



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2023/0035  
Neutral Citation number: [2023] UKFTT 876 (GRC)**

**Determined without a hearing on 22 August 2023**

**Before**

**JUDGE ANTHONY SNELSON  
TRIBUNAL MEMBER KATE GRIMLEY EVANS  
TRIBUNAL MEMBER ANNE CHAFER**

**Between**

**MR ALAN BRIAN SMITH**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION**

On reading the written representations of the parties, the Tribunal unanimously determines that:

- (1) The appeal is allowed.
- (2) A Decision Notice is substituted in the following terms.
  - (i) The Merseyside Fire & Rescue Service ('the public authority') has correctly cited the exception under the Environmental Information Regulations 2004 ('EIR'), reg 12(4)(a) (information not held) in respect of the request for disclosure of a fire management plan and a 'covering report' by the Chief Fire Officer, and the public interest in maintaining that exception exceeds the public interest in disclosure. Accordingly, the Appellant is not entitled to disclosure of that information.
  - (ii) The public authority has correctly cited the exception under EIR, reg 12(4)(d) (material in the course of completion, unfinished documents

or incomplete data) in respect of the request for disclosure of the correspondence between it and Orsted and the Chair of the National Fire Chiefs Council between September 2020 and November 2021, and the public interest in maintaining the exception exceeds the public interest in disclosure. Accordingly, the Appellant is not entitled to disclosure of that information.

- (iii) The public authority has incorrectly cited EIR, reg 12(4)(d) in respect of the (initial) Fire Investigation Report dated November 2020 and the Appellant is entitled to disclosure of that information.
- (iv) Accordingly, not later than 35 calendar days after the date of promulgation of this Decision, the public authority is ordered to deliver to the Appellant the information referred to in para (iii) above, subject to redaction of personal information as necessary.

## REASONS

### *Introduction*

1. On 15 September 2020 a serious fire occurred at a Battery Energy Storage System ('BESS') site at Carnegie Road, Liverpool operated by Orsted A/S, a Danish company. The site lies within the area for which the Merseyside Fire and Rescue Service ('MFRS') has responsibility.
2. On 13 January 2021 the Appellant, Mr Alan Brian Smith, wrote to MFRS asking when 'the report' on the Carnegie Road fire ('the fire') would be available. He explained that he had been in correspondence with the Chair of the National Fire Chiefs Council ('NFCC') on the subject of BESS fires and that he wished to have a copy of the report for use in connection with a dispute about plans for a large solar farm close to his property in Suffolk.
3. On 15 January 2021 MFRS replied saying that it was 'currently in the process of collating all the information following the investigations into this incident', and that it would contact Mr Smith as soon as the work had been completed.
4. On 26 November 2021 Mr Smith wrote again to MFRS, complaining about the delay in making 'the report' available and asking for an explanation for it. He went on: 'My request is that [MFRS] now provide me with all correspondence under the [FOIA] since September 2020 to November 2021 between your office and that of Orsted and if need be with the Chair of NFCC with a covering report from yourself as the Chief Fire Officer.'<sup>1</sup>
5. On 29 November 2021 Mr Smith wrote to MFRS pressing for delivery by 12 January 2022 of (a) 'the report' into his complaint of delay, (b) 'the report' of MFRS on the fire, (c) the correspondence requested on 26 November 2021

---

<sup>1</sup> The abbreviation CFO will be used from now on.

(hereafter 'the correspondence'), and 'the fire management plan agreed by Orsted and MFRS at the time of commissioning'.

6. MFRS did not supply the requested information by 12 January 2022 but wrote to Mr Smith on 17 January and 16 February 2022 stating that further information was being collated and that a report would be released shortly.
7. On 1 March 2022 Mr Smith complained to the Respondent ('the Commissioner') about the way in which MFRS had dealt with his request and asking for release to him of 'the fire report' and 'all correspondence between MFRS and Orsted.'
8. On 17 March 2022 MFRS made public: (a) a Fire Investigation Report ('FIR') prepared by its Incident Investigation Team, dated March 2022 in the footer on the front page but February 2022 in the footers on the subsequent pages, and (b) a Significant Incident Report ('SIR') issued by its Operational Assurance Team, dated December 2021.
9. The FIR purported to be an original FIR. It appears to contain no reference to any earlier FIR about the fire and no suggestion that any such earlier report had ever been produced.
10. The SIR was styled on its face 'version 1.2' and described as 'an updated report from the first report which was published in November 2020', containing 'updated information as a direct result of the conclusion and findings from the [FIR]'.
11. On 4 July 2022 MFRS wrote to Mr Smith (a) stating that it had supplied on 17 March 2022 the report which he had requested on 13 January 2021, (b) supplying three redacted emails but otherwise refusing to provide the correspondence, purportedly relying on the Freedom of Information Act 2000 ('FOIA'), s43 (commercial interests) and (c) asserting that it did not hold a fire management plan.
12. On 11 July 2022 Mr Smith wrote to MFRS requesting a copy of the 'first' SIR said to have been published in November 2020, copying his letter to the Commissioner.
13. In the course of the Commissioner's investigation MFRS acknowledged that Mr Smith's requests fell within the scope of the Environmental Information Regulations 2004 rather than FOIA, and placed reliance variously on reg 12(4)(a) (material not held) and reg 12(4)(d) (material in the course of completion etc) as justification for its response.
14. By a Decision Notice dated 21 December 2022 ('the DN') the Commissioner determined that MFRS had: (a) supplied the 'requested reports', (b) correctly

cited reg 12(4)(a) in respect of the fire management plan (which was not held) and (c) had correctly cited reg 12(4)(d) in respect of the correspondence.

15. By a notice of appeal dated 12 January 2023, Mr Smith challenged the DN on a number of grounds. The voluminous material submitted in support largely sought to substantiate his concerns about fire risks associated with BESS sites.
16. The Commissioner's open response, which does very little more than repeat and rely on matters set out in the DN, was presented on 3 May 2023.
17. The dispute came before us for consideration on the papers, both parties having said that they were content for it to be determined without a hearing. We were satisfied that it was just and in keeping with the overriding objective to adopt this procedure.
18. The minor delay in issuing this Decision, which is regretted, results largely from the fact that the judge was away for an extended period of leave commencing in the week immediately after the appeal came before the Tribunal.

### *The Law*

19. Relevantly, EIR, reg 5 provides:

**(1) Subject to ... a public authority that holds environmental information shall make it available on request.**

20. EIR, reg 12 includes:

**(1) Subject to paragraphs (2) ... , a public authority may refuse to disclose environmental information requested if -**

- (a) an exception to disclosure applies under paragraphs (4) ... , and**
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.**

**(2) A public authority shall apply a presumption in favour of disclosure.**

...

**(4) For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that -**

- (a) it does not hold that information when an applicant's request is received;**

...

- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; ...**

21. In *Bromley and Information Commissioner v Environment Agency* EA/2006/0072, the Information Tribunal held that any question under EIR, reg 12(1) and (4)(a) is to be decided on a balance of probabilities, adding:

**Our task is to decide ... whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.**

We agree and direct ourselves accordingly.

22. There is a helpful discussion of the exception under EIR, reg 12(4)(d) in *Coppel on Information Rights* (5<sup>th</sup> ed) (2000), pp490-1, which includes the following (footnotes excluded):

**The focus of the exception does not appear to be the state of completion of the function, project or matter to which the information relates: rather, it is the state of completion of the material, documents or data with which it is concerned. The exception will thus capture an incomplete draft of a document but not a finalised preliminary document. ... a particular document may itself be finished, but still part of 'material' which is in the course of completion. But the exception is not engaged when a piece of work may fairly be said to be complete in itself: whether a public authority treats the material as being complete is material but not decisive - 'a public authority cannot label its way out of its duty to disclose'.**

We respectfully adopt this as an accurate summary of the law.

23. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

- (1) **If on an appeal under section 57 the Tribunal consider -**
- (a) **that the notice against which the appeal is brought is not in accordance with the law; or**
- (b) **to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**

**the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the tribunal shall dismiss the appeal.**

- (2) **On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

### *The Rival Cases*

#### *Mr Smith's case*

24. Mr Smith made a number of points in support of his challenge to MFRS's case under EIR, reg 12(4)(a), contending that, for various reasons, the Tribunal should reject as implausible its claim not to hold a fire management plan or a 'covering report' of the CFO.
25. Turning to the November 2020 SIR and the correspondence between it and Orsted and the Chair of the NFCC between September 2020 and November 2021, Mr Smith argued that neither fell within the reach of the exception under

EIR, reg 12(4)(d) and that, given the obvious importance of the subject-matter, even if they did, the public interest in disclosure comprehensively outweighed the public interest in maintaining the exception.

#### *The Commissioner's case*

26. As to EIR, reg 12(4)(a), the Commissioner commended to us as credible and persuasive the reasons put forward by MFRS as to why the two disputed classes of information requested would not have been held by them.
27. Turning to the issues under reg 12(4)(d), the Commissioner invited us to accept the assertion of MFRS that the November 2020 SIR was a draft and an incomplete document and submitted that the request for it and the correspondence both related to material which was 'still in the course of completion' and/or to 'unfinished documents'. Accordingly, the exception was engaged.
28. As to the public interest test in relation to the November 2020 SIR and the correspondence, the Commissioner acknowledged the public interest in transparency in relation to fire safety but argued that the publication of the second SIR largely met the public interest in the causes of the fire being explained (DN, para 47). The Commissioner further contended that the balance favoured maintaining the exception because of the importance of allowing public authorities to complete investigations and reach conclusions in a 'safe space'. He submitted that disclosure of the disputed information during the period of the MFRS investigation 'would undermine that safe space' (DN, para 48).

#### *Analysis and Conclusions*

##### *Information not held (reg 12(1))*

29. On this part of the case, we agree with the Commissioner. We see no reason to doubt MFRS's case on the fire management plan and the 'covering report' of the CFO. Its evidence to the Commissioner concerning searches undertaken was unremarkable and, in our view, plausible. That evidence is not contradicted or called into question by any of the documents put before us. The notion that either document exists but has been accidentally overlooked or deliberately suppressed strikes us as distinctly improbable. Mr Smith's contention that such documents *should* exist has not been tested in evidence and is, we think, less than persuasive. All in all, we find on a balance of probabilities that neither was held by MFRS, at the time of the request or ever.
30. For completeness, we would add that there may have been a misunderstanding about the 'covering report' of the CFO. It may be that Mr Smith was asking for the CFO to write a report about the delay in responding

to his request for information. If so, his complaint here fails on the additional ground that a request so put falls outside the reach of our freedom of information legislation. It is elementary that a public authority is not under any duty to *generate* information in response to a request. Its obligation is only to provide information held by it and within the scope of the request.

31. Despite our finding that neither of the two disputed pieces of information was (or is) held by MFRS, the law requires us to carry out a public interest balancing test (reg 12(1)(a) and (b)).<sup>2</sup> Presumably this is so because the 'not held' exception (reg 12(4)(a)) may be engaged in circumstances where the relevant information has come into the public authority's possession after the request but prior to the response. At all events, on the facts as we have found them, the public interest question (if it is properly seen to arise at all) can have only one answer. The public interest does not favour disclosure of either of the pieces of information because we have found that neither is, or has ever been, held by MFRS.

*Material in the course of completion, unfinished documents or incomplete data (reg 12(4))*

32. Our analysis of this part of the case must distinguish between the two categories of information sought by Mr Smith. In our view, the exception relied on by MFRS in respect of the November 2020 SIR is clearly inapplicable. Even if (which, having read the closed bundle, we think unlikely) the second SIR (published in March 2022) was already in preparation at the time of the (relevant) request (13 January 2021), that state of affairs could not serve to turn the November 2020 report into a draft (let alone an incomplete draft) or an 'unfinished document'. Having read it, we are entirely satisfied that it is and was intended to be, and was presented as, a completed, final document. Quite simply, there is nothing pointing to the contrary. It is not described as a draft, or as a preliminary or provisional report.<sup>3</sup> It is not qualified in any way. Nor is that surprising. The main focus of the SIR was on examining MFRS's response to the emergency on 15 September 2020 and learning lessons within the service, in particular about matters such as awareness, training and equipment. Of course, in any well-run service, such a report would be expected to generate follow-up measures of various kinds, including, perhaps, a report on progress in implementing its recommendations. But that could not justify treating the later SIR as 'the' document and the November 2020 version as a preparatory draft. To characterise them in that way would be absurd. It would also permit the public authority to 'label its way out of its obligation to disclose', in this case by dint of a new label added retrospectively. If the legislation worked in that way, a huge proportion of reports into matters of public concern could be put beyond the reach of legitimate freedom of information requests on the strength of a simple assertion by the public authority that they amounted to

---

<sup>2</sup> Although if the hypothesis discussed in the last paragraph is correct, the request for the 'covering report' was incompetent and fell outside the reach of EIR altogether.

<sup>3</sup> As the quotation from *Coppel* above makes clear, a preliminary report would not engage the exception in any event.

mere drafts of further documents to follow at a later date. The statutory scheme (with, in the case of EIR, an explicit presumption in favour of disclosure at its heart) is obviously not intended to work in that way and, as the textbooks<sup>4</sup> show, it does not work in that way.

33. How was the Commissioner prevailed upon to see matters otherwise? We are bound to say that we find the DN puzzling on this aspect. At paras 34-37 the Commissioner appears simply to take at face value MFRS's assertion that the original SIR was a draft. There was no attempt (in correspondence during the Commissioner's investigation or in the Decision Notice) to grapple with the obvious difficulties which MFRS faced in defending that version of events. The Commissioner merely states (para 36) that he is satisfied, having considered the disputed material, that the information was still in the course of completion at the time of the request. In relation to the initial SIR, that conclusion is, with due respect, quite untenable.
34. Since the public authority fails to make out an exception, Mr Smith's right to disclosure of the November 2020 SIR prevails. No question of balancing the public interest arises.
35. As to the correspondence, we see matters differently. This was information which, at the time of the request (29 December 2021), related to 'material in the course of completion' or (the same thing in different words) an 'incomplete' document, namely the March (or February) 2022 SIR. Here, the exemption is clearly in play and fully engaged.
36. In the case of the correspondence, we are satisfied that the public interest favours maintaining the exemption. Making every allowance for the presumption of disclosure and the importance of transparency in relation to fire safety, we take the view that (as the DN, para 48 appeared to recognize) the timing of the key events is the critical consideration here. The second SIR was in preparation and, at the time of the request, its publication was imminent. Maintaining the exemption would provide the author(s) of the report with the 'safe space' needed to examine the evidence, including information and representations submitted by Orsted, and make such judgements thereon as seemed proper, without the distracting pressure of dealing with third-party interest and, perhaps, intervention. We would add that our reasoning should not be understood as closing the door on publication of the correspondence generally. As we have said, we regard the timing of the request as of high significance here. Our decision that the exception must be maintained should certainly not be read as implying that a fresh request, delivered - to state the obvious - *after* publication of the second SIR, should meet the same fate. We can see that there might well be a number of persuasive arguments in favour of a different outcome to such a request, but it would not help for us to take this speculation further here.

---

<sup>4</sup> And the Commissioner's Guidance on reg 12(4)(d)



### *Disposal and Postscript*

37. For the reasons stated, we conclude that, in part, the appeal has merit and must be allowed. The Commissioner's decision in relation to the November 2020 SIR was not in accordance with the law. To that extent, the disputed information must be disclosed.
38. Having seen the SIR completed in November 2020, we note that it refers to a FIR already in existence by that date. We find it surprising that no reference is made to that FIR in either of the reports published on 17 March 2022. We think it at least eminently arguable that Mr Smith's request of 29 November 2021 for 'the report' of MFRS on the fire should have been interpreted as a request for any and every MFRS report on the fire. Overall, the response to his requests, viewed in the round, seems to us to carry with it the misleading implication that the only report into the fire created before the two documents released on 17 March 2022 was the original SIR. But since (for obvious reasons) we have not received any representations on behalf of Mr Smith, the Commissioner or MFRS on these matters, we think that the proper course is to leave the question of the initial FIR where it is. No doubt, if he sees fit, Mr Smith will make a formal request for its disclosure, unless MFRS elects to put it into the public domain first.<sup>5</sup>

Anthony Snelson

Judge of the First-tier Tribunal

Date: 11 October 2023

Promulgated: 18 October 2023

---

<sup>5</sup> We have also mentioned the possibility of a renewed request for disclosure of the correspondence.