

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 September 2014

Public Authority: Oil and Pipelines Agency ¹

Address: Whitehall
LONDON
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested draft v4 (or a later draft) of a specific risk assessment report. Acting on behalf of the public authority, the Ministry of Defence ("MOD") relied on regulations 12 (4) (d) (unfinished documents) and 12(5)(a) (international relations, defence, national security & public safety) not to communicate the requested information to him.
2. The Commissioner's decision is that the MOD correctly relied on regulation 12(5)(a) to withhold requested information.

¹ The Oil and Pipelines Agency (OPA) is a public corporation formed in 1986 by virtue of the Oil and Pipelines Act 1985, and currently operates and maintains the Government Pipelines and Storage System (GPSS) on behalf of the Ministry of Defence (MOD). Although, the request was made to the OPA, the MOD responded on its behalf given the broader management responsibility it currently has for the Agency. The MOD also dealt with queries from the ICO following the complaint. The decision notice is however addressed to the OPA because it is a public authority in its own right for the purposes of the FOIA.

Background

3. The Oil and Pipelines Agency (OPA)² is responsible for managing the Government Pipeline and Storage System. It oversees all aspects of the facilities' operation and maintenance, ensuring (amongst other things) that UK military requirements for aviation fuel are met.
4. ABB Engineering Services (ABB) was retained by the OPA to carry out a Fire Risk Assessment for its Redcliffe Bay Petroleum Storage Depot (PSD).

Request and response

5. On 14 March 2013, the complainant requested from the OPA information of the following description:
 - A copy of ABB Redcliffe Bay Risk Assessment Report ("the risk assessment report")300039088 Draft 4, 9 December 2011 (or a later draft)
6. On behalf of the OPA the MOD's ultimate response (in its letter to the complainant dated 11 July 2013) was that this was a matter to be determined under the EIR. It concluded that whilst the OPA held the information it relied on regulation 12 (4) (d) (unfinished documents) not to communicate it to him.

Scope of the case

7. The complainant contacted the Commissioner (on 29 July 2013) to complain about the way his request for information had been handled.
8. The complainant (on 9 December 2013) confirmed to the Commissioner's Office that he was primarily concerned with seeing the report rather than pursuing the issue as to whether draft 4 should be

² <http://www.legislation.gov.uk/ukpga/1985/62>

released. The request was for whichever was the latest version of the risk assessment report at the time of the request.

9. On 11 February 2014, the MOD informed the Commissioner that it wished now³ to also rely on regulation 12(5) (a) (adverse effect on international relations, defence, national security & public safety) to withhold requested information from the complainant.
10. On 4 March 2014, the MOD provided the Commissioner with its submissions regarding its belated reliance on regulation 12(5) (a) to withhold information. It also confirmed that it would now release to the complainant a small portion of requested information.

Reasons for decision

11. Regulation 5(1) of the EIR provides that "a public authority that holds environmental information shall make it available on request". A public authority may only refuse to disclose information where an exception applies.

Regulation 12 (4) (d) unfinished documents/incomplete data

12. The MOD initially relied on regulation 12 (4)(d) to withhold the requested information from the complainant.
13. Regulation 12 (4) (d) EIR states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;"
14. A document may be unfinished because the authority is still working on it or because work on it ceased before it was finalised and there is no intention to finalise it. Furthermore, draft documents will engage the exception because a draft of a document is by its nature an unfinished form of that document. In addition the Commissioner considers that a draft version of a document is still an unfinished document, even if the final version of the document has been published.

³ A public authority is able to raise a new exception before the Commissioner reaches his decision and he must consider any such new claims (Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010))

15. During the course of the investigation the complainant maintained that:

"Although labelled "draft", the report has been circulated to government bodies. For example the HSE quoted it in the statutory advice to the N Somerset Council Hazardous Substance Authority (NSC/HSA) over granting consent for extra tanks at the Redcliffe Bay Petroleum Storage Depot. I felt at a considerable disadvantage in arguing ... (against the consent application)... without having seen the report itself. It may be legal to withhold the draft report but it must be against the spirit of the EIR to continue this indefinitely ... as a means of avoiding informing the public of a matter of great public interest".

16. The complainant's above assertion was put to the MOD by the Commissioner, in correspondence dated 14 November 2013.

17. In its response (dated 29 November 2013) the MOD conceded that the Fire Risk Assessment Report (the full title of the requested report) "was a draft document until version 6 was completed on the 6 February 2012 to allow the OPA to proactively involve the HSE but the status has since changed to final." The MOD then maintained that the final version had not been exchanged with external parties. The MOD confirmed to the Commissioner on the 19 December 2013 that the "change to final" occurred shortly after 6 February 2012 but in any event prior to the complainant's information request 14 March 2013.

18. The Commissioner is satisfied that the withheld information was in fact in its final form when "version 4 or later" was requested. The request for "Draft 4 ... (or a later draft)" would include the final version of the report. This final version (version 6) came into existence shortly after February 2012. As the final version of the report, it was no longer material in the course of completion or an unfinished document. This was the position prior to the information request made by the complainant on 14 March 2013. The exception therefore could not have been engaged in respect of the final version of the report (and this is what the complainant seeks) when the information request was made.

EIR Regulation 12(5) (a) International relations, defence, national security & public safety

19. As stated above (paragraph 9) the MOD latterly claimed that it was also withholding the requested information in reliance on regulation 12(5) (a).

20. To engage regulation 12(5)(a), disclosing the requested information must have an adverse effect on at least one of the following interests: international relations, defence, national security or public safety. It has

to be more probable than not that the alleged harm would occur if the information were released.

21. MOD's position is that disclosure would adversely affect national security and/or public safety. It reiterated to the Commissioner that the Redcliffe Bay Petroleum Storage Depot is a component of the Government Pipeline and Storage System (GPSS) which supplies aviation fuel across the UK to the MOD. The MOD explained that it is anxious to avoid placing in the public domain information that could enable vulnerabilities to be identified about areas of the site.
22. The complainant has provided the Commissioner with his reasoning for believing that releasing the withheld information would not endanger national security or public safety. He argues, supporting his argument with examples, that there is a great deal of publically available information that is likely to be similar to the withheld information. Therefore to release the withheld information would not greatly, if at all, add to the information that a potential terrorist could obtain from pre-existing public sources.
23. The Commissioner does not doubt that there is already publically available information that would assist those who might attack or harm the storage depot. However that does not detract from the MOD's assertion that releasing the withheld information would increase the risk.
24. Having viewed the information the Commissioner is satisfied, on the balance of probabilities, that the exception is engaged. The Commissioner appreciates that the withheld information could assist those that would seek to damage (for whatever reason) the storage depot. Due to the role of the GPSS and the purpose and function of the facility, such damage would have a serious impact on national security and public safety.
25. Though the exception applies, the information is still to be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".
26. Public interest arguments put forward by the MOD and the complainant are summarised below.

Public interest arguments in favour of releasing the information

- The release of this detail would demonstrate the OPA's commitment to openness and transparency about the worst case scenarios in the event of a major accident on the site.

- Since 2001 there has been a Ministerial embargo on the pro-active public release of safety information about COMAH sites post-9/11 so not much is known about the precise safety measures at these sites.
- Release of the material requested would increase the amount of technical information in the public domain about the site and enhance understanding of the site's operation in an emergency situation.

Public interest arguments against disclosure

- The PSDs are a strategic UK defence asset providing aviation fuel or Kerosene to MOD sites and form a part of the Government Pipeline Storage System (GPSS). If precise information about equipment and operations on site were to be placed into the public domain, the extent of the site's vulnerability to attack would be more clearly identifiable.
- Exception 12(5)(a) has only been applied to the specific technical details relating to the site and the specifics of the safety measures which do not of themselves give re-assurance to the public about the site's security: e.g. volume of material stored; information about pipelines and storage systems; specific details of safety measures, including alarm systems; staffing levels; incident command structure; consequences of an incident; procedures to be followed in the event of an emergency; safety equipment and emergency response equipment.
- The HSE publishes guidance to all public bodies (referenced above) on release of information relating to COMAH sites. It specifies the types of information that may not be appropriate to release other than subject to public interest test on a case by case basis. This advice cannot be ignored when responding to this request and there is no concept of 'private release' to an individual of any information withheld under EIRs.
- There is a very strong public interest in withholding information that could assist in the planning of an attack or undermine the effectiveness of a response to an emergency.

Public Interest Assessment

27. The Commissioner recognises that there is a general public interest in the disclosure of environmental information because it supports the right of everyone to live in an adequate environment and ultimately contributes to a better environment. This is a general public interest argument for disclosure and it does not have to relate to a specific exception. On the other hand, public interest arguments in favour of the exception have to relate specifically to what that exception is protecting.

28. The Commissioner further takes cognisance of the more specific public interest factors that favour the release of the withheld information, particularly, the increase in public awareness regarding the site's safety.
29. The Commissioner does not accept all of the public interest arguments postulated by the MOD. However the need to ensure high levels of public safety and the importance of upholding natural security are particularly weighty considerations. The Commissioner finds that these public interest factors clearly favour the maintenance of the exception rather than the disclosure of the withheld information. He has therefore concluded that, in all the circumstances of this case, the public interest in maintaining the exception outweighs that in disclosure.

Right of appeal

30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF