Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 March 2020

Public Authority: Health and Safety Executive
Address: Redgrave Court
Merton Road
Bootle
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested a safety report relating to Redcliffe Bay Petroleum Storage Depot. The Health and Safety Executive (HSE) disclosed some information but withheld other information under the exceptions provided by regulation 13 – personal information, and regulation 12(5)(a) – adverse affect to national security and public safety. The complainant has not challenged the application of regulation 13, which has simply been applied to the names of the individuals who authored the report, or are employees of the company operating the site.

2. The Commissioner finds that the HSE breached regulation 5(2) by failing to respond to the request within the statutory time for compliance. The HSE also breached regulation 11(4) by failing to conclude its internal review within the time allowed. However in respect of the main issue the Commissioner finds that the HSE is entitled to rely on the exception provided by regulation12(5)(a) to withhold the remaining information.

3. The Commissioner does not require the public authority to take any further action in respect of this request.

Request and response

4. On 7 January 2019 the complainant wrote to the HSE and requested information of the following description:

> "Please would you send me a copy of the 2019 Safety Report issued by the CLH-PS for the Redcliffe Bay PSD .....under the 2004 ElRegulations?
>
> I already have the previous 3 Safety Reports dated 2003, 2008 and 2014.
>
> The 2014SR expiry date is 23 Jan 2019 and I am assuming that its replacement is already with the HSE. If it is labelled as a draft or interim SR, pending approval by the CA, I would still like to have a copy please if only because COMAH2015 Reg 10(1) a says that the site must have a new SR after 5 years. Even a draft SR will be the de facto SR after 23 Jan 19."

5. On 30 January 2019 the HSE advised him that due to the complexity and volume of the information it needed to extend the time for complying with the request and that it expected to provide a response by 4 March 2019. Then on 4 March 2019 the deadline was extended to 1 April 2019.

6. On 2 April 2019 the HSE did provide a response. It provided the complainant with some of the requested information, but withheld other information under the exceptions provided by regulation 12(3) – personal information, and regulation 12(5)(a) – national security and public safety.

7. The complainant requested an internal review on 9 April 2019. The HSE concluded the internal review on 21 August 2019. The HSE upheld its original position. Although its internal review letter referred to regulation 12(5)(b) rather than regulation 12(5)(a), this is understood to be a typographical error and not the application a new exception.

Scope of the case

8. The complainant contacted the Commissioner on 25 June 2019 to complain about the HSE's handling of the request. Before accepting the complaint the Commissioner wrote to the HSE on 25 July 2019 advising it to carry out the internal review. It was only after the completion of that internal review on 21 August 2019 that the Commissioner considered the complaint was eligible for investigation.

9. The Commissioner considers the main matter to be decided is whether the HSE is entitled to withhold information under regulation 12(5)(a). The Commissioner will also consider whether the HSE dealt with the

initial request and subsequent internal review in accordance with the time frames set out in regulations 5(2) and 11 of the EIR.

10. The Commissioner acknowledges that the complainant has adopted a constructive approach to the investigation by choosing not to challenge the application of regulation 13 to the names of individuals.

Background

11. The information that has been requested is the latest report produced in compliance with the COMAH (Control of Major Accident Hazards) Regulations 2015. The COMAH regulations ensure that operators of sites which store dangerous chemicals, including petrochemicals, take all necessary measures to prevent major accidents and limits the consequences to people and the environment of any major accidents which do occur. The particular report that has been requested is for Redcliffe Bay Petroleum Storage Depot, a site operated by a private company.

12. COMAH regulations are enforced by a Competent Authority and for the Redcliffe Bay site the competent authorities are the HSE and the Environment Agency. The actual report is produced by the site operator and the operator is required to supply a copy to the HSE.

13. COMAH safety reports are reviewed every five years and the request seeks the latest version, which was actually produced in 2018. The complainant has previously obtained copies of earlier reports, albeit those reports were partially redacted.

Reasons for decision

Regulations 5(2) - time for responding to a request.

14. Regulation 5(2) provides that a public authority shall make the requested information available as soon as possible and no later than 20 working days after the request is received.

15. Under regulation 7(1) a public authority may extend that period to 40 working days where this is necessary due to the complexity or volume of the requested information. The public authority is required to inform the complainant of the need to do so within 20 working days of the request being received.

16. In this case the request was submitted by email on 7 January 2019. The HSE advised the complainant of the need to extend the time for compliance on 30 January 2019. This was within the required 20

working day period. At this point the HSE informed the complainant that it intended to respond to the request by 4 March 2019. That would have been the fortieth working day since its receipt. However it was not until the 2 April 2019 that the HSE ultimately provided the information which it was prepared to release.

17. Having viewed the withheld information, the Commissioner would not dispute that the HSE had grounds for extending the time of compliance for an additional 20 working days. However as it failed to respond within that permitted extension, it did breach the time for compliance. This constitutes a breach of regulation 5(2).

Regulation 11 – internal review

18. Regulation 11(4) provides that where an applicant requests a public authority to conduct a review of its handling of a request, the public authority is required to inform the applicant of the outcome of that review within 40 working days.

19. In this case the request to conduct a review was made on 9 April 2019. The HSE did not provide the outcome of its review until 21 August 2019. This is over twice the 40 working days permitted. The HSE clearly breached regulation 11(4).

Regulation 12(5)(a) - national security and or public safety

20. So far as is relevant, regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect national security or public safety.

21. The HSE has explained that the Redcliffe Bay site stores and supplies aviation fuel to commercial and public sector customers across the UK including major airports. A major accident at the site would have catastrophic effects on the site from the perspective of physical hurt or injury to employees working there and members of the public who live or work near the site. Such an incident would also have a significant impact on military and commercial airports which rely on the supply of fuel from the site as well as having a catastrophic impact of the environment. The HSE is concerned that placing the withheld information in the public domain in response to a request would assist those seeking to create such a major accident.

22. The HSE acknowledges that some information relating to the Redcliffe Bay site may be publicly available, but argues that the level of operational detail specified within the complete COMAH Safety Report is not publicly available in one place as to do so would greatly assist those wanting to undertake a terrorist act. Even though some of the information may appear harmless or innocuous when viewed in isolation, the HSE is of the view that when pieced together with other information

that may already be in the public domain the information could be used by a terrorist organisation to target particular areas of the site to cause physical injury to individuals and damage the site infrastructure.

23. The HSE also considers the information may be of interest to casual vandals.

24. The Commissioner accepts that the harm which the HSE believes would occur is relevant to the interests protected by the exception, i.e. both national security and public safety. Although there is no definition of 'national security' in the EIR, it is understood to concern the protection of the United Kingdom and its people and clearly encompasses the threat of terrorism. Any terrorist attack on a site close to a residential area would endanger the safety of not only those working at the site but also local residents.

25. The complainant disagrees with the HSE's assertion that the information would assist would-be terrorists. He considers that the withheld information is likely to be the same or similar to that he has already obtained from previous information requests, primarily information from older COMAH safety reports and that therefore, as he puts it, their disclosure 'has already given the game away'. He also argues that sufficient intelligence could be gleaned from observing the site and its operation to plan and carry out an attack.

26. The Commissioner challenged the HSE as to the amount of information that was already in the public domain and the extent to which disclosure of the 2018 safety report would provide additional intelligence to anyone contemplating a terrorist attack. HSE advised the Commissioner that it did not know what information had been disclosed by other public authorities in response to other requests made by the complainant. It did say however that it was of the view that it was extremely unlikely for other public authorities to disclose highly sensitive information of the type it is withholding.

27. The Commissioner has conducted searches of the internet and not been able to locate copies of any earlier reports. However she cannot rule out the possibility that some information similar in character to that which is being withheld has previously been disclosed. But it does not appear that such information is readily available. The Commissioner does though recognise that terrorists can be highly motivated and may be well resourced and so some may be capable of locating information that has been disclosed in the past and possibly published on the internet.

28. The HSE has also explained that as the complainant lives close to the site, in what is classed as the Public Information Zone, he would have been provided with additional information on the likelihood and effects of a possible major accident. Such information would be provided by the

site's operator and although it is understood that no restrictions are placed on the further dissemination of such information, the advice is written in straightforward simple terms that avoid the complicated technical expressions that appear in the COMAH report. The Commissioner considers that this information is very unlikely to be of a sensitive nature or provide information of interest to terrorists.

29. The Commissioner notes that as the complainant lives near the site, he also has the opportunity to study its layout and observe how it operates. He could do so over long periods and without any risk of raising suspicion. Any terrorist carrying out surveillance would not necessarily have the same opportunity.

30. Nevertheless the Commissioner accepts that the complainant has obtained a large amount of information relating to the site, including some which would not be easily accessible to those outside the Public Information Zone. He may also have learnt further information from being able observe the running of the site. The Commissioner also notes that the complainant has said that he is prepared to keep any information that is disclosed to him, under lock and key and not divulge it to unauthorised persons. However the Commissioner's approach when considering whether an exception is engaged is to look at the harm that would occur if the information was placed in the public domain and freely accessible to all. The question therefore is not whether disclosing the information to just the complainant would prejudice national security or public safety, but whether making the information freely accessible to anyone and everyone would cause that harm.

31. The Commissioner considers that disclosing the full COMAH report in response to an information request would promote the availability of the information and increase awareness of the site. Therefore even if some sensitive information could already be accessed through sophisticated searches of the internet, the Commissioner will take account of any risk that would be caused by providing additional information and whether making that information freely available would make it easier for anyone planning an attack on the United Kingdom's infrastructure, including those who are only capable of carrying out relatively crude attacks.

32. This is not to suggest that the exception can easily be engaged. The test is whether disclosing the information 'would adversely affect' national security. It is not possible to say with absolute certainty what will happen in the future following the disclosure of information, but the term 'would adversely affect' is taken to mean that it has to be more likely than not the harm envisaged would occur.

33. The HSE has described the withheld information as including:

- information on the physical security arrangements at the site;

- information on the location of tanks and hazardous material at the site
- inventories, outputs, storage capacity and actual volumes of hazardous material stored at specific locations and within specific tanks;
- detailed information about pipelines e.g. underground locations, flow rates etc;
- staff details and staffing levels at the site whilst operational, e.g. specific names, job functions, telephone numbers and details of shift patterns and staffing numbers during a shift;
- Safety equipment and emergency response details.

34. The Commissioner has viewed the withheld information and finds that the above description is an accurate summary of its contents. Its disclosure would provide very precise technical details of the site's facilities, operational procedures, both safety and security measures and the damage that would be caused by the different types of potential accidents identified in the report.

35. There is no need for the HSE to demonstrate that the Redcliffe Bay site is currently a terrorist target for the exception to be engaged. The Commissioner considers promoting the dissemination of such detailed and technical information through its disclosure in response to an information request would provide significant intelligence to anyone seeking to undermine the United Kingdom's national security. This would increase the risk of a terrorist attack. Even if the disclosure would not necessarily result in an attack on the Redcliffe Bay site, it could be used to build up a bigger picture of such depots, the so called mosaic approach. Disclosure would allow terrorists to compare the details of the Redcliffe Bay site with any information they had gleaned about similar sites to determine which was most vulnerable or to better understand the potential harm that could be caused by attacks on different sites. This could be used to inform a decision about which site to target.

36. Although it may be impossible to eradicate the threat of terrorism completely and although there may already be a lot of information available about the Redcliffe Bay site, the Commissioner is satisfied that disclosing the withheld information would increase the risk of an attack on that or some other, similar depot. The Commissioner finds that the exception is engaged on the basis of the adverse affect to national security.

37. For completeness, the Commissioner is not persuaded that the information would aid casual vandals. The Commissioner considers that vandalism is more likely to be undertaken on the spur of the moment

and that those inclined to such anti-social behaviour are unlikely to take the time and trouble to digest the information contained in the report.

38. The Commissioner has also considered whether some of the arguments which the HSE has presented under the public interest test are relevant to the engagement of the exception on the basis that the disclosure would have an adverse affect on public safety. These arguments are dependant on the disclosure of the information being considered as increasing the risk of terrorism, but are distinct from them.

39. Under its public interest arguments in favour of the maintaining the exception the HSE has claimed that disclosure would prejudice the quality and efficiency of the deliberation process with operators due to a loss of candour caused by the prospect of disclosure and that disclosure would hamper the gathering of information from stakeholders or confidential sources. Both of these feed into another of the HSE's argument, i.e. that disclosure would adversely affect HSE's ability to carry out its duties properly. The Commissioner recognises that there is a logic to an argument that if information was disclosed which would increase the risk of a terrorist attack, other parties could become reluctant to share information with the HSE as it would no longer be seen as a safe pair of hands when it came to protecting sensitive information. If this happened it would be more difficult for the HSE to safeguard the safety of those at work together with, in this case, the safety of local residents. However the HSE has not developed these arguments and it is therefore very difficult for the Commissioner to assess the extent, severity or likelihood of the alleged prejudice to the HSE's regulatory activities. Therefore although the Commissioner follows what she understands to be the HSE's reasoning, she is not persuaded that there are sufficient grounds for finding the exception is engaged on that basis alone. However this does not in any way interfere with the Commissioner's finding that the exception in engaged due to the increased risk of a terrorist attack if the information was disclosed.

Public interest test

40. As with all the exceptions under the EIR, regulation 12(5)(a) is subject to the public interest test. This provides that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

41. The HSE has only identified very generic public interest arguments in favour of disclosing the COMAH report in full. It has simply recognised that there is a public interest in transparency and understanding decision making, particularly in matters affecting the public.

42. The complainant has raised a number of strong public interest arguments in favour of disclosing the information. He argues that those living close to the site and who therefore would be affected by a major accident have the right to fully understand the risks they face. In broad terms, he also considers that they should have access to information which would allow them to satisfy themselves that the report complied with the statutory requirements of the COMAH Regulations, that the HSE were properly fulfilling its regulatory responsibilities when accepting the report and that disclosure would also allow local residents to challenge decisions by, or properly participate in the decision making of other public authorities, such as the local council, which affect the site.

43. The complainant argues that the HSE has failed to meet its obligation under the COMAH regulations to ensure that the public living near hazardous sites receive information on risks imposed on them and that they understand those risks. He believes disclosure of the safety report in full would therefore answer questions about the safety of the site. The complainant has quoted from the final report of the Buncefield Disaster Inquiry published in 2008, (Buncefield was an oil storage facility which caught fire in December 2005 and led to, what was described as, the biggest explosion in Europe since the second world war). The Inquiry recommended improved communications between operators of such sites and local communities to ensure residents had a practical and realistic understanding of the risks and the arrangements for their control. The complainant considers that disclosure of the report in full would meet that objective.

44. In particular the complainant seeks numerical risk data which he believes would allow him and other members of the affected public to determine whether or not all houses are the defined safe distance from the site. He also seeks the Emergency Response plan contained in Appendix O of the report. He believes it is necessary to disclose such information to enable the public to participate more fully in any consultations held by the relevant Hazardous Substances Authority (in this case the local council's planning department) into any proposed significant modifications to the site and when formulating its External Emergency Plan. The significance of the risk data and Appendix O is that the standard advice for local residents to go indoors, stay indoors and tune to the local radio station, would not be applicable to any house that was not deemed to be safe distance from the site. The complainant is further concerned that the Hazardous Substances Authority has not carried out consultations, despite what he considers to be significant modifications having been made to the site. The information would therefore allow him to challenge decisions of the Hazardous Substances Authority.

45. The complainant commented that as far as he knew the HSE had not provided the Hazardous Substances Authority with a copy of the full

report or a copy of its Appendix O. However the HSE has confirmed to the Commissioner that the Hazardous Substances Authority has access to a copy of the report. Although this should reassure the complainant that the Hazardous Substances Authority has the information it needs to perform its duties, this does not remove the value in the public also having access to this information in order to hold the Hazardous Substances Authority to account and in order to feed into its decision making process.

46. The complainant further argues that information released from the previous COMAH Safety Report identified six safety issues that were unresolved. This he believes raises questions as to whether the HSE should have accepted the previous report and presumably therefore increases the need for scrutiny of the latest report so the public can form a view on whether the HSE is correct to accept the new report. It also means that there is a clear value in the public understanding whether the safety issues identified in 2014 have now been resolved.

47. The Commissioner recognises the importance of ensuring that sites such as that at Redcliffe Bay are operated safely and that those such as the HSE and the Hazardous Substances Authority, who are those tasked with regulating the relevant safety regimes, carry out their functions diligently and can be held to account for their decisions. There is a particular value in those most likely to be affected by a major accident at the site being able to access information which allows them to ensure their lives and property are properly safeguarded. Where it is possible that there are outstanding safety concerns, there is clearly a public interest in understanding whether those matters have been resolved. Therefore the Commissioner is satisfied that there is some weighty public interest arguments in favour of disclosure.

48. Having said that the Commissioner recognises that the HSE and other authorities and the operators of the site have disclosed a great deal of information which goes along way to meeting the public interest in holding the authorities to account and informing the public on safety issues. Nor is the Commissioner aware of any wider concerns over the operation of the site or the competence of the HSE and other public authorities in regulating such sites.

49. It is now necessary to consider the public interest in maintaining the exception. The HSE has set out four public interest factors which it considers would support withholding the information. Three of these are interlinked, being those which have already been discussed at paragraph 39 and concern the alleged adverse affect on HSE's ability to carry out its regulatory duties properly. As explained earlier the Commissioner has not been persuaded by these arguments and they carry no weight in the consideration of the public interest in favour of avoiding an increased risk of terrorism.

50. In respect of that risk of terrorism, the HSE has stated that it considers disclosure would create an unacceptable risk to the health, safety and security of the public at large and the installation workforce.

51. Having accepted that disclosing the withheld information would encourage and assist a terrorist attack on the Redcliffe Bay site or a similar one, the Commissioner considers there is a very real public interest in withholding the information in order to avoid the increased risk of an attack that, if successful, would have a catastrophic impact on the site and endanger the lives and properties of local people and the workforce. The Commissioner also recognises that the site forms an important part of the United Kingdom's infrastructure and services both civilian and military airports. The Commissioner considers that any increase in the risk of such an attack to be a very strong public interest argument in favour of maintaining the exception.

52. In light of the above, although the Commissioner finds there are strong public interest arguments in favour of disclosing the information so that local residents can better understand the risks they face and so that they can better participate in the decision making process, this would be at the cost of increasing the risk to local residents and workers of a terrorist attack. The Commissioner therefore finds that the public interest favours withholding the information and that the HSE are entitled to maintain the exception.

Right of appeal

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

54. 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.

55. 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

Rob Mechan
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