider the question of aggregation of the public interests in the relevant exceptions.

27. Our decision is unanimous.

28. The Tribunal wishes to record its thanks to the advocates for their considerable assistance at the hearing and to pay particular tribute to Mr Sinclair for the quality and clarity of his submissions. That we have dealt with his submissions relatively briefly, because of the view that we came to on the evidence, is no reflection on their cogency.

Signed on original:

Andrew Bartlett QC
Judge Date: 8 November 2011