

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 23 April 2024

**Public Authority:** Merseyside Fire and Rescue Authority  
**Address:** Fire Brigade Headquarters  
Bridle Road  
Bootle  
L30 4YD

#### **Decision (including any steps ordered)**

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1. The complainant requested correspondence between Merseyside Fire and Rescue Service (the 'MFRS') and Cobalt Energy Ltd regarding a fire at an energy plant in Liverpool. The MFRS refused the request on the basis that Regulation 12(5)(e) and 12(5)(c) of the EIR applied (commercial confidentiality and intellectual property rights).
2. The Commissioner's decision is that the MFRS was correct to withhold the information under Regulation 12(5)(e). He has, however, decided that the MFRS was not correct to apply Regulation 12(5)(c) to two reports.
3. The Commissioner requires the MFRS to take the following steps to ensure compliance with the legislation.
  - To disclose copies of the two Dunton Environmental Limited reports.
4. The public authority 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

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5. On 11 July 2022, the complainant wrote to the MFRS and requested information in the following terms:

"It is noted from Internet records that Cobalt Energy had a central role in delivering the Orsted BESS installation and had to satisfy MFRS of the hazards of operating bulk Lr-on batteries. As you state "This information is not held" please supply under the FOI all correspondence with Cobalt Energy."

6. The MFRS responded on 10 November 2022 applying section 41 of FOIA to the information (information provided in confidence). In December 2022, at the internal review stated, it applied Regulation 12(4)(d) to withhold the information from disclosure (material in the course of completion).
7. In March 2023, the subsequent complaint to the Commissioner was put on hold pending the outcome of a First-Tier Tribunal hearing on an associated case. The decision of the tribunal on that case was promulgated in October 2023 and the case was then reopened.
8. On 14 November 2023, the MFRS disclosed some information to the complainant, however, it withheld other information on the basis that Regulation 12(5)(e) and Regulation 12(5)(c) applied.

## Scope of the case

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9. The complainant contacted the Commissioner on 18 December 2023 to complain about the way their request for information had been handled.
10. The following decision notice analyses whether the MFRS was correct to withhold the information under Regulation 12(5)(e) and Regulation 12(5)(c).

## Reasons for decision

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### **Regulation 12(5)(e) – commercial confidentiality of environmental information.**

11. This reasoning covers whether the MFRS was correct to withhold the requested information under Regulation 12(5)(e) of the EIR.

12. Information can be withheld under Regulation 12(5)(e) if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
13. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e) of the EIR, the authority 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.
14. Regulation 12(5)(e) is also subject to a public interest test if the exception is engaged.
15. The background to this request is a significant incident which the MFRS attended at a Battery Energy Storage System (BESS) site at Carnegie Road, Liverpool<sup>1</sup>. The site is operated by Orsted. Following its investigations, the MFRS produced two detailed reports about the incident; a Significant Incident Report (SIR - about the response to the fire) and a Fire Investigation Report (FIR - about the cause of the fire). The complainant was provided with copies of both reports when they were finalised in 2022.
16. In November 2023, the complainant was also provided with an earlier version of the SIR , following a Tribunal decision. This first report was quickly produced for the fire and rescue service in the UK to assist with their health and safety and firefighting arrangements should a similar incident occur in another fire and rescue service's area.
17. The MFRS said that it also aware that at least one independent report has also been published about the incident.
18. During its investigation of the incident, the MFRS corresponded with Cobalt Energy to obtain information from it in order to better understand the reasons, causes, and risks which such fires might give risk to. Cobalt

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<sup>1</sup> <https://www.liverpoolecho.co.uk/news/liverpool-news/live-updates-fire-rips-through-18934842>

provided the MFRS with detailed information on the equipment which is on the site.

19. It said that the information was useful to its investigation, but it was not necessary to reproduce it in its entirety in the SIR or the FIR. Some information was provided which was specifically useful to the investigation itself, some was useful for context and some information was not required by the investigators; but it said that all of the information was provided freely to the MFRS by Cobalt and its clients.
20. Cobalt provided the information in order to facilitate the investigation into the causes and the future prevention of similar events occurring. The majority of the information is technical information relating to the equipment being used at the site at the time of the fire. Cobalt considers to be commercially sensitive information, and subject to intellectual property rights. The information includes, for instance, technical diagrams and spreadsheets relating to the equipment on the site and an analysis of the running data at the time that the fire occurred. It also includes correspondence between the parties relating to that information.
21. The MFRS argued that it receives information relevant to its investigations relating to incidents under an implied duty of confidence from the providers. Cobalt also highlighted that some of the information caught within the scope of the request is information received from its contractors and that this is subject to a duty of confidentiality.
22. The MFRS argues that Cobalt informed it that if the information were to be disclosed, details surrounding the equipment would be disclosed to the whole world under the EIR, and its competitors would gain knowledge of its, and its partners, systems and its intellectual property. It argues that this would affect its place in the market.
23. The MFRS provided the Commissioner with a response it had received from COBALT detailing the commercial sensitivity of the withheld information on a document-by-document basis.

#### The Commissioner's analysis

24. The withheld information is a mixture of correspondence, reports, technical information and running data relating to the time of the fire.
25. First, the Commissioner is satisfied that the requested information is industrial and commercial in nature. Much of the information is technical information relating to the equipment on site, including diagrams, technical drawings, maps, and operational data on the site. The withheld correspondence also relates to the relevant information.

26. Secondly, the Commissioner is satisfied that the information is subject to confidentiality in law. The information was provided to the MFRS by Cobalt under an implied duty of confidence in order for it to better understand the equipment in use and the causes of the fire. In subsequent correspondence, Cobalt confirmed to the MFRS that the information should not be disclosed. The information therefore has the necessary obligation of confidence. The information is also not trivial, is commercially sensitive, and is not otherwise in the public domain. The information therefore has the necessary quality of confidence.
27. Thirdly, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest.
28. Cobalt considered that a disclosure of the information would affect its and its partners intellectual property and its market position as it would provide its competitors with a detailed overview of the equipment and other information relating to the site, including detailed diagrams and spreadsheets of running data about the systems in place.
29. The Commissioner is satisfied that a disclosure of technical specifications, running data and information subject to intellectual property rights would be likely to provide information which its competitors could use to their commercial advantage, and to the detriment of Cobalt and its partners. Clearly a disclosure of schematics and technical data about the capabilities of the equipment, details about how that is set in situ, the efficiency and the capabilities of that equipment would be technical information which would be of use to its competitors and other manufacturers of similar equipment.
30. The Commissioner is therefore satisfied that a disclosure of technical information relating to the equipment on site would be detrimental to the economic interests of Cobalt and its partners.
31. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the MFRS disclosed this information.
32. Since the four tests have been satisfied, the Commissioner finds that Regulation 12(5)(e) of the EIR is engaged. He therefore has to consider the public interest test required by Regulation 12 of the EIR.

### **Public interest test**

33. The test is whether, in all the circumstances of the case, the public interest in the disclosure of the information outweighs that in the exception being maintained.

34. When carrying out the public interest test, Regulation 12(2) provides a presumption towards the disclosure of the information which needs to be specifically taken into account.

The public interest in the exception being maintained

35. The MFRS highlighted that a disclosure of the information would damage the economic interests of Cobalt and its partners, and that it would also damage its own ability to investigate such incidents in the future. Cobalt provided a detailed response to the MFRS arguing that the information should not be disclosed.
36. The MFRS argues that it has already published the reports it produced about the issue. It also noted that there is also at least one independent report about the issue in the public domain. It has provided the complainant with some of the information however it has withheld information where Cobalt indicated that its disclosure would affect its and its partners economic interests. It said, however, that it is not an expert in this field, and so it has had to rely upon Cobalt's arguments in its decision making in this respect.
37. The MFRS also highlighted that a disclosure of the information would damage its ability to investigate such incidents in the future. It argued that Cobalt provided the information freely in order to facilitate its investigations, and that were the information it considers confidential to now be disclosed, Cobalt, and other parties, may lose confidence in the MFRS' ability to retain information in confidence in the future. Parties may not, therefore, be as open to providing sensitive information to the MFRS on a voluntary basis in the future. This would leave it less informed and potentially make it harder to identify the causes of such incidents and how to handle them appropriately and safely in the future. This would potentially put both its officers, and the public generally, at greater risk in the future.
38. Whilst the Commissioner accepts this point, the primary factors in respect of the public interest in the exemption being maintained must relate to the issues which the exception is designed to protect – the commercial confidentiality of the information in question. The MFRS' arguments primarily relate to the MFRS' ability to carry out investigations effectively.
39. The Commissioner does place some weight on these arguments, however, as the ability of the MFRS to hold commercially sensitive information in confidence is essential for it to be able to carry out its investigations.

The public interest in the information being disclosed

40. The MFRS said that BESS are being developed across the country and there is a public interest in information being made available that would inform people about the safety of those systems and also potentially highlight any misconduct, or wrongdoing, or risks to the public.
41. The complainant argues along similar lines. BESS sites involve relatively new technology and there are new sites planned across the country. He argues that any dangers such sites may pose to nearby communities should be clear, and therefore it is in the public interest that information relating to incidents such as this is disclosed so that the public, planning departments and other interested parties can access information on the dangers which they might give rise to.
42. Broadly, his argument is that there is a public interest in information relating to the safety of such sites being disclosed in order to highlight any identifiable risks associated with these. This would facilitate planning objections to proposed sites in inappropriate areas in the future, and more importantly, more informed planning decisions can be reached.

The Commissioner's conclusions

43. The central public interest issue at the heart of this case relates to public safety. It lies with the publication of lessons to be learned, so that other organisations can understand the causes of the fire, better understand any risks that such sites pose generally, and to understand the ways such incidents have been dealt with successfully in the past.
44. The Commissioner acknowledges that the complainant's arguments relate to issues of public safety. They provide a strong public interest argument towards the disclosure of information which would further the understanding of the risks that such sites entail. Whilst there is a counter public interest in protecting the commercial confidentiality of manufacturers and operators which run such sites, this can be outweighed where a disclosure of that information would further the understanding of the risks, causes, and means of dealing with significant incidents which might arise at such sites.
45. However, the Commissioner also notes that the MFRS has published a number of reports regarding the incident which specifically address the nature, causes and results of the fire. These reports significantly reduce the public interest in the need for the requested information to be disclosed.



46. The causes of the fire have been fully investigated and the reasons published in the MFRS reports. This includes some of the information obtained from Cobalt where this is relevant to its findings. The causes of the fire can therefore be taken into account by objectors and planning departments in the future based upon the information already published within these reports. This therefore lessens the public interest in the full schematics, technical diagrams and data reports being published as information relevant to the central public interest factors highlighted above has already been analysed and disclosed.
47. The Commissioner recognises that a disclosure of the information which has not been included within the reports would shed greater light on technical aspects of the equipment being used. However, he considers that the causes of the incident have been specifically identified and the reasons for it published in a number of reports which are already in the public domain. This significantly weakens the public interest in the disclosure, to the point where the public interest in the exemption being maintained outweighs that in the information being disclosed.
48. The Commissioner has therefore decided that the balance of the public interest rests in the exception in Regulation 12(5)(e) being maintained in this case.

#### Regulation 12(2) considerations

49. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
50. As set out above, having considered the arguments and viewed the withheld information, the Commissioner is satisfied that the public interest in the information being withheld clearly outweighs that in the information being disclosed.
51. Therefore, whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly.

#### **Regulation 12(5)(c) – intellectual property rights**

52. The withheld information includes two reports from Dunton Environmental detailing an environmental analysis of the area following the fire. Sections have been disclosed to the complainant in a heavily redacted form under Regulation 12(5)(c) - intellectual property rights.



53. Regulation 12(5)(c) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect intellectual property ('IP') rights.
54. The Commissioner's guidance on the application of Regulation 12(5)(c)<sup>2</sup> states that in order for the exception to apply the authority must demonstrate that:
  1. the information is protected by IP rights;
  2. the person(s) holding the IP rights would suffer harm (infringement alone will not necessarily result in harm);
  3. the identified harm is a consequence of the infringement or the loss of control over use of the information; and
  4. the IP rights holder could not prevent the harm or loss by enforcing their IP rights.
55. The Commissioner notes that the information need not be subject to IP rights directly, however its disclosure must be shown to have an adverse affect upon the IP rights.
56. The Commissioner notes that the reports detail an analysis of the soil and other areas following the fire, in effect, emissions caused as a result of it.
57. The Commissioner notes that details of emissions from an accidental fire could not be directly subject to IP rights by the owner of the facility or the manufacturers of the equipment concerned. Therefore, it would be necessary to demonstrate that a disclosure of the information would adversely affect IP rights via other means.
58. COBALT argued that a disclosure of the reports would affect its market position. It argued that the information should be withheld on the basis that disclosure would allow access to commercially valuable information and infringe on its, and its partner's intellectual property rights. It said that a disclosure of the information would breach confidentiality and affect its, and its contractor's commercial interests.
59. It did not, however, provide any further argument demonstrating what IP rights would be affected as regards these reports.

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-c-intellectual-property-rights/>

60. The Commissioner considers that a disclosure of emission data following such a fire would not adversely affect the IP rights of COBALT or its contractors – they are the result of an accidental fire and are not directly subject to IP rights. Additionally, the analysis would only provide cursory details of the equipment itself. The Commissioner has seen no evidence that the report writers have applicable IP rights in the report beyond those generally applicable, such as copyright. Copyright is retained on information disclosed under the EIR. The report itself does not seek to apply IP rights, and it is not marked as confidential.
61. The Commissioner has therefore not been persuaded that that an analysis of these emissions would infringe upon the IP rights of either COBALT or its contractors.
62. As the Commissioner has decided that Regulation 12(5)(c) has been applied incorrectly in respect of this information, there is no requirement to carry out a public interest test.
63. The Commissioner therefore requires the disclosure of these reports, appropriately redacted to remove personal data which is subject to Regulation 13 of the EIR.

## Right of appeal

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64. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Ian Walley**  
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