

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

Decision notice

Date: 11 August 2016

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a copy of the 2014 Safety Report for the Redcliffe Bay Petroleum Storage Depot. The MOD initially sought to withhold this information on the basis of regulation 12(4)(d) (incomplete material). However at the internal review stage the MOD disclosed the requested information albeit with redactions made on the basis of regulations 12(5)(a) (national security and public safety) and 13(1) (personal data). The Commissioner is satisfied that the redacted information is exempt from disclosure on the basis of regulation 12(5)(a). However, he has concluded that the MOD breached regulation 11(4) of the EIR by failing to complete its internal review within 40 working days.

Request and response

2. The complainant submitted a request to the MOD on 8 March 2014 seeking a copy of the 'Redcliffe Bay Petroleum Storage Depot COMAH Safety Report; 2014 edition' (the '2014 Safety Report').
3. The MOD responded to this request on 14 April 2014 and explained that it considered this report to be exempt from disclosure on the basis of regulation 12(4)(d) of the EIR and that the public interest favoured maintaining the exception.
4. The complainant contacted the MOD on 16 April 2014 in order to seek an internal review of this decision; the MOD acknowledged receipt of this request.

5. However, the MOD did not complete its internal review considerations until 18 January 2016. The review concluded that regulation 12(4)(d) had been incorrectly relied upon to withhold the requested information. The MOD therefore disclosed the requested report albeit with redactions made on the basis of the exceptions contained at regulations 12(5)(a) and 13(1) of the EIR.
6. Following receipt of this report, the complainant contacted the MOD on 14 February 2016 and explained that he wished to be provided with copies of appendices P and Y of the report. The Commissioner informed the MOD that in his view these appendices would actually fall within the scope of the complainant's original request for the 2014 Safety Report. This is on the basis that in the Commissioner's view a request for a copy of a report would generally be taken to include any annexes or appendices to the report itself.
7. The MOD provided the complainant with copies of appendices P and Y of the report on 6 May 2016, with redactions made on the basis of regulations 12(5)(a) and 13(1) of the EIR.

Scope of the case

8. The complainant initially contacted the Commissioner on 2 June 2015 to complain about the MOD's failure to complete its internal review in a timely manner and moreover its decision to withhold the requested report on the basis of regulation 12(4)(d). Subsequently, following further disclosures by the MOD, the complainant's concerns now focus on the MOD's decision to redact information from both the 2014 Safety Report and appendices P and Y on the basis of regulation 12(5)(a) of the EIR.

Reasons for decision

Regulation 12(5)(a)

9. 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 MOD's position

10. The MOD explained that as with the disclosures of previous safety reports regarding the Redcliffe Bay facility, information concerning site

safety and security had been redacted. More specifically, the MOD explained that the redacted information related to:

- Technical information about the equipment on site;
 - Staff procedures to be followed in the event of an emergency;
 - Details of emergency response equipment and procedures;
 - Details of safety equipment and procedures; and
 - Staffing levels and regular site operation.
11. The MOD argued that disclosure of this information would make the Redcliffe Bay facility vulnerable to malicious individuals or groups wishing to attack critical parts of the site infrastructure and the associated pipeline. In this respect, the MOD argued that there was a significant risk that this information could be utilised to undermine responses to incidents, accidents or emergencies at Redcliffe Bay. In making these redactions, the MOD acknowledged that terrorists could already gain information about the Redcliffe Bay site through observation and from recorded information in the public domain. However, in its view the site specific information redacted would provide much more detail than would be available through such methods and would undoubtedly increase the site's vulnerability and the risk of a successful attack.
12. The MOD explained that in its discussions with relevant stakeholders, consideration had been given to the previous disclosures made under EIR in relation to information concerning Redcliffe Bay. The MOD acknowledged that having consulted such stakeholders, information which had previously been released, would not now be released if the same request was received.

The complainant's position

13. The complainant argued that general information on the site which is likely to interest a potential terrorist is mostly already in the public domain. He suggested that by spending an hour on the internet, by reading reports in the public domain – including safety reports relating to the site previously released under the EIR, and/or by observing the site from outside the boundary fence, almost everything necessary is easily available to a potential terrorist.
14. The complainant argued that the MOD had clearly taken an inconsistent approach to redacting the 2014 Safety Report compared to disclosures of similar information under the EIR about the Redcliffe Bay site. For example, the complainant noted that:

- The information on tank capacities is given in Table 6 of the released 2008 Safety Report and thus it was unclear why the similar table on page 53 of the 2014 Safety Report is redacted out.
 - The dimensions of every pipe on site is given in Table 5.4.2a of the 2003 Safety Report, albeit pipe dimensions were redacted from the report disclosed in response to this request.
 - Why is every reference to the refurbishment of Tank 9 redacted out when all data including Consent for this Tank is given on North Somerset Council Planning Application 12/P/0714/HAZ?
15. Furthermore, the complainant argued that it was most unlikely that a potential terrorist would seek to imitate one of the accident scenarios described in the 2014 Safety Report. Rather, he suggested that a potential terrorist would probably choose to damage an exposed pipeline or the pump house by means of an IED. Consequently, he questioned why the details of the improved instrumentation provided against over-filling of tanks in section 2.5.1 were redacted out, if of little interest to a potential terrorist but of key interest to the safety of the site, eg accident scenario 1.8a, etc?
16. In summary the complainant argued that the MOD's policy of over redactions made to ensure national security is based on the premise that there could be a potential terrorist putting together even scraps of information released under the EIR in order to be fully prepared for an attack on the site. In his view, whoever carried out the redactions in the released 2014 Safety Report seems to be mostly unaware of what is already in the public domain and uncertain of what should be withheld for genuine concerns of national security.

The Commissioner's position

17. 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. This sets a high threshold and it has to be more probable than not that the alleged harm would occur if the information were released.
18. There is no definition of national security within the EIR, but an Information Tribunal decision considering a request made under FOIA noted the following:
- 'national security' means the security of the United Kingdom 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 United Kingdom's national security.¹
19. In the Commissioner's view 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 would suffice. Furthermore, the Commissioner recognises that terrorists can be highly motivated and may go to great lengths to gather information. Therefore, the possibility that seemingly harmless information (and he is by no means suggesting that 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 on the basis of regulation 12(5)(a).
20. Given the content of the redacted information, as summarised above by the bullet points at paragraph 10, and the context in which it was produced, ie a safety report concerning the operation of Redcliffe Bay, the Commissioner is satisfied that there is a real possibility disclosure would adversely affect national security or public safety. In his opinion it is reasonable to conclude that the information would be useful to anyone who intends to vandalise property at the Redcliffe Bay facility and/or carry out a terrorist attack on the site and beyond. Moreover, the Commissioner is satisfied that the possibility of the harm envisaged is substantial rather than remote.
21. In reaching this conclusion the Commissioner has taken into account the complainant's line of argument that similar, and in some cases, the same information would appear to have been disclosed in response to previous disclosures of reports concerning Redcliffe Bay. The Commissioner recognises that in most cases such a situation would make it difficult to sustain the engagement of an exception contained within regulation 12(5) of the EIR, all of which require that disclosure would cause some adverse effect.

¹ Norman Baker v the Information Commissioner and the Cabinet Office (EA/2006/0045 4 April 2007) <http://www.informationtribunal.gov.uk/DBFiles/Decision/i24/Baker.pdf>

22. However, in this case the Commissioner is persuaded that simply because similar, or potentially the same, information has been disclosed under the EIR in the past this does not automatically undermine the engagement of the exception when applied to this particular request. In reaching this view the Commissioner has taken into account, and placed considerable weight on the fact that as part of its discussions with stakeholders the MOD acknowledged that information previously disclosed under the EIR would now be withheld if the same requests were considered again. In the Commissioner's opinion 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. In his view, when matters of national security or public safety are relevant, such circumstances will apply.

Public interest test

23. The exception at regulation 12(5)(a) is subject to a public interest test. Therefore, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the withheld information

24. The complainant argued that the operation of the Redcliffe Bay site imposed risks on local residents without their agreement and without allowing them to know the level of the chief risks and understand them. He emphasised that the risks to offsite people, properties and the environment had not been shown to be acceptably low in the 2008 Safety Report. He explained that he wished to understand all aspects of the safety of the site, including the technical aspects of it and disclosure of an unredacted version of the 2014 Safety Report was key to this. Furthermore, he also noted that the EU directive 2012/18/EU required Member States to ensure that safety reports for such sites are available to the public upon request, subject to exceptions such as for national security. The purpose of the directive being to allow the public to provide an early opinion on significant modifications to such sites, and the complainant argued that he needed sight of the 2014 Safety Report if he was to make an informed comment about the 2015 site improvement plan. Ultimately, the complainant argued that the public interest was best served by publishing the facts concerning the safety of the Redcliffe Bay facility.

Public interest in maintaining the exception

25. The MOD argued that the public interest in providing reassurance about site safety is already met to a significant degree by the regulatory activities of the Competent Authority, ie the Health and Safety Executive, and by the MOD's partial disclosure of the 2014 safety report. The MOD emphasised that given the potentially dangerous product stored on the site and the nature of the operations conducted at Redcliffe Bay, the withheld information could be used to identify any perceived vulnerabilities which could be exploited by someone with malevolent intent to disrupt operations or cause a significant incident. This, the MOD argued, was firmly against the public interest.

Balance of the public interest

26. 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 more fully understand the safety concerns in respect of the site. In the Commissioner's view such an interest should be not 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 MOD's disclosure of a redacted version of the report in question. 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 and thus endanger local residents. 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 11 – internal review

27. Under Regulation 11 of the EIR, if a requester believes that a public authority has not dealt with a request for environmental information properly, the requester can complain to the public authority and ask it to reconsider its response. Regulation 11(4) requires a public authority to provide the requester with the outcome of the internal review within 40 working days. In this case the complainant asked for an internal review on 16 April 2014. The MOD did not inform him of the outcome of the review until 18 January 2016. This clearly represents a breach of regulation 11(4).

Other matters

28. For the reasons set out above, the Commissioner has concluded that the MOD breached regulation 11(4) given the time taken to complete the internal review. The Commissioner asked the MOD to explain this delay. In response the MOD explained that deliberations and discussions undertaken as part of the internal review had been very protracted and required consultation with a number of other public authorities, including the Environment Agency, Oil and Pipeline Agency, HSE and the company CLH Pipeline System (CLH-PS) Ltd, the new owners of the Redcliffe Bay facility. The MOD explained that such discussions involved consideration of previous disclosure under EIR, including the 2008 Safety Report.
29. The Commissioner recognises the complex and technical nature of the requested information and moreover the requirement for the MOD to consult with a variety of stakeholders in respect of this request. Nevertheless, he cannot condone a public authority taking nearly two years to complete an internal review under the EIR. Such a delay obviously comprises a procedural breach of the legislation, but arguably more importantly goes against the spirit and intention of the EIR. The delays in completing the internal review in this case meant that the complainant had to wait significantly longer to access a redacted version of the 2014 Safety Report. The Commissioner would urge the MOD to ensure that in similar cases in the future consideration is given as to how consultation with the necessary stakeholders could be completed more quickly.

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

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