

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

Date: 24 July 2020

Public Authority: Canal & River Trust

Address: Head Office
First Floor North
Station House
500 Elder Gate
Milton Keynes
MK9 1BB

Decision (including any steps ordered)

1. The complainant, on behalf of the BBC, has requested inspection reports associated with Toddbrook Reservoir in Derbyshire. The Canal & River Trust (CRT) released the reports, having redacted some of the information in them under regulation 12(5)(a) (international relations, defence, national security or public safety) and regulation 13(1)(personal data). CRT considers the public interest favours maintaining these exceptions. The complainant disputes CRT's reliance on regulation 12(5)(a) to withhold information falling within the scope of her request.
2. The Commissioner's decision is as follows:
 - CRT is entitled to rely on regulation 12(5)(a) of the EIR to withhold some of the information the complainant has requested, and the balance of the public interest favours maintaining this exception.
3. The Commissioner does not require CRT to take any remedial steps.

Request and response

4. In August 2019 residents in Whaley Bridge, Derbyshire, were evacuated because of fears that Toddbrook Reservoir would burst and flood the town.
5. On 7 August 2019 the complainant wrote to CRT and requested information in the following terms:

"I would like to request inspection reports in relation to Toddbrook Reservoir but I would like to make sure I'm asking for the correct thing before formally sending my request."
6. The complainant subsequently confirmed to CRT in a phone call that she is seeking the inspection reports from the Supervising Engineer's annual inspection and the Inspecting Engineer's Section 10 inspection.
7. CRT responded to the clarified request on 24 September 2019. It released:
 - the inspection report, dated 30th April 2019, for Toddbrook Reservoir carried out by an Inspection Engineer in accordance with Section 10 of the Reservoirs Act 1975; and
 - the Supervising Engineer's 2018 report for Toddbrook Reservoir carried out by the Supervising Engineer in accordance with Section 12 of the Reservoirs Act 1975.
8. CRT had redacted some of the information contained in these reports under regulation 12(5)(a) and regulation 13(1) of the EIR.
9. Following an internal review, CRT wrote to the complainant on 25 November 2019. It maintained its position, confirming that it considered that disclosure would adversely affect national security and public safety.

Scope of the case

10. The complainant contacted the Commissioner on 24 December 2019 to complain about the way her request for information had been handled. The complainant confirmed that the focus of her complaint is CRT's application of regulation 12(5)(a) to some of the information she has requested.

11. The Commissioner's investigation has therefore focussed on CRT's reliance on regulation 12(5)(a) of the EIR, and the balance of the public interest.

Reasons for decision

12. Regulation 12(5)(a) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety. As above, CRT has confirmed that it considers that disclosing the information it has withheld would adversely affect national security and public safety.
13. CRT has provided the Commissioner with unredacted copies of the two reports in question, as well as copies of the redacted versions that were released, and she has reviewed this information.
14. In its submission to the Commissioner, CRT has explained that reservoirs hold back huge quantities of water in many cases, with the potential to cause serious flooding and risk to homes, property and people if released uncontrolled. It considers that disclosing the redacted material would risk releasing sensitive information that could be used for malicious purposes.
15. CRT says it considers that disclosure would increase the likelihood of an attack on the UK reservoir network by criminal and/or terrorist organisations wishing to target the UK's infrastructure. It would also increase the chances that such an attack would be successful, by potential attackers with the information necessary to cause widespread injury, loss of life and damage to property. A strategically placed explosive device could lead to loss of life and damage. CRT notes that the village of Whaley Bridge is very near to Toddbrook Reservoir and there is a playground just below it.
16. In considering the request for information that is the subject of this investigation, CRT says it had regard to the *National Protocol for the Handling, Transmission and Storage of Reservoir Information and Flood Maps* (the "Protocol"), a copy of which it has provided to the Commissioner. The Protocol was produced by the UK Reservoir Safety Liaison Group and provided to CRT by the Environment Agency, its regulatory body. The Protocol states that:

"[a]ny public body that receives a request under EIRs for information relating to regulated reservoirs, which is not already publicly available, should consider release of the information in accordance

with the provisions of the legislation and the guidance provided by this Protocol."

17. CRT says that in the period immediately following the incident at Toddbrook Reservoir that prompted the complainant's request for information, it discussed its approach to releasing information of the kind sought with the Environment Agency. The Environment Agency had also received requests for information similar to the request it received from the complainant. As noted, the Environment Agency is the statutory regulatory authority for reservoir operators and an executive non-departmental public body sponsored by the Department for Environment, Food and Rural Affairs. CRT says it therefore considered it reasonable, without abrogating its own obligations to consider the requests received, to follow its lead on the disclosure of potentially sensitive information.
18. The Environment Agency explained that it had had regard to the Protocol in preparing material for disclosure in response to the requests for information it had itself received. The Environment Agency also provided CRT with copies of the information requested with redactions already applied. Ultimately, the redactions applied to the version of the material disclosed to the complainant corresponded to those applied by the Environment Agency.
19. CRT has explained that it considered it was appropriate to seek the views of the Environment Agency because the Environment Agency is, in its view, better placed than the Trust to determine what material might, if it were to fall into the wrong hands, represent a threat to national security and public safety. CRT is essentially a charitable organisation sitting outside of central government.
20. The Environment Agency has oversight of all regulated reservoirs, a closer relationship to Government and is more likely to be appraised of the varied security challenges faced by the United Kingdom. Furthermore, it is better placed to understand how information held by individual organisations such as the CRT could, in aggregate with the information held by others, pose a threat to national security and/or public safety.
21. CRT has told the Commissioner that, in the course of preparing its submission, it again approached the Environment Agency. The Environment Agency confirmed that its approach to disclosing information, bound as it is by the Protocol, has not changed. The Environment Agency confirmed that, if asked to release information that is owned by reservoir undertakers (which would include the information sought in the complainant's request) it would do so in accordance with the Government's guidance, which has not changed.

22. The Protocol is clear that “[f]ailure to apply [the Protocol] may lead to the intended or unintended release of sensitive information which may then be used for malicious purposes”. CRT says that in releasing the redacted version of the information provided to the complainant, it considers that it acted in accordance with the Protocol.
23. A detailed breakdown of how different categories of information should be treated is included at Annex 1 of the Protocol. CRT has noted that the Protocol states at Annex 1 that “[t]he general principle in releasing information is that it should not expose any vulnerabilities of a reservoir, such as structural details, faults, safety measures etc”. CRT considers, having followed the lead of the Environment Agency, that the redactions in the reports disclosed were made in accordance with this Annex and the Protocol more generally, with the objective of ensuring that any vulnerabilities of the reservoir were not exposed, thus protecting national security and public safety.
24. CRT goes on to note that the Commissioner’s published guidance entitled *International relations, defence, national security or public safety (regulation 12(5)(a)) Environmental Information Regulations* (the “National Security Guidance”) acknowledges that even “relatively mundane information about primarily civil infrastructure could also be of use to terrorists and therefore could attract the exception provided by regulation 12(5)(a)”.
25. The National Security Guidance observes that some examples of threats to national security are “more obvious” and gives as an example the Commissioner’s decision to uphold the UK Atomic Energy Agency’s decision to withhold certain information that would assist those wishing to steal material for use in a so-called dirty bomb. CRT argues that the parallels with this case and the present situation are readily apparent in the light of its decision to withhold information that would, in the expert opinion of the UK Reservoir Safety Liaison Group, assist those wishing to exploit any vulnerabilities in the UK’s reservoir network for malicious purposes.
26. CRT argues that the likelihood of disclosure having an adverse effect on national security and public safety is more substantial than remote. It considers that it is inevitable. If material that would expose vulnerabilities in the UK reservoir network - such as the withheld information - were to be disclosed, that would represent an unacceptable threat to national security and public safety. Once it is in the public domain, malicious actors would be free to disseminate the information and exploit it.
27. CRT acknowledges that Toddbrook Reservoir is currently drawn down and the risk of any attack is consequently reduced. It notes that this

will not remain the case indefinitely, however. Once information is disclosed, it will remain in the public domain indefinitely leaving Toddbrook Reservoir vulnerable. Separately, Toddbrook Reservoir shares common design and construction features with a number of other reservoirs that are not currently drawn down. The impact of any disclosure on the safety of these reservoirs must therefore also be considered.

28. CRT goes on to note that the National Security Guidance clearly states that it is "*not necessary to show that disclosing the information would lead to a direct or immediate threat to the UK*". The National Security Guidance provides the example of West Yorkshire Fire Brigade who successfully argued that disclosing details of its fleet of vehicles could allow malicious actors to clone its vehicles and allow its command centre (used to coordinate incidents of national significance) to be infiltrated.
29. CRT notes that the Commissioner made this finding notwithstanding the fact that there was no evidence that anyone was currently planning an attack against the command centre. CRT acknowledges that this decision concerned a request under the Freedom of Information Act 2000 that was refused under the national security exemption in section 24(1) of that act. In CRT's view the Commissioner appears to have accepted that the decision is relevant to decisions under the EIR, however, by its inclusion in the National Security Guidance and CRT agrees with that position. It considers the similarities between that example and the present case are readily apparent.
30. Finally, CRT notes that the National Security Guidance states that "*in broad terms [the public safety] limb of the exception will allow a public authority to withhold information when disclosure would result in hurt or injury to a member of the public*". CRT submits that where information would expose vulnerabilities in the UK reservoir network it is clear that this would threaten public safety by increasing the risk of an attack on one or more reservoirs, with consequent widespread injury, loss of life and damage to property. The National Security Guidance states that the Commissioner considers that issues including details about potential targets for terrorists are relevant to requests under the EIR.
31. To conclude CRT says that in responding to the complainant's request for information, it was and remains conscious of the fact that the national security and public safety exceptions in regulation 12(5)(a) of the EIR only permit it to withhold publication to the extent of the adverse effect. CRT has acknowledged that significant parts of the reports were redacted, but says it took care (following the lead of the Environment Agency and acting always in accordance with the Protocol) to disclose as much information as possible without giving rise to a threat to national security and public safety.

32. In her request for an internal review, the complainant had argued that CRT had failed to explain how disclosing the withheld information would expose the site (Toddbrook Reservoir) to national security and public safety risks, or to demonstrate a link between the withheld information and the potential for individuals to maliciously exploit that information.
33. In the Commissioner's view CRT has provided the above explanation and demonstration in its submission to her. She considers that disclosing the full investigation reports in response to an information request would promote the availability of this information and increase awareness of the Toddbrook Reservoir site.
34. The Commissioner has taken account of any risk that would be caused by disclosing the 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.
35. This is not to suggest that the exception under regulation 12(5)(a) can easily be engaged. The test is whether disclosing the information 'would adversely affect' national security and public safety. 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 that the harm envisaged would occur.
36. There is no need for CRT to demonstrate that the Toddbrook Reservoir site is currently a terrorist target for the exception to be engaged. But the Commissioner agrees with CRT that 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 Toddbrook Reservoir site, it could be used to build up a bigger picture of similarly constructed reservoirs, the so called mosaic approach. Disclosure would allow terrorists to compare the details of Toddbrook Reservoir with any information they had gleaned about similar reservoirs. They could then determine which was most vulnerable or 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.
37. Although it may be impossible to eradicate the threat of terrorism completely, the Commissioner is satisfied that disclosing the withheld information would increase the risk of an attack on Toddbrook Reservoir or some other, similar reservoir. The Commissioner finds that regulation 12(5)(a) is engaged on the basis of the adverse affect to national

security and public safety. She has gone on to consider the public interest test.

Regulation 12(1)(b) – public interest test

Public interest in disclosing the information

38. In her request for an internal review the complainant argued that there is a public interest in the public being able to understand how infrastructure is developed and maintained.
39. CRT notes that in its internal review response it acknowledged the significant public interest in the incident at Toddbrook Reservoir. CRT says it also recognises that there is significant interest in obtaining information that may contribute to the public debate relating to reservoir dam safety both specifically in relation to Toddbrook Reservoir and in connection with the UK's reservoir network more generally. Finally, CRT says that it is also cognisant of the EIR's presumption of openness and the need to promote accountability and transparency.

Public interest in maintaining the exception

40. CRT notes that the National Security Guidance expressly recognises “[t]here is an obvious and weighty public interest in safeguarding national security”. Taking its lead from the Protocol and the approach of its regulator, the Environment Agency CRT considers that the material withheld from the reports disclosed to the complainant would expose vulnerabilities in both Toddbrook Reservoir and other reservoirs with similar design features and construction. Disclosing such material would increase the risk of a successful attack on UK reservoirs by malicious actors and therefore run directly contrary to the public interest in safeguarding national security.
41. CRT says that to the extent permissible, it believes there are further arguments as to the class of document requested; that is, the inspection reports which are created periodically in relation to all UK reservoirs. As far as CRT is aware, it is standard practice never to disclose these inspection reports given the highly sensitive content – be that further to the Protocol or simply on the basis of confidentiality. Disclosure of any inspection report, even any anodyne content, would undermine the ability of reservoir undertakers to keep the sensitive information they contain away from the public eye.
42. CRT has identified a further consideration relevant to this. Namely, that concerns about disclosing highly sensitive information to potentially malicious actors would, in turn, have a likely chilling effect on the frank and open discussion between engineers and reservoir undertakers that

is essential to the maintenance and safe operation of the country's reservoir infrastructure.

43. CRT says its primary position is that, for the reasons discussed, the information redacted from the material provided to the complainant would, if disclosed, represent a real threat to national security and public safety. It says it attached considerable weight to this in considering how to respond to the request, particularly in view of the approach taken by its regulator, the Environment Agency.
44. CRT has noted that the Commissioner's published guidance¹ (the "Public Interest Test Guidance") provides examples of the kind of factors that will be relevant when assessing the weight of the arguments in favour of maintaining an exception. Three of the factors identified appear to CRT to be particularly relevant in the present case:

(a) **Likelihood of the adverse effect:** Information which exposes vulnerabilities in the UK's reservoir infrastructure would be in the public domain and so national security, in the sense of threat and risk, would be inevitably adversely affected.

(b) **Severity:** As set out above, reservoirs hold back huge quantities of water in many cases, with the potential to cause serious flooding and risk to homes, property and people if released uncontrolled. A successful attack on a reservoir would therefore be likely to lead to widespread injury, loss of life and damage to property. Any information that would increase the likelihood of such an attack, or of such an attack being executed successfully, would therefore have a severe adverse effect on national security and public safety.

(c) **Age of the information:** The reports requested by the complainant are from 2018 and 2019. The information they contain therefore remains topical and sensitive and its disclosure would still constitute a severe adverse effect for national security and public safety.

45. In view of the above, CRT considers that substantial weight should be attached to the arguments in favour of maintaining the exception under regulation 12(5)(a) of the EIR and submits that the public interest in safeguarding national security and public safety clearly outweighs the public interest arguments in favour of disclosure in this instance.

¹ https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

46. Further or in the alternative, CRT considers that the public interest in the incident at Toddbrook Reservoir, and in obtaining information that may contribute to the public debate relating to reservoir dam safety, has to a significant extent been satisfied by alternative means of scrutiny. This is the investigations by Professor David Balmforth and Dr Andrew Hughes into the causes underlying the incident at Toddbrook Reservoir. The reports setting out the findings and recommendations of those investigations were published following the conclusion of their respective investigations. CRT notes that the Public Interest Test Guidance contains the following paragraph:

"The fact that other means of scrutiny are available and could be used does not in itself weaken the public interest in disclosure and we consider that it is not a relevant factor in the public interest test. However, where these other means have been used or are being pursued, this may go some way to satisfying the public interest that would otherwise be served by disclosure. If, for example, a report providing the conclusions or outcome of the other means of scrutiny or regulation is publicly available, this may to some extent lessen the public interest in disclosing the information requested under EIR. Furthermore, if the other investigation is ongoing, the public interest may be better served by allowing it to continue without interference, rather than disclosing information prematurely." (CRT's emphasis.)

47. CRT has advised that on 3 September 2019, the Secretary of State for the Environment, Food and Rural Affairs announced an independent review of the incident at Toddbrook Reservoir. The review was led by Professor David Balmforth, an independent expert. He was tasked with considering what might have led to the damage and whether it could have been prevented or predicted, as well as identifying lessons learned. During the course of his review, CRT says it cooperated fully with Professor Balmforth and provided him with a large volume of material, including the un-redacted versions of the reports sought by the complainant. In his report, Professor Balmforth made 22 recommendations and these have all been accepted by the Government.
48. Concurrently with the independent review led by Professor Balmforth, CRT says it commissioned Dr Andrew Hughes, an eminent dam expert, to investigate the nature and root cause of the incident at Toddbrook Reservoir. As it did with Professor Balmforth, CRT says it provided Dr Hughes with a range of material including the un-redacted versions of the reports sought by the complainant and this information fed into both experts' reports and conclusions. CRT says it is keen to emphasise that both experts' reports are publicly available.
49. In line with the Public Interest Test Guidance, CRT considers that the public interest in disclosing the redacted information is significantly

lessened by the fact that both reports are publicly available, were published with the benefit of having reviewed the information sought, and address what happened at Toddbrook Reservoir.

50. Finally, CRT again notes that beyond the reports already published, the Public Interest Test Guidance observes that *"if the other investigation is ongoing, the public interest may be better served by allowing it to continue without interference, rather than disclosing information prematurely"*. CRT considers it may be relevant in this regard to note that the Secretary of State for the Environment, Food and Rural Affairs has asked Professor Balmforth to undertake a "phase 2" investigation into reservoir safety generally. It is CRT's view, notwithstanding the public interest in obtaining information that may contribute to the public debate on reservoir safety, that the public interest would be best served by allowing Professor Balmforth's expert and independent investigation into an important matter of public safety to continue without interference, rather than releasing sensitive information into the court of public opinion.

Balance of the public interest

51. The Commissioner accepts that there is a strong public interest in the incident at Toddbrook Reservoir; for local residents, and for those individuals nationally who live or work near to a reservoir. There is, therefore, certainly a public interest argument in favour of disclosing the information so that residents can better understand any risks they may face and understand how reservoir infrastructure is maintained.
52. However, disclosing the withheld information would be at the cost of increasing the risk to residents of a terrorist attack. In addition, disclosure could also potentially increase the risk of such an attack on other sites across the UK. The Commissioner therefore finds that the public interest favours withholding the information and that CRT is entitled to maintain the regulation 12(5)(a) exception.
53. They had not been published at the time of the request, but the Commissioner notes that two reports into the incident at Toddbrook Reservoir – which draw on the information requested in this case - have now been published².

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872769/toddbrook-reservoir-independent-review-reporta.pdf
<https://canalrivertrust.org.uk/refresh/media/thumbnail/41505-report-on-toddbrook-reservoir-by-dy-andrew-hughes.pdf>

Right of appeal

54. 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

55. 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.
56. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF