IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0202

BETWEEN:

PROFESSOR ROSS D. KING

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

CEREDIGION COUNTY COUNCIL

Second Respondent

Before

Melanie Carter
(Judge)

and

Anne Chafer

Nigel Watson

The Tribunal allows the appeal and substitutes the following Decision Notice in place of the Decision Notice dated 28th August 2012.

First-tier Tribunal (Information Rights) **Appeal Number: EA/2012/0202**

SUBSTITUTED DECISION NOTICE

Dated: **28 August 2012**

Public authority: **Ceredigion County Council**

Address of Public authority: **Penmorfa**
Aberaeron
Ceredigion
SA46 0PA.

Name of Complainant: **Professor Ross King**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Decision Notice 28 August 2012 is substituted by the following:

1. the Tribunal finds a breach of Environmental Information Regulations 2004 in that the following information falling within the letter of request from Professor King, dated 22 February 2011, was held by the Council and should, in accordance with his rights under the Regulations have been provided to him:

2008 - Outline Design – RHDHV Project Nr 9S4194

- Local bathymetric and topographic surveys commissions as part of the Council's programme of regular beach monitoring (surveys undertaken in 2003 by Longdin and Browning)

- Beach sediment samples collected from Borth beach (pdf format in HR Wallingford Report X617)

2009/10 – Detail Design – RHDHV Project 9V5090

- February 2010 Topographic survey data provided by Landmark Surveys (Wales) Ltd

- April 2010 Bathymetric survey by Coastline Surveys

- June 2010 Factual Geotechnical Report by CJ Associates Geotechnical.

The Council is required to produce this information to Professor King within 28 days of the date of this Substituted Decision Notice.

Dated this twenty-ninth day of April 2013

[Signed on the original]

Melanie Carter
Judge

REASONS FOR DECISION

Introduction

1. Ceredigion County Council ("the Council"), over a number of years, built a Coastal Defence System ("the Scheme") at Borth, near Aberystwyth, to replace the defences which had been in existence since the 1960s, with the aim of reducing future flooding and coastal erosion. On 20 July 2010, Professor King, the Appellant wrote to the Council as follows in relation to the Environment Statement submitted with the Borth planning application:

   > *"…The Environment Statement makes many statements which are not supported in the documentation, for example statements about the results of modelling. I would like to request access to this primary data so that I can judge its [sic] correctness of these statements."*

2. The Council's eventual refusal on 23 February 2011 was on the basis that the cost of collating and providing the requested information would be in excess of £2,000 and "manifestly unreasonable". The Council's refusal was therefore on the basis of the exception to the duty of disclosure as set out in regulation 12(4)(b) of the Environmental Information Regulations 2004 which provides –

> *"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –*
>
> *(a) ….*
>
> *(b) the request for information is manifestly unreasonable."*

3. The Appellant complained to the Commissioner who in turn upheld the Council's refusal in a Decision Notice dated 28 August 2012. The Council had told the Commissioner that the raw data falling within the scope of the Appellant's request was held by various external companies in a variety of locations; a variety of formats/software packages and was un-indexed. Further, it held a significant amount of primary data under licence from a variety of organisations such as the Environment Agency, the Met Office etc.

4. In support of its application of regulation 12(4)(b), the Council contacted the third party company responsible for producing a significant proportion of the raw data and asked it to provide an estimate of the amount of time it would take to respond to the request. The third party company advised that it had worked with the Council on the Scheme for over 12 years and had undertaken a number of different projects for the Council during that period. It advised that it held over 40,000 files consisting of approximately 150Gb of data in relation to its current assignment alone which related to the detail design and construction phase undertaken during the last three years. Further, it advised that it would take, on average, 30 seconds to access, open, categorise and collate each of the 40,000 files. Accordingly, it argued that this exercise (covering only the last three years) would take 80 days at a cost of £80,000.

5. The Commissioner accepted the explanation provided by the Council and the third party and found that regulation 12(4)(b) was engaged. The Commissioner went on to consider the public interest test. Although he accepted that the matter was finely balanced; he concluded that the test favoured maintaining the exception due to the strong public interest in a public authority being able to carry out its obligations without the disruption that would be caused by compliance with this request.

6. The Appellants grounds of appeal are that:

a) *He had not asked that the data be indexed, categorised (as the Council insisted it would have to be);*

b) *He had only requested information about the defence scheme that was built, not ones that were only considered in planning;*

c) *He disputed the estimate of the time and cost of providing the information. He asserted that to provide a copy would simply be a matter of a few hours work for a professional data scientist and £40 for a hard drive*

d) *That the public interest balancing test had been incorrectly concluded. He claimed that the Borth's sea defences cost a very large amount of money (£13.5 million) and they have not performed as predicted in the planning application.*

7. The Council in response to the appeal argued that:

a) The data requested was not held; this was on the basis, it was argued, that under the contract ("the contract") governing its relationship with its main contractor Royal Haskoning, ("RH") the Council had no right to the primary data which was held by RH or subcontractors. It drew the Tribunals' attention to certain paragraphs of the contract and argued that the Council only had a right to access to the reports which were the specific deliverables under the contract.

b) in the alternative, if the data was held on its behalf:

i. certain of it was excepted from disclosure under regulation 12(5)(e) (commercial interests)

ii. in any event, the cost of compliance would be "manifestly unreasonable" and therefore the Council was not under any obligation to disclose further to regulation 12(4)(b).

Issues for the Tribunal

8. The essential issues before the Tribunal were therefore:

a) Does the Council hold the data requested?

b) Whether the commercial interests exception under regulation 12(5)(e), in relation to Category 1 data is engaged (that being the category of information held under commercial licence)?

c) Whether regulation 12(4)(b) is engaged – was the cost of compliance manifestly unreasonable?

d) In relation to each exception, where does the balance of public interest lie – in favour or against disclosure?

Evidence

9. The Council provided a witness statement from M. J. Newman, the Technical Director for Rivers, Deltas and Coasts for RH. In his witness statement he referred to the four categories of information relevant to the request:

> *"Category 1 – Data purchased by the Council or Royal Haskoning and held or used under licence (for example, data purchased by either the Council or Royal Haskoning and used under licence from organisations such as the Met Office, the Environment Agency, the British Geological Society and others). The witness advised that "…the terms of the licences under which this data has been supplied generally prohibit the Council from supplying this data to others. However, all of this data are freely (but not necessarily free of charge) available to the applicant directly…";*
>
> *Category 2 - Private and confidential data (for example, internal costs, fees etc);*
>
> *Category 3 – Commercially sensitive data (for example, procurement details, tender evaluations and contract management; and*
>
> *Category 4 – Basic and unrestricted data."*

10. The witness also provided a chronology of the work undertaken by RH in connection with Scheme from 2000 and a description of the category of data held by it or subcontractors, as follows:

"Borth Coastal Study

- *No modelling work was undertaken*

- *Primary data used was predominantly category 1 data*

Multi-Purpose Reef Enabling Study

- *The modelling used a sub-contractor's own digital models which were not made available to Royal Haskoning and the sub-contractor has ceased trading*
- *Primary data used was category 1 and 4 data*

Borth Strategic Appraisal

- *No modelling work was undertaken*
- *Primary data used was category 1 and 4 data*

Outline Design

- *Primary computational modelling work was undertaken during this stage*
- *Primary data used was category 1 and 4 data*

Detail Design

- *Primary data used was category 1 and 4 data"*

Tribunal's conclusions

Scope of the request

11. The Tribunal was of the view that the data referred to as Categories 2 & 3 by Mr Newman was not, on the face of it, "primary data" underpinning the Environmental Statement and therefore did not fall within the scope of the request. Thus, the live issues, in the Tribunal's views related to Categories 1 & 4.

What information is held?

12. The question of what data is held is essentially one of fact and where there is any dispute it is to be resolved on the balance of probabilities. In this case, all data is in reality either held by RH or by the subcontractors. The issue therefore is whether this data is held by those companies on behalf of the Council, in which case the Council would be deemed to 'hold' the data. In asking itself whether the data is held on behalf of the Council, of primary relevance is the question of control and in this particular case, right of access to that data.

13. The Commissioner drew the Tribunal's attention to paragraph X9.1 of the contract which provides for the Second Respondent to own "the Consultant's rights over material prepared for this contract by the Consultant". The Commissioner took a neutral approach to this provision indicating that it could be interpreted a number of ways.

14. The Council provided written submissions arguing that clause X9.1 should be interpreted narrowly and that the provision reasonably interpreted implied there would have "been an intermediate stage between the collection of the "raw or primary data" and its conversion, through interpretation and organisation into "material prepared" or "the deliverables"/reports which is what the consultants were contracted to produce". The Council therefore maintained its position that it only had a right to the deliverables/reports and none of the primary data which was the subject of the request.

15. The Tribunal interpreted clause X9.1 of the contract between the Council and RH as providing a right of access for the Council not just for the deliverables/output reports, but also the raw or primary data created for the purpose of the contract; to include such data commissioned from sub-contractors for the purposes of the contract (there being provision in the contract which requires RH to contract on equivalent terms to the contract with the Council). The Tribunal did not agree with the Council, forming its view on a plain English interpretation of the wording of clause X9.1 such that "material prepared for this contract" would include primary data (that being considered a form of "material") created for the purposes of the contract (creation of data being, in plain English, included within the preparation of data). There did not appear to the Tribunal to be any compelling or logical reason for the narrower interpretation argued for by the Council.

16. The Tribunal having formed a view on the effect of the contract, then analysed the different types of data to see which might be said to be held by RH on behalf of the Council. It formed the view that Categories 1 & 4 were to the extent set out below held by the Council.

Category 1 data held: Commercial interests exception

17. With regard to Category 1, the Commissioner argued that as the Tribunal had been told that some of this information may have been held on licence owned by the Council, this ought therefore, (under clause X9.1 of the contract), to be viewed as held by RH on behalf of the Council and therefore as held by the Council itself. The Tribunal accepted that this information was likely therefore held by the Council.

18. However, it noted that the Council had, during the course of these proceedings, sought to rely upon the exception which relates to commercial interests (regulation 12(5)(e)). This provides that the duty to disclose may not apply (subject to the public interest balancing test) if "*the confidentiality of commercial or industrial information were such confidentiality is provided by law to protect a legitimate economic interest".*

19. The Tribunal noted that the Council, having raised this exception in the pleadings in this appeal, was entitled to rely upon this even at this late stage. Regulation 12(5)(e) was engaged given that the information was confidential in the sense that its use, including disclosure, was restricted under licence from commercial entities who, it was submitted, had inevitably incurred costs in the gathering and commercial sale of this information.

20. Neither the Commissioner nor Professor King had addressed the issues relevant to this exception in their written submissions in response. However, the Tribunal proceeded on the basis that similar public interest factors in favour of disclosure as raised in relation to regulation 12(4)(b) would apply. These were set out in summary in the Decision Notice at paragraphs 36-38 and were essentially that there had been a very large sum of public money spent on the Scheme which had only partially been successful, that there had been a high degree of public interest manifested through consultations and that there had been possible alternatives to the Scheme. Moreover the Scheme had, it was said, in and of itself caused environmental damage. This called for accountability and transparency on the part of the Council and therefore for disclosure of the information requested.

21. Against disclosure, the Council raised the commercial prejudice which would follow if information provided under licence were to be freely distributed. The Tribunal accepted that there was a self evident likelihood of such prejudice and was satisfied that there would be a public interest in the terms of any licence with those bodies listed under Category 1, being upheld. It also noted that this information would be

freely available to Professor King and any other member of the public in any event (albeit in some cases at a limited cost). As such, the public interest in disclosure was correspondingly and significantly weakened. Overall, even bearing in mind the presumption in favour of disclosure under the Regulations, the Tribunal considered the balance of public interest was, given the prejudice to the entities from whom information was given out on licence, against disclosure.

Category 4 information held: "manifestly unreasonable" exception

22. Mr Newman had told the Tribunal that in relation to the Multi-Purpose Reef Enabling Study, the sub-contractor in question which held the Category 4 data, had ceased trading (this data not having been provided to RH) and finally that in relation to the Borth Strategic Appraisal, the Category 4 data comprised consultation responses (which the Tribunal did not interpret as constituting primary data within the meaning of the original request).

23. Thus, the Tribunal was of the view that only the Category 4 data in relation to the Outline Design and Detail Design Projects is held by RH on behalf of the Council. The Tribunal noted that this Category 4 data "prepared for the purposes of the contract" for these two Projects consisted of:

    i. Local bathymetric and topographic survey data

    ii. Geotechnical investigation data, and

    iii. Beach sediment sampling

24. The Tribunal required clarification with regard to the estimate provided by RH for providing the identified Category 4 primary data underlying the Environment Statement to the planning application. In response, the Council sent in a further witness statement from Mr Newman of RH. The contractor explained that only data in relation to paragraph (i) above is held digitally. The geotechnical investigation data, which includes the beach sediment sampling, were recovered under marine licence, retained only for a limited period after testing before being returned to site. As such the data was now unavailable.

25. Thus, the remaining available data held within Category 4 was:

2008 – Outline Design – RHDHV Project Nr 9S4194

- Local bathymetric and topographic surveys commissions as part of the Council's programme of regular beach monitoring (surveys undertaken in 2003 by Longdin and Browning)

- Beach sediment samples collected from Borth beach (pdf format in HR Wallingford Report X617)

2009/10 – Detail Design – RHDHV Project 9V5090

- February 2010 Topographic survey data provided by Landmark Surveys (Wales) Ltd

- April 2010 Bathymetric survey by Coastline Surveys

- June 2010 Factual Geotechnical Report by CJ Associates Geotechnical.

26. The witness went on to say that in relation to the remaining data which the Tribunal had indicated in its view was held on behalf of the Council and to which the Council had a right of access, the effort and associated cost or retrieval/provision was significantly reduced. It was now estimated that all of this data could be accessed and copied onto a DVD by a technician in about 2 hours, at an approximate cost of £100.

27. In light of this the Council accepted that this estimate would not amount to compliance that could be categorised as "manifestly unreasonable" within the terms of regulation 12(4)(b). However, the Council pointed out that dealing with the complaint to the Commissioner and these proceedings had taken upwards of 100 officer hours (in addition to which there were payments to be made to the contractor dealing with this). This was considered a "wholly disproportionate burden on the Council which is manifestly unreasonable".

28. The Commissioner responded to point out that the latter cost could not be included within any calculation for the purposes of whether compliance with a request would be "manifestly unreasonable" under regulation 12(4)(b). The Tribunal agreed with this approach and held that compliance with the request insofar as relating to the following information was not excepted under regulation 12 (4)(b).

Conclusion

29. The Tribunal found that the Decision Notice issued by the Commissioner had been wrong in law.

30. As set out above, the Tribunal held that certain Category 1 information was held on behalf of the Council but that the commercial interests exception applied and was not therefore disclosable.

31. The Tribunal decided in light of its findings above, that the information identified in Mr Newman's second witness statement as falling within Category 4 and available to RH (as set out in the paragraph 25 above), was held by RH on behalf of the Council. It concluded that, given that the cost of the Council obtaining copies of this data from RH was no more than £100, it could not be argued that regulation 12(4)(b) was engaged. In these circumstances, it was not necessary to consider the so-called public interest balancing test and the information was disclosable.

32. Thus, the Tribunal upheld the appeal and substituted the Decision Notice set out at the beginning of this decision for that originally issued by the Commissioner. The Council is thereby required to provide the specified information to Professor King within 28 days of this decision.

[Signed on the original]

Melanie Carter
Judge

29 April 2013