

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 29 November 2016

Public Authority: Environment Agency
Address: Horizon House
Deanery Road
Bristol
BS1 5AH

Decision (including any steps ordered)

1. The complainant has requested information relating to the improvements agreed for the Redcliffe Bay Petroleum Storage Depot (the depot). The Environment Agency (EA) released some information but refused to disclose the majority of information citing regulations 12(5)(a) and 12(5)(e) of the EIR.
2. The Commissioner has decided that regulation 12(5)(a) of the EIR applies in this case. However, she has decided that she has received insufficient evidence from the EA to demonstrate that regulation 12(5)(e) of the EIR applies.
3. The Commissioner therefore requires the EA to take the following steps to ensure compliance with the legislation:
 - The EA should disclose the requested information that has been withheld under regulation 12(5)(e) of the EIR.
4. The EA must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 August 2015, the complainant wrote to the EA and requested information in the following terms:

"Please may I request a copy of the improvements to the Redcliffe Bay PSD [Petroleum Storage Depot] as agreed between the CA and the OPA [Oils and Pipelines Authority] at the time of issuing the Conclusions Letter for the 2014 Safety Report, under the provisions of the 2004 Environmental Information Regulations?"

6. The complainant wrote to the EA on 7 and 15 September 2015 chasing a response. He clarified in this correspondence that he required a copy of the Site Improvement Plan for the depot as agreed between the EA and the OPA on 20 February 2015.
7. The EA responded on 9 November 2015. It acknowledged that it had not responded within 20 working days and had therefore breached regulation 5 of the EIR. It informed the complainant that it does not hold a Site Improvement Plan as such but does hold two documents which together would constitute a Site Improvement Plan. The EA confirmed these to be a presentation to the EA by CLH (the operator) and an Environmental Cost Benefit Analysis produced by Environ UK Ltd for the OPA. The EA advised the complainant that it would respond to the request in full in due course.
8. The EA responded in full on 13 November 2015. It released a small amount of information but refused to disclose the majority of information citing regulations 12(5)(a), 12(5)(e) and 13 of the EIR.
9. The complainant referred the matter to the ICO on 16 November 2015.
10. The Commissioner wrote to the complainant on 6 January 2016. She asked the complainant to request the EA to carry out an internal review in accordance with regulation 11 of the EIR.
11. The complainant requested the EA to carry out an internal review on 11 January 2016.
12. The EA carried out an internal review on 4 March 2016 and notified the complainant of its findings. It advised the complainant that it upheld the application of regulations 12(5)(a), 12(5)(e) and 13 of the EIR to the remaining withheld information.

Scope of the case

13. The complainant contacted the Commissioner on 5 March 2016 to complain about the way his request for information had been handled. Specifically, the complainant does not agree that the remaining withheld information is exempt from disclosure under regulations 12(5)(a) and

12(5)(e) of the EIR. No complaint was made about the application of regulation 13 of the EIR.

14. The EA confirmed during the Commissioner's investigation that not all sections of the two documents constitute the agreed improvements for the depot. As the planned and agreed improvements were the focus of the complainant's request it is only these sections which have been considered by the Commissioner in the notice. She will now consider the application of each exception in turn.

Reasons for decision

Regulation 12(5)(a)

15. Regulation 12(5)(a) of the EIR sets out an exception to the duty to disclose environmental information, where disclosure would adversely affect international relations, defence, national security or public safety.

The EA's submissions

16. The EA explained that the depot is part of a pipelines and storage system, which supplies aviation fuel across the UK to the Ministry of Defence (MOD), commercial/private customers and airports such as Heathrow and Gatwick. As such, it is an important infrastructural asset in terms of defence and national security. An attack on or substantial disruption to the depot would have very serious consequences.
17. The EA advised that this exception exists to protect the UK, its people and legal and democratic institutions. The withheld information 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 tank numbers, key pieces of equipment used to control fuel movements and prevent scenarios such as tank overfilling, details of automated tank valves, boundary valves, automated tank gauging system, tank high level gauging system and the switch room. All of which could pose a risk to public safety and national security if they were to be released to the general public, as they could then be used by criminals and terrorists to plan attacks. The EA confirmed that the information would be particularly useful to anyone who intended to vandalise property at the depot and/or carry out a terrorist attack on the site and beyond. It considers this type of information should remain confidential to avoid any threat to national security and public safety and has only withheld information which could assist someone motivated to cause real harm both in the vicinity and the nation as a whole.

18. The EA referred to the case of the *Secretary of State for the Home Department v Rehman [2001] UKHL 47* and stated that this case confirmed that there is no need to demonstrate that disclosure of the information would lead to an immediate and direct threat to the UK. Instead a real possibility of such a threat would be sufficient. It was noted that even seemingly harmless information (which the EA confirmed is not the case here) when pieced together with other information could result in harm. Information may also be withheld if there is a real possibility that disclosure could result in physical hurt or injury to the public. The possibility of the harm envisaged is substantial rather than remote.
19. The EA also stated that the First-tier Tribunal hearing of *Wheeler v Information Commissioner and the Ministry of Defence EA/2014/0067* related to this depot and the tribunal accepted that disclosure of information would have a serious effect on national security. The EA maintains that in 2015/2016 there remains a real possibility of threat. It stated that it is common knowledge that at the time of the request the Government considered terrorism was a real threat to the UK.
20. The EA also explained that the withheld information may expose the operator of the depot (CLH) to attacks, including cyber attacks, as the information contains details of the site control architecture. It believes knowledge of manufacturers of equipment would potentially identify the software used that would be valuable information to anyone planning an attack. The information also includes details for the potential for a major accident to the environment (MATTE) and the consequences. Knowledge of the consequences of a MATTE enables someone planning an attack to select between the sites and consider how to maximise the damaged caused.

The complainant's views

21. The complainant advised that he requires access to the withheld information to cross check the levels of risk to the environment before and after the introduction of the changes documented within it and, if necessary, to provide a critique of the assumptions and methods used by the EA.
22. He confirmed that his justification for this aim is contained in various Articles of the European Directive 2012/18/EU which came into force on 1 June 2015. He states that these Directives state that this type of information should be made available to the public subject to possible exceptions such as national security, that the public is given an early opportunity to give its opinion and express comments before a decision is taken and that he and other concerned neighbours be informed of the reasons for any changes.

23. The complainant considers the EA has over-redacted information whilst responding to his request. He comments that he has only received a very small amount of information and cannot envisage how the majority of the requested information can be legitimately withheld under the EIR.
24. The complainant also states that the EA has admitted recently that the probability of a major leak of fuel to the foreshore and estuary during the last ten years of operation has been within a range which represents an unacceptable risk to the environment. He therefore considers the EA has failed as the regulator of the depot so far, which then raises questions on the reliability the public may place on future assurances by the EA of environmental safety and on the performance of the EA as a regulator. The complainant confirms that the EA has claimed that the contents of the withheld information discuss this risk and how to reduce it to an acceptable range. He considers that he can only judge whether this has been or will be achieved by reading the withheld information.
25. The complainant believes the EA's real reason for withholding this information is that it would prefer that no-one is allowed to check out the different risk estimates both before and after the site improvements. He believes the EA lacks confidence that its claimed risks will survive public scrutiny.
26. The complainant also considers a potential terrorist can obtain the information needed for an attack on the site by using the internet, reading information already disclosed into the public domain and the public versions of the Emergency Plans and by observing the site itself from outside its boundaries.

The Commissioner's decision

27. To engage this exception disclosure of the requested information must have an adverse effect on at least one of the following interests – international relations, defence, national security or public safety. The threshold is high so it has to be more probable than not that the alleged harm would occur if the withheld information is released.
28. It is noted that there is no definition of national security within the EIR. However, in the First-tier Tribunal hearing of *Norman Baker v Information Commissioner and the Cabinet Office (EA/2006/0045)* it was noted that:
 - national security means the security of the UK and its people;
 - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;

- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the UK's national security.
29. It is the Commissioner's view that it is not necessary to show that disclosing information would lead to a direct or immediate threat to the UK. A real possibility of such a threat is sufficient. In addition, it is the Commissioner's opinion that terrorists can be highly motivated and will go to great lengths to gather information in order to plan an attack. She agrees with the EA that seemingly harmless information (and she is not suggesting that this is the case here) when pieced together with other information terrorists already possess or could obtain, could result in harm, would also constitute sufficient grounds for withholding information under regulation 12(5)(a) of the EIR.
30. Paragraph 17 above outlines the content of the redacted information. Taking this into account and the decisions the Commissioner has already reached on requests for similar information she is satisfied that there is a real possibility that disclosure would adversely affect national security and public safety. She is of the opinion that it is reasonable to say that this information would be useful to anyone wishing to vandalise property at the depot or intending to carry out a terrorist attack on the site and beyond. The Commissioner has decided that the potential for harm is substantial in this case.
31. The Commissioner notes that the complainant considers similar, and in some cases, the same information would appear to have already been disclosed and that a substantial amount of information could be obtained by terrorists or vandals from the internet or from surveillance of the depot from its boundaries. The Commissioner communicated her view on these points in her decision notice for FS50584522 at paragraphs 21 and 22, which can be accessed via the following link:
- <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624808/fs50584522.pdf>
32. The Commissioner stated that such arguments do not automatically undermine the engagement of the exception in this particular case, particularly when matters such as national security and public safety are

concerned. It is also noted that the EA has maintained that the withheld information has never been previously disclosed.

Public interest test

33. As stated earlier in this notice, the complainant believes there is an overwhelming public interest in favour of disclosure in this case. He has stated that the operation of the depot imposes risks to residents without their agreement and without allowing them to know the true level of risks and understand them. He states that the EA admitted itself that the probability of a major leak of fuel to the foreshore and estuary during the last ten years of operation has been within a range which represents an unacceptable risk to the environment. The complainant believes the EA has failed as the regulator of the depot so far, which then raises questions on the reliability the public may place on future assurances by the EA of environmental safety and on the performance of the EA as a regulator.
34. The complainant confirms that the EA has claimed that the contents of the withheld information discuss this risk and how to reduce it to an acceptable range. He considers it is in the public interest for the public to judge this for themselves and this can only be achieved by having access to the withheld information.
35. The complainant also referred to the EU Directive 2012/18/EU and in particular directive 15 4 which states that Member States shall ensure that the public concerned is given an early opportunity to give its opinion and express comments before a decision is taken on a specific individual project. The complainant confirmed that the decision was taken to implement certain improvements detailed in the withheld information prior to the public being consulted and him being allowed to comment.
36. The EA stated, overall, the public interest in favour of disclosure is significant in this case. It acknowledged there is a public interest in promoting transparency and accountability of public authorities. It confirmed that it had taken into account the complainant's position and the submissions he had made and noted, in particular, that he has a specific interest in cross-checking the levels of risk to the environment before and after the introduction of the changes in the site improvement plans. It stated that it recognised the withheld information would enhance the public's knowledge and enable them to review for themselves the associated risks and the improvements put forward. The EA confirmed that it accepted there is a public interest in members of the public being able to assess local risks to the environment and disclosure would enable them to do this more easily and thoroughly. It also confirmed that it felt the public should be able to make informed

decisions about the risks to which they are exposed and disclosure would provide a fuller picture of its regulatory work in this area.

37. However, in relation to this site, the EA and other public authorities have already disclosed a significant amount of information in order to address the public interest. It referred to various other ICO decisions and tribunal cases very similar to this (ICO reference FER0359172 First-tier Tribunal reference EA/2011/1043, ICO reference FER0524884 First-tier Tribunal reference EA/20140067, FER0511546 First-tier Tribunal reference EA/2014/0224, ICO reference FS50584522 currently under appeal at the First-tier Tribunal) where information has been considered and this exception has been upheld.
38. Although it is aware that each case should be considered on its own merits, and this approach has been taken here, the EA confirmed that a consistent approach should be taken where it is genuinely felt that information would adversely affect national security and public safety if it were disclosed. It also stated that although there are strong public interest arguments in favour of disclosure, it is of the view that the public interest rests in maintaining the exception in this case. The EA considers there are stronger public interests arguments in favour of protecting local residents and the public at large from the risk of a terrorist attack and vandalism, which could have serious consequences for the UK's economy, its operation of its armed forces and therefore national defence.
39. It maintains that it is more probable than not that the withheld information would be of real use to those intent on causing harm or damage within the UK and public safety and national security must take precedent.
40. The Commissioner agrees that there is a significant public interest in the disclosure of the redacted information in order to allow interested parties, such as the complainant, to be able to understand more fully the local risks to the environment and the agreed improvements for the site. In the Commissioner's view such an interest should not be underestimated given the potential consequences for the safety of local residents. However, the Commissioner agrees that to some extent the public interest in disclosure is partially met by the information available in the public domain as a result of the complainant's requests and others. Furthermore, the Commissioner also accepts that there is a significant public interest in ensuring that the safety of the site is not compromised by the disclosure of information which could be used by those with a malevolent intent to disrupt the operations at the site or carry out a terrorist attack and thus endanger local residents and the word at large. Ultimately, the Commissioner considers this to be a more persuasive and compelling argument and therefore has concluded that

the public interest in maintaining the exception at regulation 12(5)(a) outweighs the public interest in disclosing the withheld information.

Regulation 12(5)(e)

41. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
42. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the EA must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
43. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the EA must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
44. The EA has applied this exception throughout the withheld information and highlighted the relevant redactions in green (purple was used to highlight the redactions made under 12(5)(a) and as detailed above the Commissioner has agreed this exception applies to all redactions marked purple). The Commissioner understands the information withheld under this exception consists of the operator's (CLH) budget costs, recommendations, methods and upgrade work, products stored on site, cost benefit analyses of advantages and disadvantages of various proposed upgrades, photographs of equipment, the installation of equipment, flow rates and names of suppliers.
45. Dealing with bullet point one, the EA has argued that the withheld information is commercial and industrial in nature. CLH is the operator of the depot and it is a commercial business which stores and transports oil for profit. The withheld information relates to details of its suppliers, the equipment it uses and its installation, the costings of various proposed upgrades and budgets.

46. The Commissioner is satisfied that the withheld information relates to the commercial activities of CLH and so the first bullet point is met.
47. The EA confirmed that the withheld information was provided to the EA to enable it to carry out its regulatory functions and it is not otherwise in the public domain. CLH consider the information is not trivial and relates to its commercial activities. It also has strong views that disclosure would harm its business. The EA have therefore claimed that the withheld information has the necessary quality of confidence.
48. The Commissioner is satisfied that the information was shared with the EA solely for it to carry out its regulatory functions and for no other purpose. The EA has confirmed that the information is not otherwise publically available, is not trivial in nature and so has the necessary quality of confidence. For these reasons, the Commissioner is satisfied that the second bullet point in met.
49. Turning now to the third and fourth bullet points, the EA has explained that disclosure of this information would adversely affect the commercial interests of CLH. CLH has an economic interest in ensuring that competitors do not gain access to commercially valuable information, retaining its market position and avoiding loss of revenue or income. It confirmed that the withheld information includes information on budget costs, recommendations, methods and upgrade work and products stored on site. It also contains details relating to the cost benefit analysis of advantages and disadvantages of various proposed upgrades, which are highly confidential and were specifically obtained by the OPA (former owner of the depot) with a view to making safety improvements.
50. The EA stated that the withheld information also contains commercially sensitive information such as photographs of equipment used, the installation of equipment and flow rates. It argued that CLH's sophisticated network and equipment is what separates them from other competitors. If the information was disclosed competitors would be able to see and then replicate the systems they use in order to gain commercial advantage. In addition, the EA stated that the withheld information contains the names of suppliers CLH use for equipment and the suppliers could then be approached for information.
51. With regards to financial information, the EA argued this information would show CLH's investment and could be used by competitors to force more competitive tenders from its suppliers and give it an unfair advantage. In addition it stated that CLH will tender this work for other sites and the information could be used to form the basis of a winning tender by unfair advantage. The work itself is ongoing until 2019 so is very much live and in progress.

52. The Commissioner has reviewed the withheld information and based on the submissions she has received from the EA and/or CLH she cannot see how disclosure of this information would adversely affect the commercial interests of CLH. The Commissioner has received insufficient arguments to demonstrate that the withheld information would be useful to CLH's competitors and to what extent or how this specific information would be useful in future tenders or at other similar sites. She cannot establish from the submissions supplied exactly how specific equipment used, how this has been installed and the names of CLH's suppliers would place CLH at a commercial disadvantage in the market place if it were disclosed.
53. The EA and/or CLH has not argued its position fully enough and the onus is on a public authority to demonstrate clearly how an exception under the EIR applies. For these reasons, the Commissioner has decided that regulation 12(5)(e) does not apply based on the evidence she has seen. This is not to say that some or all the withheld information is not of a commercially sensitive nature, it may be. Only that she has received insufficient arguments on which to make a decision and she considers the EA and/or CLH has been provided with sufficient opportunity to make its case.
54. As the Commissioner has decided that regulation 12(5)(e) does not apply, as there is insufficient evidence to demonstrate that the withheld information would have the adverse effects described, there is no need to go on to consider the public interest test for this exception.

Procedural matters

55. The Commissioner has found the EA in breach of regulation 5 of the EIR in this case, as it failed to respond to the complainant's request within 20 working days of receipt.

Right of appeal

56. 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

57. 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.
58. 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

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