



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

**EA/2014/0067**

**BETWEEN:**

**RODNEY WHEELER**

**Appellant**

**-And-**

**(1) THE INFORMATION COMMISSIONER**

**-And-**

**Respondent**

**(2) MINISTRY OF DEFENCE**

**Second Respondent**

**Date of decision:** 8<sup>th</sup> October 2014

**Date of promulgation:** 9<sup>th</sup> October 2014

**Hearing**

Held on  
Before M Hake, N Makanji and Judge Taylor.

**Decision**

The appeal is unanimously dismissed.

## Reasons

### Background

1. The Redcliffe Bay Petroleum Supply Depot (RBPSD) is part of the Government Pipelines and Storage System ('GPSS'), which supplies aviation fuel across the UK to the MOD and commercial/private customers including at Heathrow and Gatwick airports.
2. The GPSS is overseen by the Oil and Pipelines Agency ('OPA'), on behalf of the Ministry of Defence ('MOD'). Although the OPA is the public authority, the MOD has responded in this case on its behalf.
3. On 21 May 2008, an '*emergency preparedness exercise*' was conducted – under the codename 'Weaver' – to assess the RBPSD's capacities for dealing with sudden incidents of risk. A report setting out the 'learning outcomes' from that exercise was completed by a consultancy named Babcock Infrastructure Services and provided to the OPA in January 2009. On 6 June 2013, Mr Wheeler requested disclosure of that report in its entirety, having previously been provided with a redacted version.

### The Law

4. Under regulation 5(1) of the Environmental Information Regulations 2004 (EIR), a public authority that holds **environmental information** is required to make it available on request, subject to **exceptions**.

#### **Environmental information:**

5. "Environmental information" is defined in regulation, as:

*'any information in written, visual, aural, electronic or any other material form on—(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements.'*

6. We accept the Commissioner's reasoning as to why the requested information is "environmental information", thus falling to be dealt with within the framework of EIR. The requested information is a report about a safety exercise carried out at the depot and falls within regulation 2(1)(c). We are

informed that this exercise was concerned with reducing the risk of a major industrial accident or incident and to limit the harm to both people and the environment. The information in the report relates to an activity or measure affecting or likely to affect the elements as well as a measure designed to protect elements including land and landscape within the non-exhaustive list of elements set out in regulation 2(1)(a).

### **Exception**

7. Regulation 12(5)(a) EIR provides an exception to disclosure as follows:

*“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”.*

8. The exception is subject to the assessment of the public interest set out in Regulation 12(1):

*‘1)...a public authority may refuse to disclose environmental information requested if (a) an exception to disclosure applies ... and (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.’ (‘public interest test’).*

### The Request

9. On 6 June 2013, the Appellant requested from the OPA:

*‘a complete copy of the BIS report on Exercise Weaver/Learning Outcomes under the EIR provisions? The exercise was held on 21 May 2008 and the report on the exercise is dated Jan 2009.*

*I first requested this report on 22 May 08, but the version I received dated 29 4 09 was so heavily redacted that very little useful information could be extracted from it. [Following an internal review], a second version of the report with fewer redactions [was provided].....*

*Since 2009, there have been several changes which affect the process of redaction. The HSE have withdrawn the SPC Permissioning Document which determined the basis of the Exercise W redactions. The OPA have released most of the 08 Safety Report despite earlier redactions. Likewise, the OPA have released much of the On-Site Emergency Plan...’*

10. The Appellant explained in submissions to the Tribunal that as a local resident, he was chiefly interested to see how safety was affected by staff reaction times and how long it took the operators to locate and stop the leak, having himself observed the process from his fence.
11. The MOD responded that (a) it considered that the request was for the emergency preparedness exercise (the ‘report’); and (b) it refused to release

the information relying on regulation 12(5)(a) Environmental Information Regulations 2004 (EIR) adversely affecting national security or public safety.

12. (Following its internal review of its decision, the MOD additionally relied on regulation 13 EIR (on personal data) in relation to information in the report that could assist in identifying individuals. The Appellant subsequently confirmed he would not seek names of staff, email addresses and telephone numbers information withheld under regulation 13, such that this appeal rests on whether regulation 12(5)(a) EIR was relied upon.)
13. The Appellant proceeded with his complaint and the Information Commissioner ('Commissioner') issued a decision notice, stating that it was satisfied that (a) there was a real possibility disclosure would adversely affect national security or public safety and (b) the public interest in maintaining the exception outweighed the public interest in disclosure. It found that the authority had breached regulations 14(2) and 11(4) in relation to its response times.
14. The Commissioner's reasoning included:

***National security or public safety:***

- a. The information withheld was described by the MOD as:

The volume of fuel stored; details of the alarm systems, safety measures and migration of fuel; staff procedures to be followed in the event of an emergency and key words used; details of emergency response equipment and procedures; details of the safety equipment and procedures; location of the control centre; details of security arrangements; details of site power supply; staffing levels; and timings of the exercise.

- b. In *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, national security is defined as "*the security of the United Kingdom and its people*". There was no need to demonstrate that disclosure of the information would lead to an immediate and direct threat to the UK – **a real possibility of such a threat** would be sufficient. (*See para.s 16,17, and 50 of that decision*). Even seemingly harmless information (which is not suggested in this instance) when pieced together with other information could result in harm.
- c. Information may also be withheld if there is a real possibility that disclosure could result in physical hurt or injury to the public.
- d. The disputed information was produced as part of a report on an emergency preparedness exercise at RBPSD.
- e. Contrary to the Appellant's assertions, the disputed information had not been previously placed into the public domain.
- f. The information would be particularly useful to anyone who intended to vandalise property at the RBPSD and/or carry out a terrorist attack on the site and beyond.

- g. The possibility of the harm envisaged was substantial rather than remote.

***Public interest***

- h. Recognition that the report being released would enhance the public's knowledge; the public interest in releasing the full report so that local residents could assess the level of preparedness for an emergency at RBPSD; and that disclosure would further demonstrate the public authority's commitment to openness and full transparency regarding information relating to the site. However, the authority had already disclosed a significant amount of information from the report demonstrating the public authority recognises that there is a public interest in ensuring that local residents and the public were confident about the safety measures in place at RBPSD.
- i. There was a stronger public interest in protecting the local residents and the public at large from the risk of a terrorist attack and vandalism that could have serious consequences for the UK's economy, and the operation of its armed forces and therefore national defence. It was more probable than not that the information would be of real use to those intent on causing harm to the UK.
- j. The withdrawal of section 11 of the HSE's SPC Permissioning document was not in itself a reason to disclose the disputed information.

**This Appeal**

**The Task of the Tribunal**

- 15. Our task is to consider whether the decision made by the Commissioner is in accordance with the law or whether any discretion it exercised should have been exercised differently in relation to the Appellant's grounds.
- 16. The Appellant's grounds of appeal may be summarised as:
  - a. Either the Commissioner was wrong to conclude that regulation 12(5)(a) EIR was engaged in relation to the requested information; ('Ground A'); or
  - b. If regulation 12(5)(a) EIR was rightly engaged, the Commissioner wrongly concluded that the public interest in maintaining the exception outweighed the public interest in disclosure of the withheld information. ('Ground B')
- 17. We note for the benefit of the Appellant, that this Tribunal may only conclude that the information should be disclosed if we find that the public authority was not entitled to rely on the exception set out in Regulation 12(5)(a), or that even though the exception has been properly 'engaged' or relied upon, the public interest in 'maintaining' that exception is not greater than the public interest in disclosure. The Appellant made many arguments. We have

considered these so far as they can be seen to advance his case in relation to Grounds A or B.

18. We have received a Decision Notice, the Appellant's grounds of appeal, and responses, and the Commissioner's and MOD's responses as well as a bundle of documents, an additional email from the Appellant and the requested information. We have reviewed all these documents, even if not specifically referred to below.

### **Our Findings:**

#### **Ground A: Is 12(5)(a) EIR engaged?**

19. We consider that the regulation is engaged. We accept the Commissioner's and MOD's arguments in this regard. This is because:
  - a. We accept the MOD's description of the RBPSD as part of the national pipeline supplying aviation fuel across the UK, to both the MOD and the private sector. As such, it is an important infrastructural asset, including as regards defence and national security. An attack on or a substantial disruption to the depot would have very serious consequences.
  - b. On reviewing the limited wording that was redacted from the report, the vulnerability of the site in the event of disclosure became evident. It is clear to us that the MOD have carefully selected the key words that are problematic, and would involve severe risks. What has been withheld quite clearly could assist someone motivated to cause real harm both in the vicinity and, to the nation as a whole.
  - c. The exercise that was conducted, on which the report is based was designed to consider what it describes as an 'intermediate incident 'with potential to escalate to a 'major incident'. As such, its purpose was to review the emergency plans that might be followed to limit the harm to both people and the environment in the event of a major industrial accident or incident.
  - d. Therefore, it is clear that there is considered to be a risk of such an incident for which emergency plans have been put in place. (We note that the Appellant has recognized that he considers the site to be at risk from terrorist attacks, as well as accidents.)
  - e. It is evident from the words the authority chose to redact, (other than those that were personal data), that the only reason for redacting them would be to protect national security, and redactions serve no obvious other purpose.
  - f. Disclosing the particular material requested would help anyone seeking to cause harm, to understand how best to go about doing so.
20. We note that much of the report was disclosed to the Appellant. It is clear to us that there was proper scrutiny to ensure no more than necessary was withheld and that the MOD were sparing in which words they have redacted.
21. The Appellant made various arguments to support his case, which we deal with below.

#### **Interpretation of the regulation**

- a. The Appellant argues that regulation 12(5)(a) EIR should be construed to mean the exception should apply if national security

would be seriously and adversely affected. He says that otherwise, almost all government business might be said to fall within this regulation indirectly or otherwise.

- b. We accept the Commissioner's interpretation of Regulation 12(5)(a) EIR. It quotes the House of Lords decision in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, where national security is defined as "*the Security of the United Kingdom and its people*" (see para. 50 of the *Rehman* case), and that the risk does not have to be the result of a "direct threat" to the United Kingdom but a real possibility of such a threat would suffice (See para. 16-17 of *Rehman*). This is a significantly higher test than the Appellant describes, such that not any government business would fall within in it. We consider there to be a real possibility of threat, as evidenced by the common knowledge that the Government considered at the time of the request that terrorism was a real threat to the UK. Furthermore, if the possibility of the threat were to materialize, this would conceivably pose a serious adverse affect on national security.

**The withheld information adds negligibly to the risk of a terrorist attack and information assisting a terrorist has already been published**

- c. The Appellant argues that the possibility of a terrorist attack leading to public harm is not altered by the disclosure of the disputed information. There is sufficient information already in the public domain to allow a potential terrorist to access the site and engineer a major kerosene fire. Further, the Appellant argues that virtually everything which a terrorist might need to know before planning an attack is already available. This includes: plans of the site, with the positions of the tanks, buildings, pipelines, boundaries, roads, tank capacities, aerial photographs on Google, and so on. Most of the information in the report is already available.
- d. As made clear above, we consider that the words redacted would assist a terrorist. That a potential terrorist might have other options for planning attacks is not an argument to allow disclosure of this information where it would provide valuable material to a motivated terrorist to adversely affect national security or public safety. We consider that the MOD's selected redaction of the report is justified, as material that is particularly sensitive. Disclosure would enhance the risks that are already present, and our concerns in this regard are very strong.

**Potential terrorists would not be very interested in the report.**

- e. The Appellant argued that the disputed information does not affect national security or the danger to the public from an attack on the site. The thrust of his argument is that the requested information affects the safety of the public from potential accidents on-site; that the report relates to how the operators locate and the stop a leak of fuel; and that this has no bearing on how to place an improvised explosive device under exposed pipelines, which he says is the most likely soft target for a terrorist. In an explosive attack, there would almost

certainly be a large fire and the operators would rapidly vacate the site and wait for the emergency services.

- f. As made clear from our assessment above, we do not agree with the Appellant. It is clear that an accident can be manipulated such that it can have potential to escalate into a very serious incident. The material that has been withheld could be used maliciously to engineer an incident that would have greater disruptive and damaging effect locally and potentially nationally. The material has clearly been redacted because of the risk of terrorism and we consider the ability to be disruptive would be significantly enhanced by its disclosure.

### **Ground B: The Weight of Public Interest?**

22. We consider that the public interest in maintaining the exception on the basis of the interest in national security and safety, outweighs the interest in disclosure.
23. We agree with the reasoning of the Tribunal in *Kalman v IC and DfT (EA/2009/0111)*, [2011] 1 Info LR 664 at paragraph 47:
  - a. *“The Commissioner and DfT draw a parallel with PETA v Information Commissioner and University of Oxford (EA/2009/0076), a case concerning section 38 FOIA where the Tribunal agreed that there was significant additional weight in favour of withholding the disputed information because of the **nature of the threat** (in that case an increased risk of indiscriminate and extreme acts of bombing and arson). In that case (as in this case) it was not suggested that the nature of the risk has the status of turning the exemption into an absolute exemption but, that it **requires a very strong public interest to equal or outweigh it. They argued that even if the chances of the risk happening were low, the consequences were so serious that the public interest lay in favour of withholding that information. In this case the threat involves the risk of the death or serious injury of many through terrorist action. This Tribunal sees no reason to depart from that approach which is even more applicable in light of the numbers of those potentially affected in the event of a successful terrorist attack of this nature.**”* (Emphasis added.)
24. We agree with and adopt the Commissioner’s reasoning in paragraphs 23 to 31 of its Response dated 28 April 2014, and do not repeat it here. However, we address some of the Appellant’s claims in relation to the balance of the public interest below.
25. The Appellant argues that residents are at risk from both terrorist attacks and from accidents on the site. He states that the main protection against fatalities following accidents on the site comes from the enforcement of safe distances between hazardous plant and people; improved safety assessments; better emergency plans; and proper testing of these plans. The report contains the results of the only practical test of the operators’ response to a large leak of kerosene fuel near the north corner of the relevant site, near residential housing. As such, he says it contains the ‘*key to a main plank in the safety case*’ that should be published. He also says that as the person at most



notional risk (excluding staff) of a notional fire centred on the fuel receipt building, the Appellant should have key information on Exercise Weaver.

26. We do not consider that public safety issues require disclosure of the requested information, and on the contrary, its disclosure under the EIR would have adverse consequences on public safety. We recognize that the Appellant is concerned as a local resident of the risks of an accident near his premises. However, a disclosure under the EIR is treated as a disclosure to the 'world at large', and when weighing the public interest under regulation 12 (1), it is done in this context.
27. In terms of the interest in openness and transparency, the Appellant states that the very small or negligible amount of extra information of use to potential terrorist attacks is outweighed by the public interest in understanding what the operators would be expected to do in the event of a large leak of fuel or actually did in Exercise Weaver. We have already stated that we do not consider the extra information to be negligible, and it is clear that there is already a lot of information available in the public domain, and that the Appellant has been able to make good use of what is available.
28. The Appellant points to failings of communication by the OPA. This includes an assertion that they have ignored the Buncefield Inquiry recommendation for improved communications between the operators and the communities surrounding major accident sites to ensure practical and realistic understanding of the risks and the arrangements for their control." (See *Buncefield Final Report 4 page 3 Para 9*.) He asserts that the public living near the site have been misled by the OPA in their July 2013 information sheet which it fails to reassure residents. It calls on residents to '*Go in, stay in, tune in in the event of an emergency*'. We do not have sufficient information before us, (within the bundle), to judge whether the OPA and information provided to residents has been misleading, or whether there have been failures to provide statutory data on risks. However, the disclosure of the information would not assist the Appellant in this regard.
29. The Appellant asserts that the disclosure would assist in making his own assessment of risk. We accept the possibility that disclosing the requested information might help the Appellant in this regard, as well as demonstrating the importance of good relations and communications and cooperation between the public authority and residents. We regard such communication as extremely important. However, the public interest in maintaining public safety is more important, and therefore so is the interest in withholding the information from public disclosure on the basis of national security and safety.
30. In short, even if we were to have accepted all the public interests the Appellant identified in favour of disclosing the information, we find that having examined the material redacted in detail, the public interest in not disclosing that information to the public or 'world at large' on the basis of public safety and/or national security significantly outweigh the public interest in disclosing them. The Appellant has raised balanced points and has understandable concerns, but the issues of public safety and national security in relation to this material are genuine.
31. We note that during submissions, the Appellant indicated that he would be content to receive only part of the requested information, insofar as it related

to the timings element of the exercise, fuel volumes migrating in the exercise, actions taken and timing of Actions, and incident logs. However, we found that all redactions made in relation to regulation 12(5)(a) EIR (and the relevant public interest test) had been properly done so.

32. Our decision is unanimous.

Judge Taylor

8 October 2014