



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2011/0156

**ON APPEAL FROM
The Information Commissioner's Decision
No FER0317507 dated 29 June 2011**

**Appellant: MR ROY JONES
(on behalf of Swansea Friends of the Earth)**

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: THE ENVIRONMENT AGENCY

Third Respondent: S I GREEN (UK) LIMITED

Date and place of hearing: on the papers

Date of decision: 27 April 2012

Before

**Anisa Dhanji
Judge**

and

**Elizabeth Hodder and Darryl Stephenson
Panel Members**

Subject matter

EIR regulation 12(5)(e) – whether disclosure would adversely affect the confidentiality of commercial or industrial information; whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Case Law

Coco v A.N. Clark (Engineers) Ltd [1968] FSR 415

Derry City Council v Information Commissioner (EA/2006/0014)

Elmbridge Borough Council v Information Commissioner and Gladedale Group Limited (EA/2010/0106)

HRH Prince of Wales v Associated Newspapers Ltd [2006] EWHC 522

Mersey Tunnels Users Association v Information Commissioner (EA/2009/0001)

Staffordshire County Council v Information Commissioner and Sibelco (UK) Ltd (EA/2010/0015)

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2011/0156

DECISION

The Tribunal allows the appeal and substitutes the following Decision Notice in place of the Decision Notice dated 29 June 2011.

[Signed on original]

Anisa Dhanji
Judge

27 April 2012

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2011/0156

SUBSTITUTED DECISION NOTICE

Dated: 27 April 2012

Public Authority: The Environment Agency

Address of Public Authority: Tyneside House
Skinnerburn Road
Newcastle Business Park
Newcastle upon Tyne
NE4 7AR

Name of Complainant: Mr Roy Jones
(on behalf of Swansea Friends of the Earth)

The Substituted Decision:

We allow the appeal and substitute the following in place of the Commissioner's Decision Notice dated 29 June 2011.

The Tribunal finds that the Disputed Information is not exempt under regulation 12(5)(e) of the Environmental Information Regulations 2004.

Within 20 working days of the Tribunal's determination being promulgated, the Public Authority must disclose the Disputed Information to the Complainant.

Except as set out above, the Commissioner's Decision Notice shall remain in effect.

[Signed on original]

Anisa Dhanji
Judge

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2011/0156

REASONS FOR DECISION

Background

1. This is an appeal by Mr. Roy Jones (on behalf of Swansea Friends of the Earth (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 29 June 2011.
2. The appeal arises from a request for information made by the Appellant to the Environment Agency (the "Agency") under the Environmental Regulations 2004 ("EIR"). The request was for information relating to financial guarantee arrangements put in place by S I Green (UK) Ltd ("Green"), a landfill site operator, as a condition for obtaining a permit to operate a waste landfill site at Cwmrhydycierw Quarry near Swansea.

The Complaint to the Commissioner

3. The Agency refused the request in part and the Appellant complained to the Commissioner under section 50 of FOIA.
4. The Appellant's complaint related to the requests he had made to the Agency on 7 July 2008 and 4 February 2010, respectively. On the Commissioner's advice (for reasons that are not material to this appeal), on 16 September 2010 the Appellant made a fresh request to the Agency for the same information. It is that request that became the subject of the Commissioner's Decision Notice.
5. During the course of the Commissioner's investigation, the Agency disclosed redacted versions of certain information that it had previously withheld. In relation to the remaining withheld information, the Commissioner found that the Agency had properly applied regulation 12(5)(e) of the EIR. The Commissioner recorded a number of procedural breaches in relation to how the Agency had dealt with the request, but did not require any remedial steps to be taken.

The Appeal to the Tribunal

6. The Appellant has appealed to the Tribunal against the Decision Notice. The Tribunal joined the Agency as a second respondent, and granted the application by Green to be joined as a third respondent.
7. All parties requested that the appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could properly be determined without an oral hearing.

8. We have considered all the documents and written submissions received from the parties (even if not specifically referred to in this determination), including the documents contained in the agreed bundle of documents. We have also received certain information on a closed basis, including in particular, the information in dispute (the “Disputed Information”) and the closed statement of Guy Titman dated 24 November 2011.

The Tribunal’s Jurisdiction

9. Regulation 18 of the EIR provides that the enforcement and appeals provisions of the Freedom of Information Act 2000 (“FOIA”) apply for the purposes of the EIR (save for the modifications set out in the EIR).
10. The scope of the Tribunal’s jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
11. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

The Legislative Framework

12. The EIR implements Council Directive 2003/4/EC on public access to environmental information. It creates a duty on public authorities to make environmental information available on request (regulation 5(1)). “Environmental information” is defined in regulation 2(1). To the extent relevant to this appeal, it provides as follows:

"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 –

....

(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;

13. It is common ground between the parties that the information in issue in this appeal constitutes “environmental information” and therefore comes within the scope of the (“EIR”). Information within the scope of the EIR is exempt information under FOIA (pursuant to section 39), and the request must be dealt with under the EIR.

14. As already noted, the Agency relies on the exception in regulation 12(5)(e) of the EIR. This provides as follows:

“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.”

15. If regulation 12(5)(e) is engaged, the information must be disclosed except *“if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”* (regulation 12(1)).
16. Regulation 12(5)(e) does not apply to *“the extent that the environmental information to be disclosed relates to information on emissions”* (regulation 12(9)). There is no suggestion however, that any of Disputed Information relates to emissions.

The Disputed Information

17. The Agency is responsible for granting permits under the Landfill (England and Wales) Regulations 2002 to operate landfill sites. Amongst other things, those applying for permits must demonstrate, in the case of landfill sites with potential long term liabilities, that they have adequate financial provision in place to discharge the obligations of the permit for as long as the landfill site poses a hazard. The required level of financial provision varies from site to site dependent on the circumstances specific to any given site.
18. Financial provision can be made in a number of ways, most commonly by a bond. In the event that any of the events specified by the bond occur, the amount secured by the bond is paid directly to the Agency which can then use the funds to put matters right. There are approximately 800 such bonds in place in relation to different landfill sites around the country.
19. As already noted, the Appellant’s request relates to the financial provision made by Green in respect of the Cwmrhydycierw Quarry landfill site. The Disputed Information comprises the information redacted by the Agency from two specific documents, namely a Performance Agreement and Bond.
20. The Performance Agreement is dated 9 December 2008 and is between Green and the Agency. It records that Green has been granted a permit by the Agency for waste management activity at the Cwmrhydycierw Quarry landfill site, and that in order to meet the requirements of a “fit and proper person”, Green is to make and maintain adequate financial provision in relation to its duties and obligations under the permit which the Agency can access in defined circumstances. In particular, Green is required to enter into a Bond substantially in the form of a draft attached to the Performance Agreement. The Agreement specifies the amount of the Bond for the first year. For subsequent years, the amounts are set out in a schedule to the Agreement to be calculated in accordance with a certain formula. The redacted figures in the Performance

Agreement comprise the bonded sums for the first 6 (operational) years and for the 60 years after-care period and the maximum liability.

21. The Bond is also dated 9 December 2008. It provides for specified amounts to be paid to the Agency upon certain events occurring. The redacted information from the Bond comprises the amount secured for the first, second and third years, and the maximum liability of the surety. This is essentially the same information as has been redacted from the Performance Agreement. In essence, therefore, the appeal relates to a very small amount of information, namely the amount of the bonded sum Green is required to secure for each year of operation of the landfill and going forward through a period of 60 years after operations terminate.

Issues

22. The first issue before the Tribunal is whether regulation 12(5)(e) is engaged at all? If not, then since no other exception is relied on, the Disputed Information must be disclosed.
23. In order for regulation 12(5)(e) to be engaged, the following questions must be answered affirmatively:
 - (a) is the information commercial or industrial in nature?
 - (b) is the information subject to a duty of confidence provided by law?
 - (c) is the confidentiality necessary to protect a legitimate economic interest?
 - (d) would that confidentiality be adversely affected by disclosure?
24. The Appellant does not dispute that the information is commercial or industrial in nature. The other questions (b) – (d) however, are in dispute.
25. If regulation 12(5)(e) is engaged, then the next issue is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
26. In a more shorthand form, there are therefore two issues before the Tribunal, namely, the confidentiality issue and the public interest balance issue.

Findings

The Confidentiality Point

The Respondents' Arguments

27. Although the different respondents have stressed different points, there is no material difference in their respective positions and for convenience, their arguments will, for the most part, be dealt with together without distinguishing between the respondents. We have also not attempted to set out every argument made by the parties (although we have considered them all), just those that seem to us to be their main points or most material to the issues in this appeal and which assist to explain our findings.

28. The respondents say that the Disputed Information is subject to a duty of confidence provided by law because the information was created and provided in circumstances giving rise to an obligation of confidence. They say that there was an expectation that once the permit was granted, the information that had been provided by Green when applying for the permit, would remain confidential, and that in fact, Green had requested the Agency to keep the information confidential. The respondents say that the Agency has accepted, in relation to all landfill operators, that their financial information is to be kept off the public register and not made available to the public. This is because the operators consider that the information is essential commercial information that would be of considerable value to their competitors. They say, in this regard, that the Agency's approach is the same as that taken by regulators in other sectors in which operators are obliged to give financial information.
29. Second, they say that the Disputed Information, is neither trivial, nor widely known, and has the necessary quality of confidence about it. The Performance Agreement and the Bond contain the agreed costs that were arrived at after detailed negotiations between Green and the Agency. They say that the waste management industry is a very competitive business operating in the private sector and that disclosure of the Disputed Information may provide sufficient information to competitors who, given a certain amount of industry knowledge of this market (in particular gate prices and the usual costs of a landfill site) could estimate the cost and liabilities of this particular site, and perhaps even the profit margin.

The Appellant's Arguments

30. The Appellant says that the Disputed Information is not confidential and that in fact, Green had not asked the Agency to keep the information confidential, and that the Agency had not agreed to do so. He refers to the Pollution Prevention and Control (England and Wales) Regulations 2000 (the "PPC Regulations") which enables landfill operators to apply for any information they provide to the Agency to be excluded from the public register on the grounds that it is commercially confidential. The Agency has to determine any such application and there is a right of appeal to the Secretary of State against the Agency's decision. The Appellant says that as shown by the Agency's Notice of Determination dated 15 February 2006, the application made by Green and granted by the Agency was in respect of a document referred to as the "Expenditure Plan" which is different from the Performance Agreement and Bond. The Appellant says that by omitting to register the Disputed Information as confidential when it considered the terms of the permit, it is clear that the Agency itself did not recognise its allegedly confidential nature.
31. Second, the Appellant says that the redacted figures are based not only on the calculated costs of running the site, but also likely liabilities unique to the site that could arise if a trigger event occurs, such as the operator becoming insolvent. Since the redacted figures do not represent the cost of the running the site, it is difficult to see how revealing those figures would itself, without any other context, enable a competitor to work out the costing for the site.

32. He also says that the information cannot be considered to be “imparted”. He says that the Agency had very considerable involvement in determining the amount of the financial provision and that this followed long and detailed discussions with the result that the overall level of the financial provision cannot be regarded as being Green’s exclusive financial information.

Findings

33. To the extent this is relevant, we find that the Disputed Information was not covered by Green’s application under the PPC Regulations 2000 for commercial confidentiality. Confidentiality was sought for the Expenditure Plan. We agree with the Appellant that the Bond and Performance Agreement are different documents setting out different information. We do not consider there was any proper basis for the Commissioner to have found, as he did, that the confidentiality sought by and agreed to by the Agency in respect of the Expenditure Plan, applied to the Bond and Performance Agreement as well. We note that the Commissioner has now accepted, in his Reply dated 19 August 2011, that the Agency’s determination on Green’s application referred only to the Expenditure Plan and not to the Performance Agreement or Bond. Although the Commissioner goes on to submit that due to the nature of the Disputed Information, it is nevertheless reasonable to conclude that the information is also subject to a duty of confidence, we do not consider that it can be said to follow inevitably from Green’s application and the Agency’s acceptance as to the confidentiality of the Expenditure Plan that any other information submitted was also to be treated as confidential by virtue of an application dealing with the confidentiality of the Expenditure Plan.
34. The Appellant’s argument is essentially that since Green did not apply for the Performance Agreement and Bond to be kept confidential, there can have been no expectation that the information would be held in confidence. We do not consider that this factor is determinative as to the position of the Performance Agreement and Bond. Information can be subject to a common or duty of confidence quite apart from the operation of any other regulatory regime.
35. The well-established test in **Coco v Clark** is that, apart from contract, for a common law breach of confidence claim to succeed, three elements must be present:
- (a) the information itself must “have the necessary quality of confidence about it;
 - (b) the information must have been imparted in circumstances importing an obligation of confidence; and
 - (c) there must be an authorised use of that information, to the detriment of the party communicating it.
36. In the present case, we consider that the main hurdle for the respondents is (b). On the evidence before us, we do not see that it can be said that the information was imparted in circumstances importing an obligation of confidence. That element implies the communication of the information by one party to the other. The evidence in the present case, however, is that the

information came into existence through a process of negotiation between the parties.

37. This is clear from the second respondent's own evidence. The Witness Statement of David Andrew Peter Balmer, on behalf of the second respondent, explains that determining the adequate level of financial provision is an important function of the Agency. The financial provision must be established before a permit is granted and it must be adequate for an operator to discharge the obligations of its permit for as long as the landfill poses a hazard. He explains that once a proposal for financial provision is received, the Agency considers the costs in a very detailed manner to assess their adequacy. The assumptions made by the operator are closely examined by reference to a number of different criteria. He explains that the process is an iterative one, with exchanges taking place between the applicant and the Agency, until a mutually agreed position is reached. It seems to us that in those circumstances the Disputed Information was created by the Agency and Green and not provided by Green to the Agency.
38. We have found support for our finding in this regard in the Tribunal's decision in **Derry City Council v Information Commissioner**. That case was decided under the provisions of section 41 of FOIA, rather than under the EIR. We recognise that section 41 refers more explicitly to information being "obtained" by the public authority from any other person. That is not the language of regulation 12(5)(e). However, we consider that the same element is imported by the incorporation of the common law test of breach of confidence into regulation 12(5)(e) of the EIR. In short, we find that the second element of the test in **Coco v Clark** has not been met and the information is not subject to a duty of confidence provided by law.
39. It follows that we find that regulation 12(5)(e) is not engaged, that the information must be disclosed, and the appeal dismissed. On this basis we do not need to go on to consider whether the confidentiality is necessary to protect a legitimate economic interest or whether the confidentiality would be adversely affected by disclosure.
40. We also do not need to consider the public interest test. However, for completeness, and in the alternative, even if regulation 12(5)(e) was engaged, we would find that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. We have set out below our reasoning on that issue.

The Balance of Public Interest

The Respondents' Arguments

41. The respondents have made a number of arguments as to why the public interest balance favours maintaining the exception. As noted in paragraph 29, they say that disclosure of the Disputed Information could provide sufficient information to competitors who, with a certain amount of knowledge of this particular market (in particular gate prices and the usual cost of a landfill site) would be able to estimate the cost and liabilities of this particular site, and

perhaps even the profit margin. This could lead to competitors lowering their gate prices to undercut Green and even deliberately driving it out of business.

42. They say that ensuring that Green is not damaged by its competitors is not just in Green's interest, but that it is in the public interest as well. Green has only one site in England and Wales and it is uniquely vulnerable, therefore, to local and national competitors, many of whom operate several sites within the UK and internationally and would be able to undercut Green. If Green were to be put out of business, then the conditions that have been put in place for the remediation of the site as part of Green's permit will not come into place. There would be a delay in remediating the site, dependant on an alternative operator coming forward to seek a permit. It is in the public interest, therefore, for Green to continue in business.
43. They also say that a significant element to be weighed in the public interest balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. Relying on the case of **HRH Prince of Wales v Associated Newspapers Limited**, they say that it is in the public interest that commercial confidences are protected so that the interests of UK companies are not unnecessarily compromised, and that competition is not undermined.
44. The respondents say, in addition, that if all operators had to disclose detailed information about their anticipated costs and expenditure, that would be particularly damaging to small and independent operators in the landfill sector, who cannot spread their costs across a number of sites and it would make those operators vulnerable to larger operators and could ultimately lead to a reduction in competition in the market. It could also lead to operators going out of business, leaving incomplete landfill sites, increasing the risk of harm to the environment, and requiring the regulator to step in.
45. In addition, the respondents say that disclosure of the information would result in operators becoming more reluctant to provide very detailed figures about their costs and expenditure, to answer questions and to revise figures, making the Agency's regulatory job more difficult and potentially impacting on the adequacy of the financial provision.
46. Finally, the respondents say that the public interest about the financial provision arrangements for the site has largely been met by disclosure of the redacted documents.

The Appellant's Arguments

47. The appellant says that the Agency has a statutory duty to ensure that the level of the financial provision is adequate to guarantee the safety of the public and the environment in the event of an emergency. He says that the public is entitled to know the extent of the level of protection for the site and to know that the Agency has properly fulfilled its statutory duty.
48. As noted in paragraph 31, the appellant also disputes that any meaningful conclusions could be drawn by potential competitors from mere knowledge of the overall sum of the financial provision. He says that the overall level of the

financial provision is based on what it costs to run the site and the likely costs that would arise in the event of a trigger event such as insolvency or the need for corrective or remedial works. While the financial provision would have been arrived at taking into account what it costs to run the site, it would not be possible to identify those costs in the final sum. There are many factors that would likely have been taken into account, particularly given that the site in question is a difficult site lying below the water table, and the weight accorded to the different factors could not be known from mere knowledge of the overall sum and that this, too, makes it unlikely that any meaningful conclusions could be drawn by competitors.

49. The appellant also says that what is in issue is not the financial survival of a small operator with one site. He says that Green is a wholly owned subsidiary of the Green Holding Group, which manages over one million tons of waste per year. It is a leader in the field of waste management in Europe and is therefore well placed to respond to any competitive threats.

Findings

50. In favour of maintaining the exception, we accept that the waste management industry operates in a competitive market and that financial information on the operating and other costs of an operator is of value to its competitors.
51. We also accept that there is an in-built public interest in maintaining commercial confidentiality so that the interests of UK companies are not unnecessarily compromised, and that competition is not undermined.
52. However, the respondents' submissions are premised largely on the assumption that the Disputed Information, if disclosed, would reveal useful information about Green's operating costs in relation to the landfill site in question. We find that the evidence before us falls far short of supporting this assertion. The Disputed Information comprises the financial provision quantum. The evidence before us does not show that equipped with this information, competitors would know its operating costs associated with the site or be able otherwise to damage Green's economic interests in any material way.
53. In reaching this finding we have given careful consideration to the evidence in the closed witness statement of Guy Titman, in particular. We are of course somewhat constrained in what we can say in an open determination about the closed material, but we note that his evidence is not that disclosing the amount of the bond is itself the problem. Rather, the suggestion is that one can somehow reverse engineer from the bond amount to arrive at information about Green's operating costs.
54. However his evidence does not show (as opposed to assert) that that is the case. The very purpose of the bond is to make financial provision for dealing with certain risks if they were to materialise. The cost of doing so does not, on the face of it, depend just or even primarily on how much it costs an operator to run a site. There is no evidence before us, for instance, to indicate that there is a known formula that would allow anyone with knowledge of the bonded sum to be able to arrive at any meaningful information about Green's operating costs,

profits, or any other information that would be damaging to it if it fell into the hands of a competitor.

55. We have also given careful consideration to the evidence in the Witness Statement of Mr Balmer. He maintains that disclosure of the annual figures in the Bond and Performance Agreement would enable competitors to use the Agency's standard spread sheet to back calculate and work out "reasonably accurately" the make-up of Green's costs. Again, we are not satisfied that the witness has shown that that would indeed be the case. The evidence is that the financial provision figure takes into account a very large number of variable costs concerning the various specified trigger events and also factors in post-closure contingency costs. We are far from satisfied that a figure thus arrived at would enable a back calculation to be made, stripping out all these various factors to arrive an operator's costs.
56. The factors in favour of disclosing the information are not in dispute and have been helpfully summarised by the Commissioner in the Decision Notice. He notes in particular that the purpose of the bond is to provide the public with protection should things go seriously wrong. Disclosing the information would allow the public to understand the level of protection that is being provided to them and for them to feel confident that the provision is sufficient to deal with potential difficulties. There is of course, also the more general but also clear public interest in the Agency being open, transparent and accountable regarding its regulation of a particular operator. The disclosure of the information will enable and enhance public understanding and participation in the public debate about the site.
57. We have also taken into account the witness statement of R.W.J. Davies, a resident of the area where the site is located and a campaigner for Swansea Friends of the Earth on water, industry and pollution issues.
58. We accept that there is a strong public interest in the protection that the financial provision provides in relation to this site if an event were to occur threatening the safety of the public or the environment.
59. We bear in mind that, as has already been noted, the EIR contains a presumption in favour of disclosure. We also bear in mind that the Council Directive 2003/4/EC on public access to environmental information which we have referred to earlier and which the EIR implements, sets out, in regulation 1 the general public interest factors in favour of disclosure of environmental information, namely that disclosure of environmental information contributes to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision making and eventually to a better environment.
60. Although the respondents say that the public interest in the financial provision arrangements for the site has largely been met by disclosure of the redacted documents, the public interest in the level of the financial provision has clearly not been met.

61. We find that in all the circumstances of this case, the public interest in maintaining the exception does not outweigh the general and specific public interest considerations referred in favour of disclosure. For all these reasons we find that even if regulation 12(5)(e) is engaged, the Disputed Information must be disclosed.
62. We emphasise that our decision is based on the evidence before us and may be different, therefore, in another case on different evidence.

Decision

63. This appeal is allowed. Our decision is unanimous.

[Signed on original]

Anisa Dhanji
Judge

27 April 2012



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

Appeal No: EA/2011/0156

RULING ON APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. Mr Roy Jones (the “Appellant”) on behalf of Swansea Friends of the Earth, appealed against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 29 June 2011.
2. The appeal arose from a request for information made by the Appellant to the Environment Agency (the “Agency”) under the Environmental Regulations 2004 (“EIR”). The request was for information relating to financial guarantee arrangements put in place by S I Green (UK) Ltd (“Green”), a landfill site operator, as a condition for obtaining a permit to operate a waste landfill site at Cwmrhydycierw Quarry, near Swansea.
3. The Agency refused the request in part and the Appellant complained to the Commissioner under section 50 of the Freedom of Information Act 2000 (“FOIA”). During the course of the Commissioner’s investigation, the Agency disclosed redacted versions of certain information that it had previously withheld. In relation to the remaining withheld information, the Commissioner found that the Agency had properly applied the exception in regulation 12(5)(e) of the EIR to refuse the request.
4. The Appellant appealed to the First-tier Tribunal against the Decision Notice. The Agency was joined as the Second Respondent, and Green was joined as the Third Respondent. At the request of all parties, the appeal was determined on the papers without an oral hearing.
5. The First-tier Tribunal held that the exception in regulation 12(5)(e) was not engaged. In the alternative, it found that even if the exception was engaged, in all the circumstances of the case, the public interest in maintaining the exception did not outweigh the public interest in disclosing the information.

The Scope of the Tribunal's Consideration of an Application for Permission to Appeal

6. Both the Agency and Green have applied under Rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the "Rules") for permission to appeal against the First-tier Tribunal's decision.
7. Rule 43 provides that on receiving an application for permission to appeal, the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44. Rule 44(1) provides that the First-tier Tribunal may only undertake a review if it is satisfied that there was an error of law in the decision.
8. If the First-tier Tribunal decides not to review the decision, or reviews the decision and decides to take no action, the First-tier Tribunal must consider whether to give permission to appeal to the Upper Tribunal. An appeal to the Upper Tribunal lies only on a point of law.
9. The first question therefore, is whether any of the grounds raised by the Second and Third Respondents disclose an error of law in the First-tier Tribunal's decision.

Was There an Error of Law in the Tribunal's Decision?

10. The Second and Third Respondents have lodged extension submissions in support of their respective applications, totalling some 32 pages. It is not practicable to set out and deal with all their arguments in this ruling. It is also not necessary to do so because there is at least one point which both Respondents have made which I consider is arguable. This has to do with whether the First-tier Tribunal correctly applied the test in **Coco v. Clark**.
11. The First-tier Tribunal found that disputed information did not meet the second element of the **Coco v. Clark** test. The information was not imparted in circumstances importing an obligation of confidence because the evidence indicated that the disputed information was created by both the Agency and Green and not provided by Green to the Agency.
12. Both Respondents say that the First-tier Tribunal was wrong in law in this finding. I am not satisfied that there was an error of law in the First-tier Tribunal decision. The First-tier Tribunal's decision was based on the evidence before it as to how the disputed information came into being and on a straightforward interpretation of the test in **Coco v Clark**. I do not consider, therefore, that the First-tier Tribunal should review the decision under Rule 43 of the Rule.
13. Nevertheless, I consider that permission to appeal should be granted. The grounds of appeal contain cogent arguments and raise an important point of law of general application. There is considerable merit, therefore, in the issue being considered by the Upper Tribunal.

Grant of Permission

14. I give permission to the Agency and Green to appeal to the Administrative Appeals Chamber of the Upper Tribunal.
15. Permission is granted on all grounds advanced, not limited to the point in paragraphs 10-13, above. The various grounds raise closely inter-related issues, and subject to any directions in this regard made by the Upper Tribunal, I consider that it would not be appropriate to limit the grounds in this grant of permission.
16. Under Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, the Agency and Green have one month from the date this Ruling is sent to them, to lodge their appeal with:

The Upper Tribunal (Administrative Appeals Chamber)
5th Floor, Rolls Building,
7 Rolls Buildings
Fetter Lane,
London, EC4A 1NL

17. The First-tier Tribunal's determination dated 27 April 2012 contained a direction for the disputed information to be disclosed within 20 working days of that determination being promulgated. That direction is stayed pending the outcome of the appeal to the Upper Tribunal.

[Signed on original]

Anisa Dhanji
Judge

25 July 2012