**First-tier Tribunal**
**(General Regulatory Chamber)**
**Information Rights**

**Appeal Reference: EA/2016/0307**

**Decided without a hearing**
**On 13th November 2017 and thereafter.**

**Before**

**RODNEY WHEELER**

Appellant

**and**
**INFORMATION COMMISSIONER**

Respondent

**and**
**THE ENVIRONMENT AGENCY**

Second Respondent

## DECISION AND REASONS

Introduction

1. This is an appeal against decision notice FER 0605855 dated 29th November 2016 which held that the Environment Agency (EA) had correctly applied r 12(5)(a)[1] of the Environmental Information Regulations 2004 (EIR). The Commissioner was not satisfied that regulation 12(5)(e)[2] applied and directed the EA to disclose the information requested under reg 12(5)(e) EIR within 35 days. The information so directed has been disclosed and this appeal relates to the decision notice insofar as it relates to reg 12(5)(a). The Tribunal has refused the appeal for the reasons set out below.

Background

[1] Adverse effect upon national security or public safety

2. Redcliffe Bay PSD (the depot) is part of a pipelines and storage system which supplies aviation fuel across the UK to the Ministry of Defence, commercial and private customers and airports (including Heathrow and Gatwick). It is an Upper Tier site (a site containing more hazardous chemicals and therefore subject to a higher level of control than Lower Tier sites) under the 2015 COMAH[3] Regulations and is jointly regulated by the Environment Agency and Health and Safety Executive (who constitute the COMAH Competent Authority). The EA's case is that it is an important infrastructural asset in terms of defence and national security. It is regularly inspected by Counter Terrorism Security Advisors from the local Police force who work with businesses to identify and assess sites that may be vulnerable to attacker or extremist attack. An attack upon or disruption to the depot would have very serious consequences.

3. A safety report was compiled in 2014 which showed that the site was insufficiently safe in at least 3 key accident situations. This report was the subject of a decision notice by the ICO (FS5058522) following a request for the report by this Appellant to the MOD. Although the Commissioner upheld the MOD's refusal the MOD have subsequently disclosed a "lightly redacted" copy of the report to the Appellant.

Information Request

4. On 8th August 2015 the Appellant wrote to the EA[4] asking for disclosure under EIRs of:

> "*a copy of the [site improvement plan][5] to the Redcliffe Bay PSD [petroleum storage Depot] as agreed between the CA[6] [competent authority] and the OPA [oils and pipelines authority] at the time of issuing the conclusions letter for the 2014 Safety Report...*"

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[2]Adverse effect on confidentiality of commercial or industrial information

[3] Control of Major Accident Hazards Regulations

[4] 45 OB

[5] The original word used was "improvements" however, this was clarified in correspondence dated 7th and 15th September 2015 that he was seeking a copy of the Site Improvement Plan for the depot as agreed between the EA and OPA on 20.2.15 p 47 OB

[6] The CA in this case are the Health and Safety Executive and the Environment Agency, however, in correspondence 7th and 15th September 2015 he clarified that he meant the Environment Agency

5. The EA responded in correspondence dated 9th and 13th November 2015[7]. They stated that they do not hold a document entitled "*Site Improvement Plan*" but held instead 2 documents that would contain the same information namely:

i. A presentation to the EA by CLH (site operator Compania Logistica de Hidrocarburos) in 2015.

ii. An environmental Cost Benefit Analysis produced by Environ UK Ltd for the OPA dated 2014.

They disclosed a small amount of the executive summary of ii) but refused to disclose document i) and most of ii) relying upon regs 12(5)(a), 12(5)(e) and 13[8] EIRs.

6. The EA conducted an internal review on 4th March 2016 upholding the application of the exemptions.

Complaint to the Commissioner

7. The Appellant challenged the EA's reliance on regs 12(5)(a) and 12(5)(e) EIRs by complaint to the Commissioner on 5th March 2016. In his complaint to the Commissioner he noted that he had received the 2014 Safety report from MOD on 18.1.16 and maintained that the site improvement plan flowed from this report. He was of the view that it was likely the EA were withholding information already released by MOD. The EA explained that not all of the 2 documents constituted the agreed improvements for the depot. Consequently, the Commissioner confined her consideration to the information that fell within the scope of the request.

Appeal

8. The Appellant appealed on 10th December 2016[9], his grounds of appeal can be summarised as:

i. The exemption was not engaged.

ii. The public interest favoured disclosure.

iii. The withheld information was likely to be over-redacted.

iv. Withholding the information was inconsistent with disclosure by MOD of other similar information.

[7] P54 OB
[8] 3rd party Personal Data

He included a document itemising the information already available to a potential attacker.

9. Pursuant to their own application EA were joined by the Registrar by order dated 24.5.17. Following their review of the case they decided that further information could be disclosed from the 2014 cost benefit report. Significantly more information was disclosed so that it was now apparent which receptors and scenarios had been considered, it also provided many of the assumptions for the figures which themselves were largely redacted although certain risk range levels were now disclosed. In doing so they took into consideration recent disclosures made by the MOD.[10]

10. The Commissioner opposed the appeal relying upon the contents of her decision notice but addressing some of the specific points raised by the Appellant.

11. . All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) *(Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (GRC Rules*), being in receipt of an open bundle of documents comprising some 799 pages (including 2 witness statements from James Heavingham EPR Installations and COMAH Officer and Michael Nicholas Senior Adviser COMAH, Environment Agency) and the written arguments advanced by the parties in the pleadings and submissions. The Tribunal has also had regard to the closed bundle compiled as per the Registrar's case management directions dated 22.3.17 and 4.08.17. Which included a full copy of the withheld material, CPNI guidance and a closed versions of Mr Nicholas' statement.

12. The Tribunal adjourned the appeal and issued open and closed directions dated 15th January 2018 for the provision of further information by the 2nd Respondent relating to consistency and redaction as well as the arguments applicable to specific elements of the withheld material. Further open submissions dated 25.1.18 were received from the EA and the Appellant made further submissions dated 31.1.18. In proceeding without an oral hearing the Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules, the ability to obtain further information in documentary form by way of adjournment and has had regard to costs, proportionality and the issues in this case.

[9] P 15-19 OB

The Tribunal has had regard to all the documentary evidence before it, even where not mentioned directly in this decision. Although the Tribunal has received closed information and submissions as set out above which refer to the detail of the closed material, the Tribunal does not consider it necessary to provide a closed annex to the decision. In light of the additional disclosure made prior to the appeal the nature of the redactions is apparent and the Tribunal has therefore been able to provide sufficient detail in the open decision without direct reference to the redacted information.

Scope

13. There was no dispute that this request fell to be considered under the Environmental Information Regulations.

14. The terms of the request were for the Site improvement plan "*as agreed … at [a specified date]*[11]*".* The Tribunal's jurisdiction is limited to the objective construction of the terms of the request. The Appellant argues that*:*

*" by redacting out all actions which were not agreed for the SIP I am unfortunately prevented from checking out the past decisions of the Operators and the Competent Authority… My request to the EA is not solely for the description of the improvements agreed by the CA and OPA… but to receive the agreed SIP reports, which is different from the present interpretation by the EA".*

He further argues that by redacting out sources of potential risk reductions which were not chosen because judged unreasonable, the reader of the SIP reports is prevented from understanding ALARP.[12]

15. The Tribunal takes into consideration that there was no single SIP document and that what has been identified is the recorded information that would have been included. Proposals that were not agreed at the relevant date in our judgment cannot objectively be considered to be part of the agreed SIP and hence included in the request in light of the specificity of the Appellant's request. We are satisfied therefore that they are not in scope.

[10] P776 and 778 OB

[11] Although the Appellant argues he asked for the whole report in the letter of 02.10.15 from the face of that document at p49 it is clear the reference to agreement and the date are still present.

Regulation 12(5)(a) EIRs

*16.* Regulation 12 EIRs provides:

*(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.*

*…*

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

*(a)international relations, defence, national security or public safety; …*

17. Disclosure must have an adverse effect on one of the stated elements, in this case national security and public safety are relied upon. It has to be more probable than not that the adverse harm would (not could or might) occur if the information is disclosed. The test is as set out in Secretary of State for the Home Department v Rehman 2001 UKHL 47 which held that there is no need to demonstrate that disclosure would lead to an immediate and direct threat to the UK. A real possibility (defined as substantial not remote) is sufficient. We are satisfied that this includes a substantially increased risk of a direct and immediate threat as a result of disclosure. The increased risk itself is an adverse effect on national security. Seemingly harmless information pieced together with other information can result in harm. We are also satisfied that information may be withheld if there is a substantial rather than remote possibility that disclosure could result in physical hurt or injury to the public.

Whether Regulation 12(5)(a) is engaged

18. National Security is not defined by EIR but from Rehman we are satisfied that it includes the security of the UK and its people and that disruption of the infrastructure

[12]As low as reasonably practicable - Para 14 Appellant's submissions dated 25.9.1

supporting its defence, the UK economy or a risk of physical harm to a significant section of the populace would fall within that definition. The EA (supported by the Commissioner) argue the depot is an important infrastructural asset for defence and hence national security purposes and serious consequences would arise if it were attacked or disrupted. We accept this and are satisfied that in light of the potential for explosion, fumes and fire the potential for harm is substantial in this case and the risks to public safety from adverse events are self evident[13].

19. The EA rely upon the content of the withheld information which contains detailed information about the depot's site control architecture and potential sabotage risks, the consequences of a major emergency scenario and the risk factors with and without certain mitigation measures. It includes which tanks are active, key pieces of equipment used to control fuel movements and prevent scenarios such as tank overfilling, details of automated tank values boundary valves, automated tank gauging system, tank high level gauging system and the switch room. They argue that it would be useful to anyone who intended to vandalise the property or carry out an attack on the site and beyond as the vulnerability of other sites can be inferred (e.g. sites of the same operator where the same systems are in place) from the withheld material. By their nature sites on the pipeline system are similar and information gathered in association with one could be used to target another.

20. The Appellant argues that information of this type is already in the public domain and disclosure of this information would not therefore add to the risk as a potential attacker already has enough information to distinguish between sites and methods of disruption. He relies upon attachment 2 to his Grounds of appeal and the information already disclosed to him pursuant to other information requests. He also cites internet research, public versions of emergency plans and observing the site itself from outside the boundaries in support of this contention.

Information in the public domain

21. As set out below we are satisfied that the withheld information would add to the information already in the public domain. The EA argue that some information disclosed to the Appellant is not in practice widely available as the Appellant has not

[13] P 785 OB

disseminated the information. The Tribunal has noted that disclosure under EIR is not limited to the Appellant and in the same way that this Tribunal cannot limit the dissemination of information disclosed pursuant to this appeal, there is no restriction on what the Appellant can do with information he has already received. In our judgment it is in the public domain as it has been disclosed without restriction to a member of the public and its future use cannot therefore be predicted.

22. The evidence of Mr Nicholas is that disclosures by MOD go beyond the information that EA would disclose about a COMAH site if the CPNI[14] guidance is followed[15]. CPNI is the government authority for protective security advice to the UK national infrastructure. Its role is to protect national security by helping to reduce the vulnerability of the national infrastructure to terrorism and other threats. It is accountable to the Director General of MI5 and focuses on providing advice and assistance to reduce vulnerability to those who have responsibility for protecting the highest critical elements of the UK's national infrastructure from national security threats. CPNI's Guidance on the Disclosure into the Public Domain of Sensitive information "*is intended to help public authorities in maintaining decisions about release of information under FOIA or EIR and seeking to use national security exemptions"*[16].

23. Prior disclosure or public availability of information does not automatically undermine reliance on the exemption. Mr Nicholas' evidence was that in order to implement the SEVESO III Directive (legislation dealing with the control of onshore major accident hazards involving dangerous substances) the COMAH Regulations were amended in 2015 and the level of detail of information routinely provided was reduced. He gives the example that since this review the public were given access to the nature of a hazard (e.g flammable or toxic) but not the detail[17]. In light of the French attacks in 2015 the EA (and other governments) have become increasingly aware of the growing capabilities of people who want to cause mischief. As a consequence, information

[14] Centre for Protection of National Infrastructure
[15] The Tribunal was provided with a copy of the CPNI guidance in the closed bundle which has been withheld pursuant to rule 14.
[16] P799 OB
[17] The Appellant has drawn the Tribunal's attention to the level of detail given in planning applications, however, these are outside the remit of EA and in relation to past planning applications do not indicate the up to date position (e.g. the Tribunal

may not be disclosed now even if its equivalent was historically. We accept his evidence which we rely upon in rejecting the Appellant's arguments relating to consistency of approach. We take into account that greater regard is now had to the "mosaic effect" and the reviewed assessment of security threats. In our judgment it is material to consider whether disclosure at the relevant date would "confirm" the validity of previous information, and to look at the extent to which disclosure would reinforce or magnify an earlier disclosure.

24. We agree with the Commissioner's view in FS50584522 that there will be circumstances where it is sustainable to argue that a public authority should not be made to make further disclosures of information under FOIA or the EIR when it could have conceivably made a compelling case to withhold the same information which it previously decided to disclose and that, when matters of national security or public safety are relevant, such circumstances will apply. In our judgment it is even more significant when it is argued that the actions of a different public authority should in effect bind the judgment of the public authority that is being asked for disclosure on this occasion.

25. The Respondents argue that disclosure of the withheld information would result in more specific and detailed information relating to the site's make up and vulnerabilities entering the public domain. The EA accept that there is much information in the redacted 2014 safety report disclosed to the Appellant and other information in the public domain that could be used to inform a malicious attack. However, it is their case that (unlike the withheld material) that information does not confirm current operations. In accepting their evidence we have had regard to the withheld material.

*Planning information*

26. Their evidence was that the planning information:

*"creates an envelope of maximum inventories and possible storage locations within which an operator is free to store dangerous substances (or not)… the conclusion from this is that other than Tank14 and Tank 15 the planning information does not confirm*

gives as an example from general experience not based upon the closed material that permission may be given for the use of a building for a specific purpose which then falls out of use).

*which infrastructure is actually being used*[18]*"*. The Appellant relies upon the piecing together of planning information and the Council's website[19] to assert which tanks are in current use. The EA rely upon the amount of research that was required to draw these inferences. The Tribunal is satisfied that disclosure in this context would be to reinforce, magnify and draw together information which it may be possible to discern from information in the public domain. Disclosure would confirm or contradict the position and thus validate or refute the proposed inferences providing certainty and the up to date position.

*Observational information*

27. The Appellant makes detailed comments as to the relevance of observational data[20] in selecting a target and planning an attack. The Tribunal does not suggest that observational evidence plays no role, but is satisfied that the risk is increased by the publication of the withheld data in light of the mosaic/jigsaw effect. For example we accept that Mr Heavingham has visited the site when the tanks are being refilled and could not identify by sound which tanks were empty or full or hear between which tanks transfers of fuel were taking place.[21] The appellant argues that reliance upon the jigsaw/mosaic effect is in contravention of EIRs which make no reference to this term[22]. This argument is misconceived. The jigsaw/mosaic effect is merely a shorthand way of describing the impact of specified information when it is placed in the context of other information already available. There is no requirement to consider information under EIRs in isolation, indeed in assessing whether the exemption is engaged the Tribunal is required to consider the impact of the disclosure of this information which necessitates a consideration of context. In our judgment, the Appellant's detailed analysis of the information already in the public domain e.g. in relation to the use of the tanks is an example of an example of the Jigsaw effect in operation.

[18] witness statement of Michael Nicholas as Senior Advisor on issues related to sites the EA regulates under the Control of Major Accident Hazards (COMAH) Regulations p796OB
[1919] P44AC OB
[20] E.g p 44 AB
[21] P778 OB

*The fire safety report*

*28.* The EA's case is that the 15.2.12 fire safety report disclosed by the MOD report is "*dated and relevant to operations of the previous operator and thus should not be considered to demonstrate the nature of current operations at the establishment*" [23] We accept this evidence.

*The 2014 safety report*

29. Unlike the 2014 safety report, the withheld information is relatively recent and "*has been endorsed by the current operator in terms of significant investments to implement improvements…*[24]*"* we accept that the withheld information is a strong indication of current and ongoing operations and the control measures to reduce risk from them. In our judgment disclosure would confirm the current status/specification of the site and what of the "old" information is still valid.

Whether disclosure would increase risk

30. The EA's case is that the withheld information would be useful to someone motivated to cause real harm (e.g. criminals and attackers) to plan attacks on the site and beyond. They rely upon the risk of cyber attacks as the information contains details of the site control architecture and knowledge of the manufacturers of equipment would potentially identify software used. The information also includes the likelihood for a Major Accident To The Environment (MATTE) and the consequences. Knowing the impact of such an incident is material to someone planning an attack to choose between targets based upon maximum likely impact.

31. The Appellant argues that the risk associated with this plant is overstated as an attacker could cause huge devastation attacking a petrol station. Mr Nicholas acknowledges that "soft sites" are at risk and that considerable measures have been taken with regards to layers of security at COMAH sites to reduce the potential for attack. However, we observe that detailing those security measures would be likely to increase the risk

[22] 44AC OB
[23] P795 OB
[24] P340 OB

enabling potential attackers to overcome or bypass these measures. We rely upon the examples given by the EA of a 2015 attack on a petrochemical plant in France and a gas factory near Lyon as demonstrating that industrial/ depot type sites remain at risk. We also accept Mr Nicholas's evidence that these physical attacks could have had more devastating consequences had they taken into consideration and sought to circumvent the control measures and emergency response arrangements.[25]

32. The Appellant argues that the information would not be of use to a potential attacker[26] because it relates to accident scenarios and not attack scenarios. He argues that the risk of an attack is unknowable so it is not possible to work out probabilities. In his view the risk of an attack cannot be calculated and thus the likelihood of a "natural" accident is irrelevant to the probability that it will inform an attack. He argues that the figures relating to the safety scenarios withheld are not reasonably related to terrorism and vandalism (rather than malfunction) due to the difficulty in accessing the relevant parts of equipment relating to particular scenarios. It is his case that the probability of most 'accidental accidents' is low , and a Potential Attacker "*is most unlikely to wait around for the chance to worsen such an event . Rather he would design and engineer his own 'deliberate accident' or act of sabotage"*[27]. In his view to achieve similar levels of devastation an attacker would be more likely to blow up the pumphouse or the pipelines which are in the open with an IED.

33. In attributing little weight to these arguments, the Tribunal observes that the Appellant's attacker scenarios are not exhaustive and are made without knowing whether there are any security provisions which might impact upon the opportunity to observe the site. Unlike the EA's submissions, they are not made with the benefit of expert input relating to national security and the risks arising as are provided through reliance on the CPNI guidance. Additionally, the example given implies the availability of an IED. The Appellant's assertion as to the likely timing of an attack in our judgment is speculation and not evidence based, we do not rely upon it.

[25] P789 OB
[26] Although argument has focused upon potential attackers, the Tribunal considers that the same arguments would apply to anyone with malevolent intent or a desire to disrupt infrastructure or cause widespread public injury
[27] Letter of 31.1.18

34. The EA argues that the locations of current safety critical operations or precise descriptions of the control of those operations could inform a would be attacker. The withheld information includes current best estimates of probabilities of different scenarios (revealing the potential "easier" or more likely scenarios including the barriers which would need to be overcome)[28].

35. The Appellant argues that the EA are confusing risk with consequences and that releasing estimated risk levels would not have much impact on national security, (unlike consequence levels and physical details of the site).[29] He believes that the risk of sabotage is given the same numerical factor in all scenarios thus undermining the argument that the likelihood of sabotage would depend upon variables such as ease of execution and possible consequences. Without commenting on the closed information the Tribunal is satisfied that the Appellant's argument is flawed since it depends upon a potential attacker knowing and being in a position to action the very information that is being withheld, namely knowledge of a site's vulnerabilities, the likely consequences of an incident etc.

36. The EA's case was that the risk frequencies "*inform an attacker as to the probability or likelihood of an event occurring, how those frequencies are affected and reduced by different control measures and therefore how to target a site so as to increase the probability of a serious scenario being caused*." We accept this and are satisfied that the likelihood or probability of an event occurring accidentally (whether through technical failure, human error or natural event) cannot be divorced from the deliberate instigation of an event as the scenarios provide an indicator both of the way and ease with which an event can be precipitated.

37. The EA have given examples of how exploitation of risk factors outside the control of the attacker (such as weather systems that would carry any gaseous release towards centres of population) would, enable the timing of an attack to cause maximum impact.[30] The withheld information includes the make model and location of equipment installed to control fuel movements and minimise the impact of pipework or

[28] P797 OB
[29] Appellant's email of 31.1.18
[30] P788 OB

tank failure. Applying that to the Appellant's scenario of information gleaned from observation; knowledge of the safety measures in place to minimise the consequences of e.g. damaging pipework on site would increase the impact and make the prospect of attack more likely.

38. We accept this evidence. The Tribunal is satisfied that if one knows how to reduce risk and consequence that can be "reverse engineered" in order to increase risk and impact. Having had regard to the open and closed material, in our judgment the withheld information would be useful to someone wanting to:

    i. Weaken barriers through human error or purposefully wanting to attack a site to cause multiple layers of protection to fail and cause maximum harm.[31]

    ii. Target systems to cause them to fail and increase the consequences of a Major Accident .

    iii. Time an incident to cause most harm.

    iv. Launch a cyberattack on the depot or pipeline.[32]

    v. Target an appropriate site.[33]

    We are satisfied therefore that the exemption is engaged.

Public interest.

39. Regulation 12(5)(a) is subject to the public interest test pursuant to regulation 12(1)(b) EIRs. In applying this test the Tribunal has applied regulation 12(2) namely that there is a presumption in favour of disclosure.

In favour of disclosure

40. In addition to the presumption, the EA accept that the public interest in disclosure is strong:

    i. In promoting transparency and accountability for public authorities.

[31] P787 OB

[32] We rely upon the example of specialised software used to oversee and administer a steel mill plant was exploited in a cyber attack by attackers who were familiar with the specialised software used to oversee and administer the plant p789 OB.

[33] Information relating to one site can be used elsewhere as the same operator runs multiple sites with the same systems in place. "It is likely that identical control systems are being installed at other storage sites."p780 OB

ii. The Appellant and those living locally have an interest in cross checking the levels of risk to the environment before and after the introduction of the changes in the site improvement plans.

iii. Disclosure would enhance the public's knowledge and enable them to review the risks and improvements put forward.

iv. The public should be able to assess the local risk to the environment.

v. The public should be able to make informed decisions about the risks to which they are exposed.

vi. Disclosure would provide a fuller picture of the EA's regulatory work in this area.

vii. Disclosure would provide transparency in the assessment of risk providing the information upon which report was based, which would allow Public scrutiny into whether the EA carry out this work effectively and improve public confidence in the process.

viii. Transparency would be a strong incentive for the CA to ensure all assessments are carried out as thoroughly and robustly as practicable which may contribute to the effective running of the public sector and in turn help ensure the best options for public health, safety and environmental protection are selected.

41. Specifically, the Appellant argues that disclosure is in the public interest because:

i. The public (including local residents) have concerns relating to issues raised in the 2014 safety report which showed that the site is insufficiently safe in at least 3 key accident situations, the CA only accepted the report on condition that a large programme of site improvements was undertaken therefore the redacted information is very closely connected. The public cannot understand the safety case without the Safety report and the SIP reports.[34] It is necessary for public reassurance.

ii. The operation of the depot imposes risks to residents without their agreement and without them knowing or being able to understand the true level of risks.

iii. In the absence of disclosure there will be a suspicion that the EA do not believe that its arrangements will withstand scrutiny.

iv. The site improvement plan included provision for large tertiary containment bunds. He believes that the EA has decided not to proceed with these and is concerned the

[34] P15 G of A

public are not being consulted. The information would enable them to express comments before a decision is made or lobby to change the decision if appropriate.

v. In his view the EA have failed as a regulator of the depot thus far (it is not disputed that the probability of a major leak of fuel to the foreshore and estuary over the last 10 years has been in a range representing an unacceptable risk to the environment). These documents discuss this risk, the public need to judge for themselves whether measures agreed reduce the risk to an acceptable level. They cannot trust assurances that it has been addressed in the absence of detail.

vi. Disclosure would enable a critique of the assumptions and methods used by the EA e.g. a cross check of the numerical risks before and after the changes documented within the SIP in relation to:

- People in the open outside the site
- The risks of spontaneous ignition of nearby houses and consequent risks of fatality to people sheltering indoors.
- Risks of seriously contaminating the Severn Estuary downhill of the site following a major leak of fuel.

42. In support of his arguments he relies upon the *2015 Planning (Hazardous Substances) Regulations*, the *Buncefield Disaster Inquiry Recommendations* and the SEVESO 111 Directive (*European Directive 2012/18/EU* in force 1.6.15) as authority for the type of information which is withheld generally being made available to the public to enable them to know and understand the risk from hazardous sites (subject to exemptions such as national security[35]). The Tribunal observes that in this case National Security is relied upon and therefore withholding the information on those grounds is consistent with the Directive.

Against disclosure

43. The EA argues that the public interest remains stronger in protecting local residents and the public at large from the risk of a deliberate attack at the Site with its local and national consequences, including for the UK economy and for the operation of the UK armed forces and national defence, than the public interest in cross-checking the levels of risk to the environment before and after introducing the agreed changes In

[35] P 44AE

particular they advance the following arguments in favour of withholding the information:

i. the withheld information details the levels of potential harm there are in certain scenarios and provides very detailed information to assist an attacker in knowing exactly what to target, how to do it and how to compromise all the control measures in place. It is in the public interest to ensure an incident does not take place. There is a strong public interest in favour of protecting those living locally as well as the general public from the risk of attacker or other malicious attack and the very serious consequences that would ensue to the economy, public safety and national security (in light of the impact of disruption of the fuel supply to the armed forces).

ii. There is already significant information in the public domain, the jigsaw effect of adding this additional information to the existing information would be to increase the risk of the site security being compromised.

44. They rely upon their disclosure of the broad risk region that a site falls into[36] including use of the TifALARP[37] category, which is disclosed giving orders of magnitude. These risk regions are objective being defined in the Chemical and Downstream Oil Industries Forum (CDOIF) Guideline on Environmental Risk Tolerability for COMAH Establishments which is publicly available. The guideline defines:

- the types of harm that should be considered in an environmental assessment.
- how the harm should be characterised for the assessment.
- For MATTEs this is a combination of the severity of harm (the degree of harm within the extent or area/distance of impact), and the duration of harm (the recovery period).)[38]
- The thresholds of Receptor Tolerability for unmitigated consequences reflect expert opinion on levels of harm that would be considered serious, with consideration to various receptor specific areas of legislation.

45. The Tribunal is satisfied that the need for public scrutiny of the specific risk levels rather than broad risk region is mitigated by the use of the CDOIF guidelines which are

[36] Or would after specified upgrades
[37] Tolerable if as low as reasonably practical
[38] EA submissions 25.2.18

industry standard and provide a yardstick against which the report can be judged. The Appellant argues that despite reliance on CDOIF guidance the withheld information is necessary for the public to understand its application as the impact of factors such as the duration of damage have a significant impact upon MATTE categorisation. The Tribunal observes that this ought to be apparent from the terms of the guidelines applied which are in the public domain.

46. If the mitigated risk is TifALARP then the operator must demonstrate they are doing all they can to mitigate the risk taking into consideration the costs and benefits of taking action. The Appellant's case is that this is subjective and public scrutiny is required to ensure that safety is not compromised on the grounds of cost. He draws an analogy with a financial audit arguing that the EA would not issue annual accounts containing only ranges of financial income and expenditure and the auditors would expect to check for detailed internal consistency of the balance sheets.

47. The Tribunal observes that the withheld material relates to the arrangements that are agreed and those that have been rejected even if on the grounds of cost are not therefore in scope. Additionally, in that scenario the public are not the auditors. The EA is the Regulator and not the operator, their role is to scrutinise the operation of the site and in doing so they have access to the unredacted figures. The Tribunal rejects the Appellant's contention that the EA cannot be relied upon as Regulators such that the public need to undertake direct scrutiny of the raw data. Whilst it is clear that the probability of a major leak of fuel to the foreshore and estuary was found to be "intolerable" the EA dispute that they had "allowed" intolerable operation of the site. Mr Heavingham explains that the methodology and definition of a threshold level of risk that would be intolerable was not established nationally until 2013[39]. As soon as the tolerable risk levels were defined the operator did the risk assessment, identified intolerable risk and informed EA in November 2014. The EA took action and by February 2015 had agreed an operator improvement plan.[40] The Tribunal has to assess the position at the date of the request and take into consideration both the response of the current operator and the regulator at that date in assessing the public

[39]The Appellant relies upon earlier references to unacceptable risk but we accept the EA's case that these related to different standards as they were neither nationally agreed nor applied.
[40] P773 OB

interest. We are satisfied from this that the role of the EA as Regulator reduces the need for additional public scrutiny of the detailed figures.

48. The Appellant has argued that he needs this information for future statutory consultations and he also argues that there should have been consultation in relation to the containment bunds. He relies upon the provision for public consultation and participation in decision-making as provided for in SEVESO 111 European Directive.[41] The EA points to the different provisions between Planning Regulations (which is outside their remit) and the COMAH Regulations with which they are concerned. Their case is that there is no requirement in the COMAH Regulations for the site operator or the CA to provide public consultation as the installation of the new control system and the improvement to the containment bunds is not considered to be a significant change.[42] The Tribunal accepts this and considers the relevance to any future statutory consultations to be speculative.

49. The Buncefield Disaster Report in 2008 called for "*improved communications between the operators and the communities surrounding major hazard sites to ensure practical and realistic understanding of the risks and the arrangements for their control*". From the Appellant's submissions[43] it is clear that there is already a considerable amount of information in the public domain. He has provided the Tribunal with considerable details of the types of questions that he would wish to have answered through disclosure of the withheld material. Many of these relate to the rate of offsite fatalities. However, the site improvement plan does not discuss off-site fatalities. The probabilities given in the plan are the likelihood of an environmental impact only. There is no data given for the risks to human health and consideration of those risks are outside the Environment Agency's role and responsibility within the COMAH Competent Authority[44]. Additionally, the EA also rely upon their attempts to be open and transparent, with members of the public including the Appellant. Mr Heavingham references 3 face to face meetings and additional telephone calls with him in support of their endeavour to be transparent. In particular the Appellant has expressed concerns

[41] P 44z OB
[42] it does not add to the inventory of dangerous substance and does not introduce a new process or major accident hazard scenario p781 James Heavingham statement
[43] .g. p 44y-44AO OB
[44] Email of 26.09.2017

relating to the present risk to the Severn Estuary and in response to his concerns has been informed that it is now in the TifALARP Region[45].

50. In assessing the weight to be given to the competing arguments the Tribunal has taken into consideration all the arguments as set out above. The Tribunal agrees with the Commissioner that the need for the public to scrutinise and be able to assess safety concerns for themselves should not be underestimated given the potential consequences for the safety of local residents. However, we agree with the EA that the other information in the public domain and the disclosure of the redacted report which goes a long way to addressing these concerns. In particular we take into account the information that has been disclosed which gives significant information as to which risks have been considered, their range and the general proposals to improve site safety.

51. In particular aggregate MATTE A and B current mitigated tolerability assessment ranges have been provided and some indications as to where within the TifALARP range a risk now lies. The assumptions behind the figures e.g. low or high tide for 50% of the year and the cost of agreed upgrades go a long way towards enabling the public to evaluate the improvements and to form a view as to how likely it is the costs are being prioritised over safety.

52. In our judgment however, there is a greater public interest in making sure that the safety of the site is not compromised through disclosure of information which we are satisfied would increase the risk of a terrorist or malicious attack defeating security measure and the consequences that would flow from that. We are satisfied that there is significant additional weight in favour of withholding the information because of the nature of the threat. In our judgment it requires a very strong public interest in disclosure to equal or outweigh it which in our judgment is not the case here. We repeat our assessment of the adverse effect that disclosure would have as set out above and also rely upon the seriousness of the risks that are being managed and the harm that would arise from a malevolent act in concluding that the public interest in maintaining the exception at regulation 12(5)(a) outweighs the public interest in disclosing the withheld information

[45] EA submissions 14.9.17

Redaction

53. The Appellant argues that this report is (or is likely) to be over-redacted. He has compared the original disclosure of the 2014 safety report received from the MOD with the lightly redacted copy eventually received and argues that much of the original redaction had nothing to do with national security. From this his concern is that too broad a brush has been used to redact the documents in this case.

54. The Tribunal has had regard to the closed information and as set out in this decision is satisfied that the withheld information whilst also relating to safety and operational matters is material to National Security and public safety.[46] He gives as an example the 2014 Safety Report which shows, the actual estimated risks for 7 storage tank overfilling scenarios. The Appellant argues that it is inconsistent to release actual risks for this site before the site improvements and to withhold the similar risk data after the site improvements. In rejecting this argument the Tribunal repeats its analysis as set out at paragraphs 22 - 29 above in particular insofar as it provides an indicator of the efficacy of a safety measure and therefore points towards how worthwhile it would be to overcome that measure in seeking to create maximum impact from an adverse event.

55. The EA have disclosed some risk numbers as an order of magnitude e.g. a risk may have reduced from $10^{-3}$ to $10^{-4}$. If this were expressed as an actual number the new risk would be a number between $1x10^{-4}$ to $9.9999 \times 10^{-4}$. It is their case that using order of magnitude discloses risk sufficiently to inform tolerability (red/amber/green), without disclosing specific frequencies within the range. Similarly, they have not disclosed the aggregated detailed ranges for some categories but have disclosed the risk across all MATTE As or the more serious MATTE Bs. They argue that at some sites there will be a very low number (1 or 2) so that in effect there would be disclosure about the environmental risks arising from just one or a combination of a very low number of individual scenarios if more detail were given. It is their case that the increased specificity in providing either actual figures, disaggregated figures or aggregated figures for certain receptors (as applicable) would enable a potential attacker to select the sites for target where the risk was higher. We accept this argument and repeat

[46] As set out in detail under consideration of whether the exemption is engaged.

paragraph 30-38 above in support of our conclusion that the information is not over-redacted.

Conclusion

56. For the reasons set out above we are satisfied that regulation 12(5)(a) EIRs is engaged and that the public interest in disclosure is outweighed by the public interest in upholding the exemption.

Signed: Fiona Henderson
Judge of the First-tier Tribunal
Dated this 23rd day of May 2018