



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

Case No. EA/2010/0047

**ON APPEAL FROM:
Information Commissioner
Decision Notice ref FER0168409
Dated 25 January 2010**

Appellant: Department of Energy & Climate Change

Respondent: Information Commissioner

Determined on papers

Date of decision: 4 October 2010

Before

HH Judge Shanks

Subject area covered:

The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009
Rules 10 and 17

Case referred to:

Royal Mail Group Ltd v The Information Commissioner EA/2010/0005 8.9.10

Ruling

The Tribunal:

- (1) orders the Appellant to pay the Commissioner the sum of £4,347.50 in respect of costs under rule 10(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009;
- (2) consents to the withdrawal of the appeal pursuant to rule 17(2) of those Rules.

Reasons for ruling

1. This appeal arose out of a request made by Dr David Lowry on 24 February 2007 under the Environmental Information Regulations 2004 for (inter alia) "...reports and advice prepared in association with the [2006] Energy Review ... by ... consultants contracted by the DTI or other government departments ... on the costs of prospective new nuclear plants and the full management of radioactive waste arising and decommissioning..." The DTI (who have been succeeded by the DECC in relation to this appeal) refused to supply the information relying (again inter alia) on regulation 12(4)(e) (which protects "internal communications") and regulations 12(5)(e) and (f) (which are designed to protect the confidentiality of commercial information and the interests of third parties who voluntarily supply information to public authorities).
2. Following an internal review which went against him Dr Lowry applied to the Information Commissioner on 28 June 2007. By a decision notice dated 25 January 2010 the Commissioner largely found against the Department and ordered disclosure of a substantial amount of information. He found in particular that in relation to six "independent reports" the Department could not rely on regulation 12(4)(e) because they were not "internal communications" (see para 80 of decision notice); he also found that it could not rely on regulations 12(5)(e) and (f) because of regulation 12(9), which excludes reliance on those regulations in the case of

environmental information “which relates to information on emissions” (see para 67 of decision notice).

3. On 22 February 2010 the DECC appealed against the decision notice. Directions were given by the Tribunal on 20 April and on 5 May a hearing was fixed for 7 and 8 September 2010.
4. On 26 July 2010 in accordance with those directions the DECC served a witness statement from Mark Higson, a senior civil servant and CEO of the Office of Nuclear Development. Mr Higson’s statement made clear that the appeal would only be proceeding in relation to certain parts of a particular report submitted to the Government by Morgan Stanley on 30 June 2006 and that the balance of the information requested either had been or would be supplied to Dr Lowry. He stated that the parts of the Morgan Stanley report which the Department sought to withhold concerned the views of private energy companies provided at confidential interviews regarding financing and investment issues relevant to the development of new nuclear power stations and he put forward a clear and determined case for withholding those parts of the report under regulations 12(4)(e) and (5)((e) and (f). The parties prepared for the hearing on this basis and substantial skeleton arguments were served on 2 September 2010 addressing the issues arising under those regulations and under regulation 12(9).
5. At 1252 on 6 September 2010, the day before the scheduled hearing, the DECC gave written notice of withdrawal of their case under rule 17(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Because the Commissioner indicated that he may wish to make an application for costs against the DECC and rule 10(4) suggests that an application for costs can only be made “...during the proceedings”, I withheld consent to the withdrawal under rule 17(2) until any application for costs had been dealt with. The Commissioner duly made a written application for costs on 20 September 2010 and the DECC responded on 1 October 2010. I have considered the matter on the basis of the evidence and representations contained in those documents.
6. The application for costs is made under rule 10(1)(b) which provides:

The Tribunal may make an order in respect of costs ... if the Tribunal considers that a party has acted unreasonably in bringing ... or conducting the proceedings

It is clear that I can only make an order against DECC if I consider that it has acted unreasonably in bringing or conducting the appeal and that, even if I do so consider, I still have a discretion as to whether to order any costs or not and, of course, on quantum. I have been helpfully referred to the decision of this Tribunal in *Royal Mail Group v Information Commissioner* EA/2010/0005 which contains useful observations both on the question whether a party has acted unreasonably and on the exercise of the discretion in circumstances like these.

7. The Commissioner pointed out in his application that no reason had then been put forward by the DECC for the withdrawal save that in an email sent to him at 1644 on 6 September 2010 they stated that the withdrawal was made "... after discussions with counsel and further reappraisal of the material and the resource implications of pursuing this matter". The Commissioner said that there was no indication that the withdrawal resulted from any unforeseeable circumstances outside the control of the DECC and that it was therefore to be inferred that a decision to withdraw could have been made at a much earlier stage and that it was unreasonable to leave it until the eve of the hearing to withdraw the appeal. He therefore claimed the sum of £4,347.50 which represents counsel's brief fee for the hearing: that fee had become payable in two tranches, the first on the morning of Friday 3 September and the second on the morning of Monday 6 September 2010. Counsel for the Commissioner had informed counsel for the DECC of this arrangement in an email sent at 1547 on 2 September 2010. The email had also reported the Commissioner's views that the appeal had little or no reasonable prospect of success and his concern that it was being unreasonably pursued and reserved his position on costs. I should say at this stage that I am not in a position and do not propose to reach any view about the legal merits of the appeal as it stood on 2 September 2010 and that I will not base my decision on the contents of this email.
8. The DECC's response states that "the position as to whether the appeal should be maintained" had been kept "under continual review". It states that advice was taken

from leading counsel soon after the appeal was started; a submission was made to the new Minister in June 2010 after the general election; there were exchanges and consideration of the material and surrounding circumstances throughout June and July; Mr Higson provided his statement on 26 July; he was then away from 2 to 31 August; counsel had met Mr Higson on her return from leave on 2 September and following that conference a submission was prepared on 3 September and the relevant Minister responded to it on 6 September 2010 leading to the withdrawal that day. What is not revealed by the DECC, however, is what it was that caused their change of heart between 26 July 2010 when Mr Higson's statement was served and 6 September 2010 when they gave notice of withdrawal, notwithstanding that the Commissioner's application clearly invited some explanation of this. I accept the DECC's submission that there is no requirement for them to establish that the withdrawal came about "as a direct result of ... unforeseeable circumstances outside [their] control", but, in the absence of any evidence at all on the point, it seems to me that I can only infer that there was no good reason for the change of heart and that the whole case ought to have been withdrawn earlier (or, indeed, never started) and that continuing with it was therefore unreasonable. In this respect the case is quite different from the *Royal Mail* case where the appellant stated that the reason for the withdrawal application was that it had learnt at a late stage that a key part of the requested information had entered the public domain by virtue of unauthorised disclosures by a third party and that this had led to a general reconsideration of the position (see paras 3 and 21 of the Tribunal's decision in *Royal Mail* case). On the evidence before me, I am therefore satisfied that the DECC acted unreasonably in continuing with the case after July 2010.

9. I must therefore consider whether to make an order for costs against the DECC. The costs claimed are clearly reasonable and were incurred only at the very end of the period during which I have inferred the DECC were themselves acting unreasonably. The only substantial argument raised against an order for costs in this case is that such an order would tend to discourage late withdrawals and encourage appellants to continue to the hearing where they would rely on the "costs-neutral" approach generally adopted by the Tribunal. I have considered this point anxiously and it seems to me that in the circumstances of this case it should

not deter me from ordering costs for two reasons: (1) given the lack of evidence as to why the appeal was withdrawn in this case, for all I know if it had continued to a hearing the Tribunal may have accepted a submission by the Commissioner that it was hopeless all along and that an order for the costs should be made against the DECC at the end of the hearing; (2) it seems to me it is just as undesirable in principle to allow appeals that ought to be withdrawn (for whatever reason) at an early stage to carry on until the last possible moment without any sanction as it is to discourage late withdrawals in the way the DECC suggest.

10. I have therefore decided that in this case I should order the DECC to pay costs of £4,347.50 to the Commissioner.

11. There is a right of appeal from my decision on a point of law. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

HH Judge Shanks

Dated 4 October 2010