



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights [alter as appropriate]**

Appeal Reference: EA/2016/0190

**Heard at 10 Alfred Place, London WC1E 7LR
On 24 March 2017**

**Before
CHRIS RYAN
JUDGE
ROSALIND TATAM
DAVID WILKINSON
TRIBUNAL MEMBER**

Between

VEHICLE CERTIFICATION AGENCY

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

CLIENTEARTH

Second Respondent

DECISION AND REASONS

Attendances:

For the Appellant: Tom Cross of Counsel
For the First Respondent: Robin Hopkins of Counsel
For the Second Respondent: Ugo Taddei

Subject matter: Environmental Information Regulations 2004

- Exceptions, Regs 12(4) and (5)
- International relations (5)(a)
 - Intellectual property rights (5)(c)
 - Confidential information (5)(e)
 - Interests of an individual (5)(f)

Cases: Vestergaard Frandsen A/S v Bestnet Europe Ltd [2010] FSR 2

Stephen John Coogan v News Group Newspapers Ltd and Glenn Michael Mulcaire [2012] EWCA Civ 48

IN THE FIRST-TIER TRIBUNAL

Case No. EA/2016/0190

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is refused.

REASONS FOR DECISION

Summary

1. We have decided that the Information Commissioner was correct when determining (Decision Notice FER0608099 of 15 June 2016) that the Vehicle Certification Agency ("VCA") should have disclosed to the Second Respondent ("ClientEarth") all the information it requested, pursuant to the Environmental Information Regulations 2004 ("EIR"), in a request for information dated 5 May 2015 ("the Request"). The Request was for the documentation the VCA held as a result of it having tested for approval the emissions produced by a number of engines incorporated into various items of garden equipment ("the Products").

Background facts

2. Under European Union and United Nations regulations, any product that incorporates an internal combustion engine must be approved by the approval authority of a Member State. Such "type approval" process includes the gathering of data and the performance of tests for the purpose of ensuring that the engine meets the required standards on the emission level of gaseous and particulate pollutants. It also includes enquiries to ensure that all examples of a product that has been approved will be built to the same specification of the tested sample. Once approved by the VCA the product may be offered for sale throughout the EU, without the requirement for any further approval at either EU or national level.
3. The VCA is an Executive Agency within the Department for Transport, which provides the testing and certification service within the UK. It cooperates with its counterparts in the EU under Directive 2007/46/EC of the European Parliament and of the Council dated 5 September 2007 ("the Framework Directive")
4. In order to secure type approval from the VCA a manufacturer must lodge with it an information package which will contain information about the engine, including a detailed technical specification, emissions test results and photographs.
5. The VCA will then conduct its own tests. If it is satisfied, on the basis of the test results and its review of the information provided by the manufacturer, that the engine is compliant, it will then issue an approval certificate. This is what happened in respect of the engines intended to power the Products.
6. ClientEarth is a charity which focuses on environmental issues. It is concerned that a paper published by an organisation called TÜV Nord in March 2015 reported that the Products exceeded the permitted limits for emission of carbon monoxide, hydrocarbons and oxides of nitrogen. This suggested to ClientEarth that either the approval process had not been carried out properly or that the manufacturers had altered the specification of the engines incorporated in the Products after approval had been granted.

The Request and VCA's response to it

7. The Request asked for "*detailed testing and approval documentation for all elements of*" a total of six of the Products, which the VCA had approved. The products were chainsaws, various types of garden trimmers or cutters and other gardeners' power tools. All were powered by engines manufactured in the Peoples Republic of China.
8. The Request stated that it was being made under the EIR. It did not refer to any specific provision, but EIR regulation 5 imposes on public authorities an obligation to make environmental information they hold available on request.
9. On 1 June 2015, the VCA rejected the Request on the grounds that the requested information was excepted from the obligation to disclose because it was covered by the exceptions set out in EIR regulations 12(5)(a) (adverse effect on international relations) and 12(5)(c) (adverse effect on intellectual property). The VCA also argued that the public interest in maintaining each of those exemptions outweighed the public interest in disclosure. The VCA added an invitation to ClientEarth to provide it with the TUV Nord test reports to see if it, the VCA, could offer any comment on the apparent disparities in outcome.
10. The refusal was maintained by the VCA, following an internal review carried out at the request of ClientEarth. This led ClientEarth to complain to the Information Commissioner about the way in which its request had been handled. At no stage did it react to VCA's invitation to share the TUV Nord test information.
11. During the course of the Information Commissioner's investigation of ClientEarth's complaint the VCA indicated that it also intended to rely on EIR regulation 12(5)(f) (adverse effect on a third party which had provided the information).

The law relied on by the VCA

12. EIR provides that the obligation to disclose environmental information is subject to various exceptions set out in regulation 12. The parts of regulation 12 that are relevant to this Appeal (including the exception raised for the first time during the course of this appeal – see paragraphs 20 and 21 below) are as follows:

"(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.*

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

(3) ...

(4) ...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that disclosure would adversely affect –

(a) international relations ...

(b) ...

(c) intellectual property rights;

(d) ...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
(f) the interests of the person who provided the information where that person

–
(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority,
(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it, and
(iii) has not consented to its disclosure; or

...
(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 5(d) to (g).”

The Information Commissioner’s Decision Notice

13. As part of her investigation the Information Commissioner’s staff carried out online searches and satisfied themselves that each of the Products was available for purchase on the UK market at the time.
14. The Information Commissioner issued a decision notice at the end of her investigation, which decided that all of the information should have been disclosed. The Decision Notice recorded the following conclusions:
 - a. The exception set out in EIR regulation 12(5)(c) was not capable of applying to information derived from tests carried out by the VCA and that, as regards information provided to the VCA by the manufacturers of the Products, the VCA had failed to identify the category of intellectual property right on which it said the manufacturers might rely or to show that any such right could be relied upon to prevent disclosure.
 - b. The adverse effect under EIR regulation 12(5)(a) was said by VCA to apply to relations with China and with Member States within the EU, as well as the European Commission. In all of those cases the Information Commissioner found that the VCA had failed to identify commercially confidential information, the disclosure of which would damage relations, particularly as the information could easily be acquired by inspecting the Products, each of which was available on the market.
 - c. EIR regulation 12(5)(f) is not capable of protecting from disclosure information that relates to “emissions”. The Information Commissioner found that the information to which the VCA sought to apply the exception fell within the definition of emissions for this purpose. Even if it did not, the Information Commissioner did not accept that the information had been provided on a voluntary basis or that disclosure would cause any harm to the provider.
15. On the basis of those conclusions the Information Commissioner directed the VCA to disclose all of the withheld information. A small amount of personal data was redacted, without objection from ClientEarth

The appeal to this Tribunal

16. On 13 July 2016, the VCA lodged an appeal to this Tribunal. Appeals to this Tribunal are governed by FOIA section 58, as adapted by EIR regulation 18 to apply to environmental information. Under those provisions, we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
17. Client Earth was joined as Second Respondent to the Appeal. It filed a written Response to the Grounds of Appeal, as did the Information Commissioner.
18. It was agreed by all parties that the Appeal should be determined after a hearing, rather on the basis of the papers alone.
19. Frequently, as in this case, we find ourselves making our decision on the basis of materials that are more extensive than those submitted to the Information Commissioner. We were provided with a copy of each of the type approval documents constituting the withheld information. Each copy had been marked up in colour to help us to identify relevant categories of information. This was provided to us on a closed basis and not made available to ClientEarth, as its disclosure at that stage would have pre-judged the outcome of the Appeal.
20. We were also provided with a witness statement, which was filed in the following circumstances. For various reasons the preparations for the hearing of the appeal took some time and a hearing scheduled for January 2017 had to be adjourned. On 1 March 2017, some seven months after it had launched its Appeal, the VCA filed and served a witness statement in support of its case, signed by its Chief Executive Officer, Pia Wilkes. This was evidently designed, in part, to deal with a number of issues and questions which the Information Commissioner had raised in her Response. However, the witness statement was also used as the means by which an entirely new exception (under regulation 12(5)(e) – adverse effect on commercial confidentiality) was introduced into the case. The email, under cover of which the witness statement was filed and served also confirmed that the VCA would no longer be relying on regulation 12(5)(f).

The substance of the VCA's evidence

21. Ms Wilkes explained that she had been in post since November 2016, although she had worked for the VCA between 2004 and 2008 in a role which had included the handling of freedom of information requests. She provided general information about the type approval processes, including the VCA's role in relation to them, and the history of the Request and of VCA's response to it.
22. Although, as previously mentioned, all of the requested information was provided to us in a closed bundle, Ms Wilkes summarised, in her open witness statement, the documentation created in the course of processing a type approval. This was:

- a. A letter from the VCA confirming that approval has been granted, identifying the documentation enclosed with it and incorporating its terms and conditions;
 - b. The certificate of approval;
 - c. Appendices to the type approval certificate, typically comprising:
 - i. Test results for the engine, including information about the engine specification, fuel and lubricants used, the power and speed settings applied for the test and the emissions recorded during it; and
 - ii. The equipment and auxiliaries installed for the test to determine engine power;
 - d. The information package provided by the manufacturer, typically comprising:
 - i. An index;
 - ii. A form completed by the manufacturer, with appendices, the whole typically running to some 20 pages and disclosing the engine's detailed technical specification, including photographs and technical drawings of the engine and certain of its components, as well as diagrams illustrating certain performance characteristics;
 - iii. The VCA Test Report, including information about the test conditions and the emission levels recorded; and
 - iv. The manufacturer's test report and test photographs.
23. Ms Wilkes sought to identify the information within the approval documentation which was protected by intellectual property rights. This led her to focus on just one document among the withheld material. A drawing of a carburettor included in the information package incorporated the © symbol, indicating that the manufacturer asserted copyright protection in respect of it. She then explained her view that there was a significant public interest in protecting copyright and that this justified the withholding of the relevant information under EIR regulation 12(5)(c). Ms Wilkes appeared to then equate the rights granted to the owner of copyright in the two-dimensional drawing to those arising in respect of the material composition of the item depicted and the manner in which it would operate. She suggested that these two features could not easily be explored and replicated as a result of a three-dimensional embodiment of the depicted item being purchased on the open market and disassembled. Moreover, if it could be done, it would make it very difficult to protect an approved product once it had been released for sale.
24. The confidentiality of information within the type approval documentation was dealt with by Ms Wilkes by reference to regulation 12(5)(e) rather than (c) or (f). She stressed that the expectation of confidentiality was an important part of VCA's dealings with manufacturers and the approval authorities of other nations. The ability to test and certify products prior to manufacture depended on maintaining confidentiality, which was both implicit in the arrangements and expressly set out in terms and conditions governing the process and in type approval standards. In particular, the VCA's terms and conditions included the following:

"All information provided to VCA by the customer relating to an approval or other work will be regarded by [sic] as secret processes, designs and information of a technical nature, which necessitate a high degree of confidentiality. Both the customer and VCA acknowledge that disclosure of that information may prejudice the

commercial interests of the customer and of VCA such that both the customer and VCA are obliged to maintain that confidentiality.

However, once an approval has been issued, VCA will make available approval documentation and information on request and without reference to the manufacturer or his representative, to the United Kingdom Department for Transport, other UK government Departments, the Police, Courts and other official enforcement bodies in the United Kingdom, and to other Approval Authorities and relevant official bodies in other countries and to others as required by law or any professional or regulatory obligation."

25. The Framework Agreement was also referred to in Ms Wilkes' witness statement. This included:
 - a. Article 38(1) – *"The vehicle manufacturer may impose a binding agreement on the manufacturers of components or separate technical units to protect the confidentiality of any information that is not in the public domain, including what is related to intellectual property rights."*
 - b. Appendix 2, which provides that any parties providing technical services to an approval authority (referred to as "auditors") must *"show trust and integrity, and must respect confidentiality and discretion"*.
 - c. A regulation relating to virtual testing which stressed the importance of compliance with obligations of confidence.

26. Ms Wilkes stated that the information provided to the VCA by a manufacturer was confidential and provided under an expectation that it would not be released to a wider audience. Protecting confidentiality allowed businesses to innovate and improve engine designs and to prevent competitors from copying the appearance or functionality of their designs. There was public interest in preserving that confidentiality. Conversely there was very little public interest in its disclosing the relevant information in this case as it provided no useful information to those wanting to investigate the approval testing procedures.

27. A series of examples of withheld information was provided by Ms Wilkes in order to demonstrate how the exception had been applied. These were:
 - a. The product number of the engine used by the manufacturer as the basis for the one incorporated into each Product. It was said that this would provide competitors with information on the origins of the engine used, which would provide competitors with an unfair advantage.
 - b. A description of the product that the engine would power, e.g. "chainsaw", "leaf blower", "hedge trimmer" etc. This would add to the collective body of information that could be extracted from the withheld materials and give a competitor an insight into the thinking processes behind the manufacturer's development strategy.
 - c. Photographs of the engine, which would tell a competitor how the original product should look on completion.
 - d. Technical drawings showing the shape and dimensions of internal components such as the engine's combustion chamber, both internal and external, and piston crown. Disclosure would help a third party to develop a competing product without the need for expensive research and development.
 - e. Technical diagrams illustrating the engine's ignition sequence and timing advance curve. This, it was said, would show a competitor the manufacturer's

optimum set up for the engine and enable it to “short circuit” the normal development process and create a copy of the engine.

- f. Drawings of spark plugs, which were said to provide data that was not required for the emissions test but would help a competitor to copy the engine design.
- g. Drawing of the carburettor showing its internal and external dimensions which, again, do not provide information relevant to the emissions test but would help a competitor build a copy of the carburettor.
- h. Information about the history of the approval processes to which the engine in question had been submitted. This was said to give an insight into the history of the product and the reasoning for each of the previous extensions, providing a competitor with an insight into the development journey, including the correction of previous errors.
- i. Technical drawings of the catalyst unit, including information about its technical specification disclosing the mesh density and the materials from which it had been constructed. Its disclosure would provide competitors with an unfair advantage.

28. On the question of potential harm to international relations (for the purposes of regulation 12(5)(a)) Ms Wilkes considered that disclosure would adversely affect relations with both China and the approval authorities of other EU Member States. In the case of China Ms Wilkes explained that VCA had developed an excellent reputation with Chinese manufacturers for its robust approach to the approval process and had engaged a local delivery partner to maintain what she described as *“a culturally significant level of trust and a high degree of confidentiality.”* She anticipated that release of the information in question would undermine that position, as the relevant manufacturers had expressly stated that they wished to maintain confidentiality, and would increase the likelihood that they would turn to another approval body that they perceived to be more trustworthy. Another likely result would be that the manufacturers would seek recourse in the Chinese courts and that the Chinese Government, which in many cases owns or has an interest in manufacturing companies, would *“take a dim view of actions which they perceive to be damaging to the interests of indigenous industry”*. This, in turn, would have a detrimental effect on international relations and lead to a diplomatic response. Ms Wilkes concluded this part of her written evidence with the statement that:

“...China is not subject to the European Directive giving rise to the EIR and as such is likely to be unfamiliar and uncomfortable with the principle that a UK public body may disclose information relating to them.”

29. Ms Wilkes explained that the VCA was a trusted member of the community of type approval authorities across the EU and that it might be prevented from sharing confidential approval documentation with other authorities if it was perceived to have released an approval into the public domain. It might also jeopardise its ability to participate in international fora at which standards are discussed and undermine its ability to attract manufacturers to seek approval in the UK, rather than other countries.

30. The public interest in disclosure, which must be set against the public interest in avoiding the categories of harm which Ms Wilkes identified, was said by her to be small. Each approval operates as confirmation that a particular item of equipment

passed the test set out in the relevant Directive, but provides no insight into the way the test was conducted and would not explain any differences in test results generated by other organisations. Nor would it provide information that was relevant to the question of whether or not a manufacturer had maintained conformity, during production, with the specification of the sample or samples that had been tested.

31. Ms Wilkes attended the hearing and answered questions on the content of her witness statement put to her by Mr Hopkins, counsel for the Information Commissioner, Mr Taddei of ClientEarth and the panel. She answered all questions clearly and, in our perception, honestly, whether or not her answers assisted the VCA's case. The following points arose from her answers that were particularly pertinent, in our view:

- a. Ms Wilkes starting by saying that the VCA's approach was that if a manufacturer indicated that it did not want its approval documentation to be disclosed under EIR, then VCA would not disclose it. Although she modified her position during subsequent questioning, we were left with the clear impression that neither the VCA nor its local agent questioned the manufacturer's refusal to disclose. No effort seemed to have been made to separating out for possible disclosure information that was not truly confidential or not likely to cause real harm if disclosed. The written communications from the manufacturers to the VCA were unspecific on the point and Ms Wilkes could not say exactly what the local agents had been told. The agents had simply reported back that "nothing was to be released".
- b. Senior personnel of a testing authorities in another EU Member State had expressed the view that only the certificate of approval should be disclosed in response to an EIR information request, and not the underlying technical information. However, it was not clear whether the opinion had been expressed in the context of an information request that had been ruled on by a regulator or a judicial body considering an appeal from the regulator's decision.
- c. The extract from VCA's terms and conditions set out in paragraph 25 above was interpreted by the VCA as meaning that it should not disclose any information provided by a manufacturer unless either the manufacturer consented or a court ordered disclosure.
- d. The Products were available on the market before the date of the Request.
- e. It seemed likely, on closer inspection of the materials, that some components, such as spark plugs and catalytic convertors were "bought in" items from specialist manufacturers whose products were available on the open market.
- f. The code number used to identify the engine used was printed on a plate attached to the relevant Product and visible to anyone who purchased it or had access to it in some other way.
- g. It was possible that disclosure by one country's approval authority would lead to future products being referred to that of another country even if the disclosure had been made in accordance with a freedom of information regime which applied to both countries. A possible reason that Ms Wilkes gave for this was that, even within the EU, it could not be guaranteed that all approval authorities would act in the same way. The result, she feared, would be a loss of work for the VCA, which could impact on its ability to fund its activities.

- h. Once any of the engines tested by the VCA had been launched on to the market it would be possible for a competitor to buy an example and find out from it what it needed for the design and manufacture of its own product, but it would take some hours to dismantle and examine it. It would take much longer, running into weeks or months, to work out what materials had been used in its manufacture.
 - i. Ms Wilkes was unable to explain why Chinese manufacturers should say that they required a blanket restriction on disclosure but considered that this stemmed from the fact that Chinese business operates on the basis of a high level of trust. It followed, she thought, that offence would be caused by any disclosure that a manufacturer had not approved, regardless of whether the information disclosed was sensitive or not.
 - j. Ms Wilkes also thought that disclosure in response to the information request would result in some diplomatic contact, although she was not able to say what form this would take or at what level it would take place.
 - k. Information derived from the withheld materials would not provide any assistance to a person seeking reasons for an apparent difference in test outcome between the VCA and TUV Nord.
 - l. The VCA checked compliance of production models with the product submitted for approval by an audit system that involved factory visits. The frequency of such visits would vary depending on the perceived risk of a breach occurring.
32. At this stage, having considered the evidence that we **did** receive, it is appropriate to mention what we **did not** receive. First, we received only incomplete evidence as to the date on which the Products became available on the market. That is the date on which, as Ms Wilkes accepted, a competitor could have obtained a sample and started the work of disassembling it and inspecting its component parts. She confirmed, in answer to a question from the panel, Ms that the Products were certainly on the market before the date of the Request. It seems likely that they were in fact available a good deal earlier than that. The approval certificates under consideration were issued on various dates between September 2009 and November 2012. The shortest time lapse between the issuing of a certificate and the submission of the Request was therefore two and a half years. It seems extremely unlikely that a commercial organisation should have delayed very long in getting the Products to market, once it had been given type approval. They must certainly have been available in early 2015 to enable TUV Nord to carry out the tests which it did before issuing its report in March 2015. Even if the TUV Nord tests had been completed in a very short period, it is clear that the Products had been on the market for at least two months by the date of the Request and possibly, in light of the dates of the approval certificates, a good deal longer. Out of a sense of caution, however, we proceed on the basis that competitors would only have had weeks, rather than months, in which to examine the Products.
33. A second issue on which evidence was missing was the extent to which information contained in the VCA materials may have been replicated in user manuals or instructions to those assembling Products, in the event that they were imported in disassembled form.
34. Thirdly, the information on the tests carried out by TUV Nord was incomplete in as much as only two pages were made available to us in English translation.

35. Fourthly, just as ClientEarth provided no explanation of why it ignored the VCA's invitation to review the TUV Nord test information, so the VCA provided no information about any steps it had taken to review its own tests or to check that the Products on the market were of the same specification as those tested – both matters of relevance to the public interest issues that may arise on a case of this nature.
36. Finally, as noted in our summary of Ms Wilkes' evidence, we were provided with very limited evidence about the exchanges between the Chinese manufacturers, on the one hand, and the VCA or its local agent, on the other.

The arguments presented to us

37. The VCA argued in its Grounds of Appeal that the Information Commissioner had been wrong to reject its reliance on regulation 12(5)(c) because the process of combining bespoke and off-the-shelf items in the design of each Product gave rise to intellectual property rights in the form of trade secrets or a work protected under the law of copyright. It argued, also, that the Information Commissioner had been wrong to conclude that, even if intellectual property rights arose, this did not act as a barrier to disclosure. Any attempt to reverse engineer the design by dismantling and examining an example of a Product purchased on the open market would not provide as much information as could be obtained from the type approval documents. A competitor would therefore be assisted by seeing those documents, to the detriment of the originator of the design.
38. If, as the VCA asserted, the exception was engaged, there was strong public interest in maintaining that exception because of the harm that disclosure would cause to the manufacturer, in the form of potentially unlawful competition, and to the VCA, in the event that either a manufacturer claimed damages from it for having disclosed the information without consent or other parties decided in future to prefer the approval authorities of other Member States, which were regarded as more secure. The VCA also argued that there was a public interest in preventing harm to the VCA's relationship with China, the EU Commission and the approval authorities of other Member States - a consideration that had traction in this context notwithstanding that it was also the basis for the VCA's case under regulations 12(5)(a) and (f). Against that, it was argued, the public interest in disclosure was weak in that there was little or no public interest in seeing the detail of how the VCA conducts its type approval activities, as opposed to knowing that a particular product had secured approval.
39. In his closing submissions at the hearing counsel for the VCA concentrated on copyright as the relevant intellectual property right, rather than trade secrets. He raised a (doomed) challenge to the evidence that the Products were on the market at the date of the Request but argued that, even if they were, competitor manufacturers would still gain an advantage from seeing the withheld materials. Against that, disclosure to the public at large would not provide any valuable information about the effectiveness of the approval process as operated by the VCA.

40. The other parties challenged both the subsistence of any intellectual property and the operation of the public interest balance, which they said, in any event, favoured disclosure.
41. The exception under regulation 12(5)(a) was said to be engaged because, as asserted above, the type approval documents did contain confidential commercial information, the disclosure of which would breach the terms of the Framework Agreement, cause harm to manufacturers and undermine cooperation between authorising bodies within the EU. It would also harm relations with China if, as the VCA expected, Chinese manufacturers affected by the disclosure of information about one or more of the Products asked their own government to raise with the UK Government the harm done to their competitive advantage. We were urged to accept the evidence (which had not been available to the Information Commissioner when formulating the Decision Notice) regarding the cultural environment in which the VCA and its agent operate in China. We should acknowledge the difficulty of knowing precisely how the authorities there would react and accept the VCA's judgment that there would be some response if disclosure were to be ordered.
42. The VCA relied upon the same public interest arguments under regulation 12(5)(a) as it did under regulation 12(5)(c) but submitted, in addition, that any inhibition of the willingness of other Member States to exchange information with the VCA would be a legitimate cause for public concern, particularly if it affected other areas of cooperation within the EU. The very existence of strain in international relations would not only justify a conclusion that the exception was engaged, but would add to the public interest in maintaining it, particularly in light of the importance of China as a trading partner for the UK. The countervailing public interest in disclosure was said, again, to be weak.
43. The Information Commissioner, supported by ClientEarth, invited us to adopt a restrictive approach to the analysis of the exception, as required by the EIR, and to conclude that it was not engaged in respect of either China or the EU. In both cases, it was suggested, the fears of a reaction of any consequence were supported only by evidence that was vague, second hand and largely conjectural.
44. As we have mentioned above, the regulation 12(5)(e) exception did not feature in the Grounds of Appeal but emerged from the witness statement of Ms Wilkes. In his closing submissions Counsel for the VCA laid stress on his client's obligations to protect the information provided to it by manufacturers from exploitation by their competitors. This, he said, arose from the nature of the relationship between manufacturer and approval authority and did not need to be expressed in any formal agreement between them. Disclosure would harm the VCA – a factor that was relevant to the issue of "*economic interest*" referred to in the regulation (to the extent that was relevant to the engagement of the exception) and also to the public interest balance.
45. The VCA accepted that the regulation 12(5)(e) exception could not apply to information about emissions, but argued that not all the information in the withheld materials related to emissions. It was wrong to say, as the Information Commissioner and ClientEarth did, that regulation 12(9) applied to all of the materials because they were created and submitted for the purpose of testing the emission levels of a particular engine.

46. On the issue of public interest the VCA accepted that the outcome of TUV Nord's testing gave rise to a legitimate public interest in the viability of the approval system, but maintained its position that the withheld materials would provide no information that would inform public debate on the point. In particular, it would reveal nothing about the way in which the VCA carried out its testing processes, particularly as it was not clear whether TUV Nord had applied the same testing methodology or whether it had tested the same variant of engine.

Our Conclusions

47. The starting point for our analysis of the arguments made by the parties and the evidence submitted is to consider the extent to which disclosure of the withheld materials in response to the Request in May 2015 would have constituted an unauthorised breach of confidentiality.

48. Such a breach occurs if:

- i. information having the necessary quality of confidence;
- ii. has been passed to a third party in circumstances giving rise to an obligation of confidence; and
- iii. the third party makes an unauthorised disclosure, or otherwise misuses the information.

It is debatable whether or not it must be established, in addition, that:

- iv. the owner of the information would suffer detriment as a result of the unauthorised disclosure/misuse.

49. It is clear that, when originally submitted to the VCA, the information from manufacturers in the withheld materials would have satisfied the first requirement. At that stage the relevant product had not been launched on the market. Indeed, it could not be launched until approval had been given. It may not even have entered full scale production at that stage.

50. It is equally clear that the relationship between a manufacturer and an approval authority is one which gives rise to an obligation of confidence at the time when a product is submitted for emission testing. Any disclosure by the approval authority at that stage could provide the manufacturer's competitors with very valuable information about technical innovations proposed to be included in the product when it came to be launched. It is no doubt for that reason that the first paragraph from VCA's terms and conditions quoted in paragraph 24 above includes an express covenant to maintain secrecy during the approval process.

51. It is less clear whether, on the facts of this case, there was at the date of the Request any information within the withheld materials that retained the necessary quality of confidence. Self-evidently, once a secret becomes known it is no longer a secret. So, if the owner of information puts it into the public domain, no claim to confidence in respect of it may thereafter be maintained. That is reflected in the second paragraph of the quoted extract from the same terms and conditions, which recognises that it is appropriate to adopt a more relaxed approach to confidentiality, once the approval process comes to an end and (by inference) the product has been put on the market.

52. It is established in this case that, by the date of the Request, each of the products covered by the relevant approval had been made available on the market. It does not follow from that event that all the information contained in the withheld materials was immediately put into the public domain. Information about any features that may only be determined by stripping the product down and/or carrying out tests on individual components, may continue to be treated as confidential information. How long those details will continue to be treated as confidential will depend on how easy it is to determine them from inspecting the publicly available product. The shape and dimensions of a simple component may be apparent almost immediately. A more complex component, or one that is not visible during normal operation and may only be accessed by stripping the product down, may take a few days to reveal itself. However, the precise firing sequence of a multi-cylinder engine or the most suitable choke settings may only be established after a period of testing (unless disclosed in a maintenance manual accompanying the product). And, even more remotely, it may take some months of research and analysis to determine the precise composition of an alloy used in the construction of a particular component or the combination of materials used in a catalytic converter incorporated into an exhaust system.
53. In comparable circumstances, a court may be required to decide how long an interim injunction should last to keep off the market a product made using confidential information without permission. The court will calculate a period of restraint which reflects (in the words of Arnold J in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2010] FSR 2, at paragraph 80) “... the time it would take someone starting from public domain sources to reverse engineer or compile the information”
54. In this case the VCA did not establish that there was any information in the withheld materials which could not, by the date of the Request, have been obtained by reverse engineering the Products that had by then been available on the market for many weeks, at the shortest possible count. In reaching that conclusion we have considered each of the categories of information highlighted by Ms Wilkes in her evidence and summarised in paragraph 27 above:
- a. The engine type number appears to have been stamped on a plate attached to each production sample of the tested engine. Indeed the information would have to be available to purchasers in case they needed to order compatible spare parts.
 - b. The matching of an engine to a particular item of equipment would be instantly apparent to any member of the public who saw the relevant Product offered for sale, whether or not they chose to purchase.
 - c. Self-evidently a three-dimensional example of an engine would tell the public more about its appearance than a two dimensional photograph taken from a particular angle.
 - d. Information about internal dimensions and configurations would not instantly be apparent to a purchaser, but the time needed to dismantle an engine and inspect or measure individual components would not have extended beyond the date of the Request. The evidence presented to us was vague on the time that might be taken but, having seen pictures of the relatively simple arrangements of components in each Product, we are satisfied that this information could have entered the public well before that date.

- e. We accept that some time would be required to “tune” an engine, even a single cylinder model, in order to achieve the ideal balance between power output and fuel consumption. However, this is a skill possessed by very many engineers and mechanics, including amateur motor mechanics. It might take some hours of experimentation, or even days in some cases, but could still have been completed well before the date of the Request. This assumes that the individual was not assisted by a user’s manual or equivalent guide, which would reduce the time required, even if it did not disclose the whole of the information in question.
 - f. It was established in evidence that the spark plugs in use were “bought in” products from one of the well-established manufacturers of those components. There was therefore no information on the subject in the withheld materials that was not in the public domain and/or owned by someone other than the manufacturer of the relevant Product.
 - g. As in the case of d. above, the shape and dimensions of a carburettor could very easily and quickly be determined by inspecting a sample of the Product and carrying out a relatively small amount of dismantling.
 - h. It is true that some of the withheld materials did provide information about previous occasions when the same Product had been submitted for approval testing in a slightly different configuration of components. However, the same information would have been available to anyone monitoring changes made to the production models from time to time – a process that a competitor may be expected to have implemented as part of normal market awareness. The more important information, however, would be likely to be the design of the current model. For the reasons given that could have been obtained very quickly as soon as a Product appeared on the market.
 - i. As in the case of f. above, it was established during the hearing that this was a standard component bought in from a third party and therefore available to competitors. Even if that were not the case, we were presented with no evidence that demonstrated that the process of reverse engineering it from a production model would have taken longer than the period between product launch and the Request being submitted.
55. It is conceivable that the withheld materials did contain information which, contrary to our conclusions in respect of the design elements identified by Ms Wilkes, would have presented greater challenges to those seeking to investigate and reverse engineer a product. More rigorous questioning of the manufacturers, in order to establish particular concerns that led them to issue the uninformative statements that they did not consent to disclosure, may have resulted in a more compelling case for maintaining confidentiality over at least parts of the withheld material. But we can only decide the case that is presented to us and the VCA failed to identify any piece of information that was available in the withheld information and could not easily and quickly have been obtained from a production model of the equivalent Product.
56. In light of our decision on that issue, it is not necessary for us to consider whether an element of detriment is or is not a requirement for a breach of confidence claim or, if it were, whether it would arise on the facts of this case.
57. We therefore reject the argument that there is any information to which the regulation 12(5)(e) exception may apply.

58. Even if regulation 12(5)(e) had applied, the VCA would not have been able to rely on the exception to the extent that the withheld materials contained information about emissions for the purpose of regulation 12(9). We would, in any event, have rejected the VCA's argument that only some of the information under consideration was about emissions. The certificate of approval in respect of each of the Products is headed with the words:

"Communication concerning the type approval of an engine type or family of engine types with regard to the emission of pollutants pursuant to Directive 97/68/EC as last amended by 2004/26/EC".

The Directive in question describes its subject matter as:

"the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery".

[Emphasis added in each case]

59. The materials accompanying the certificate all relate to the design and performance of the particular engine being tested for emissions. It would be highly artificial in those circumstances to identify particular pieces of information and, divorcing them from their context, categorise them as not relating to emissions.
60. If we were found to be wrong in deciding that the exception is not capable of applying, therefore, we would nevertheless decide that regulation 12(9) prevents the VCA from relying on it.
61. At the hearing, the VCA did not press its case that the manufacturers' trade secrets also constituted an intellectual property right covered by regulation 12(5)(c). The advantage of relying on that exception, from the VCA's viewpoint, would be that regulation 12(9) would not apply. In those circumstances, it is right that we say that there is at least a case for treating the right to confidentiality of commercial or technical information as a category of intellectual property right – see *Stephen John Coogan v News Group Newspapers Ltd and Glenn Michael Mulcaire* [2012] EWCA Civ 48. In the event, however, nothing turns on the point because, for the reasons set out above, it has not been established that any confidential information remained in the withheld materials at the date of the Request.
62. The intellectual property right on which the VCA did rely for the purposes of the exception was copyright. One of the drawings attached to an approval certificate bore the "©" copyright notice. On closer inspection, the notice did not comply with the form required under the Berne Convention. Even if it had done, its effect would simply have been to give notice that copyright protection was claimed. It would not be determinative of whether copyright subsisted. That would be determined by operation of the law on copyright, as codified in the Copyright, Designs and Patents Act 1988 ("CDPA"). The law found there would apply with equal effect to copyright owned by a Chinese national or organisation as it would to a UK citizen or company – the result of both the UK and the PRC having ratified the Berne Convention.

63. Under the CDPA if a product is based on an original design drawing (for copyright purposes an “artistic work”), then anyone who copies the shape of the product may infringe copyright in the underlying design drawing (section 16(3)(b)). It is as much an infringement of copyright in the drawing to copy the three-dimensional embodiment made from it as it would be to make a direct photocopy or scan of the drawing itself. For these reasons, and because copyright would come into existence automatically on the creation of such a drawing, we have assumed that all of the drawings included in the withheld materials (and not just the one bearing a copyright notice) were capable of attracting copyright protection.
64. The protection provided under CDPA is limited. It protects just the shape of the item depicted in a design drawing (and maybe its dimensions if they are either written on the drawing or may be scaled off from it). It does not protect anything that is not depicted. So, for example, the composition of the alloy from which the depicted item is ultimately constructed cannot be protected by copyright. Nor will copyright normally protect the way in which the final product operates. (It is conceivable that the shape and configuration of depicted components is so precise that they can only work together in a particular way, once connected together in the manner shown in the drawings. But that is unlikely in practice).
65. Even if a drawing is copied, indirectly in the way described, there will still be no copyright infringement unless the final item may properly be characterised as an artistic work (CDPA section 51(1)). So, copyright in a drawing of a vase may be infringed by copying an example of the finished item, but not a utilitarian device – like a carburettor. The appearance of non-artistic items may only be protected by registered or unregistered design right – a separate category of IP right which has not been referred to in this case.
66. It follows that if a drawing protected by copyright is directed to be disclosed to a third party (by the Information Commissioner or this Tribunal) then the recipient remains under an obligation not to make or distribute further copies. But that does not prevent him or her from extracting a certain amount of information from the document and using it for product development. This is because it is not unlawful to copy a competitor if the copying does not result in the infringement of copyright or a design right. And the threshold for infringement is not achieved, in the case of copyright, until a “substantial part” of the original has been taken (CDPA section 16(3)(a)).
67. If disclosure is ordered, the making of a copy by the VCA to be passed to the requester would be capable of constituting an infringement. However, the relevant documents were passed to the VCA by the manufacturer under terms and conditions that have the effect of consenting to disclosure if it occurs after approval has been issued and is “*required by law or...regulatory obligation.*” Additionally, CDPA section 50(1) provides that it is not an infringement if the action complained of is “...*specifically authorised by an Act of Parliament...*” Both of the quoted phrases cover the obligation of a public authority to disclose information under the EIR, particularly when directed to do so by either the Information Commissioner or this Tribunal.
68. Even if providing a copy to a requester did amount to infringement, it does not follow that providing a single copy to someone who remained under an obligation not to make further copies, would “*adversely affect*” the right, as EIR regulation 12(5)

provides. It seems to us that the selection of that phrase, as opposed to the term "*infringe*", was intended to create a distinction between a purely technical infringement causing no harm, on the one hand, and an act that undermines the copyright owner's commercial interest in his or her work, on the other. It is only the latter that is capable of triggering the exception. And it would not be triggered where, as in this case, the three-dimensional embodiment of the item depicted in the drawings was available on the market before the date of disclosure.

69. For all of these reasons, we reject the argument that any copyright owned by the manufacturer would be adversely affected by the disclosure sought.
70. The failure by the VCA to establish any reasons for the Chinese manufacturers' objections to disclosure undermines its case under regulation 12(5)(a) as much as it did in respect of other exceptions. If the manufacturers had volunteered, or been persuaded to disclose, specific elements of information within the withheld materials which were not capable of being discovered from publicly available sources of information, then not only would the VCA's claims based on confidential information have been bolstered, but it would have been more easy to see that the objection to disclosure had a rational basis. Without that information, the effect of the claim for exception can be put no higher than that a foreign country, wishing to trade with the UK, insists in having a veto over the disclosure of any information provided by its exporters in order to obtain approval for that trade. The veto, one would have to assume, could be operated even if no reason were given, or the reason was irrational. And it would apply even when, as here, the manufacturer had submitted the information under terms and conditions which clearly put it on notice that a regulatory requirement might lead to the disclosure of information, once approval has been granted.
71. Even if we were willing to countenance the purpose of this country's freedom of information regime being undermined in this way, we would need much clearer evidence of the foreign government's attitude and the steps it was likely to take, or had taken in similar circumstances in the past. The evidence, (although no doubt honestly given, as we have said), completely lacked any substance in this respect and disclosed no serious efforts to investigate the likely consequences of a direction to disclose. It is really not enough to simply say that the manufacturer's government would "*take a dim view*" of the UK applying its freedom of information rules in the way it would to its own nationals and that some unspecified action at a diplomatic level may result. The effect of our decisions under the other exceptions relied on is to apply the same law, on confidentiality and freedom of information, which would be applied to a UK national. And the application of the law would be based on the universally acknowledged common sense rule, that once a product becomes available on the market, any confidentiality in its design become public knowledge. A diplomatic complaint about the manufacturer's treatment in those circumstances would be so irrational that it ought not to be relied upon to undermine the operation of the FOIA.
72. The position in relation to the EU is that every Member State is bound by the Directive which the EIR implemented in this country. The purpose of the Directive, as in the case of the Directive on emissions, is to bring the laws of all Member States into harmony with one another. Differences in the application of those two bodies of EU law may exist between one Member State and another, as the VCA's evidence

suggested. However, a difference of view expressed by one official from one Member State does not demonstrate, to our satisfaction, that the disclosure of information after it has entered the public domain, would create the violent and disruptive reaction which Ms Wilkes evidently fears. It would be irrational and contrary to the rules of the relevant Directives for the authority of one Member State to be pilloried or excluded from full participation in EU initiatives simply for having complied with a ruling, by regulator or tribunal, enforcing the terms of a Directive in the way that it thought was appropriate.

73. For these reasons, we do not accept the VCA's arguments that the regulation 12(5)(a) exception is engaged.
74. As we have decided that none of the exceptions relied on by the VCA are engaged, it is not necessary for us to consider whether the public interest in maintaining any of the exceptions would have outweighed the public interest in disclosure.
75. All of the requested information should therefore be disclosed.
76. Our decision is unanimous.

Judge Chris Ryan
Judge of the First-tier Tribunal

Date of Decision: 12 July 2017

Date of Promulgation: 12 July 2017