Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **5 April 2018**

Public Authority: **Lancashire Fire and Rescue Service**
Address: **Garstang Road**
Fulwood
Preston
PR2 3LH

Decision (including any steps ordered)

1. The complainant requested information relating to a hydraulic fracturing operation. Lancashire Fire and Rescue Service (the FRS) dealt with the request under the FOIA and refused to confirm or deny whether it held the requested information, citing the exemptions provided by sections 24(2) (national security), 31(3) (law enforcement) and 38(2) (health and safety) of the FOIA. Following the intervention of the Commissioner, the FRS acknowledged that at least some parts of the request should have been dealt with under the EIR and issued a further response to the complainant under the EIR. It maintained the refusal to confirm or deny whether the requested information was held and cited the exception provided by regulation 12(5)(a) / 12(6) (national security and public safety) of the EIR.

2. The Commissioner's decision is first that the whole of the complainant's request should have been dealt with under the EIR. Secondly, she finds that the exception provided by regulation 12(5)(a) / 12(6) is not engaged and now requires the FRS to respond to the complainant with confirmation or denial as to whether the information she requested is held.

3. The Commissioner requires the FRS to take the following steps to ensure compliance with the legislation.

- Write to the complainant with confirmation or denial as to whether the requested information is held. In relation to any information that is held, this should either be disclosed to the complainant, or the grounds under the EIR for withholding this information should be set out.

4. The FRS 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 27 July 2017 the complainant wrote to the FRS and requested information in the following terms:

"…please respond to the following requests in relation to the Cuadrilla site at Preston New Road.

1) Did operators consult with you at the planning application stages / pre-planning stage, or at any time since on the following emergency response rescue methods;

a) casualty handling;
b) decontamination zones;
c) any special equipment required;
d) emergency procedures discussed and agreed between all parties;
e) water requirements for fire fighting.

Please provide all information that you hold OR confirm that no such consultation has taken place.

2) Have any joint incident-response training exercises been discussed or taken place between operators, yourselves, United Utilities and other emergency responders? If so, who pays / has paid for this?

Please provide all information that you hold OR confirm that no such consultation has taken place.

3) At the planning application stage or pre-planning stage, were the following points presented to you for consultation;

a) alarm systems for fire warning and fire detection;
b) alarm systems for blow-outs;
c) hydrogen sulphide (or other toxic gas) alarm systems;
d) alarm systems which are directly linked to emergency response

centres;
e) emergency lighting systems and generators.

Please provide all information that you hold OR confirm that no such consultation has taken place.

4) Are any of the points in item 3 regularly checked by you at the site? If so, how regularly?
b) What role, if any, do you / have you had in advising or supporting the HSE or company Fire Officers in 'Process (PSPs)' and 'General Safety Precautions (GSPs)' at this site?

Please provide all information that you hold OR confirm that no such consultation has taken place.

5) Have you ever been provided (either at planning stage or the current pre-development stage) with a list of Material Safety Data Sheets (MSDS) and / or the chemical CAS numbers of ALL chemicals proposed for use at this site?

Please provide all information that you hold OR confirm that no such consultation has taken place.

6) With reference to chemicals listed as 'proprietary' in documents supplied to the Environment Agency, are the MSDS and chemical CAS numbers released to your service or to your knowledge, to the Fire Service through the Premises Risk Management Process?

Please provide all information that you hold OR confirm that no such consultation has taken place.

7) During flow-testing stage of a hydraulic fracturing operation, the operator 'perforates' the well at various stages below ground. Has the Fire and Rescue Service been warned in advance that explosives / cords / detonators will be on site as would be required under the Dangerous Substances and Explosive Atmospheres Regulations (DSEAR) 2002?

Please provide all information that you hold OR confirm that no such consultation has taken place.

8) The Civil Contingencies Act 2004 has defined an emergency as - 'Any event or situation which threatens serious damage to human welfare in a place in the UK, the environment of a place in the UK, or war or terrorism which threatens serious damage to the security of the UK.'
Please advise when your next review of the necessary emergency

procedures for this well site will be, OR confirm that no such review is deemed necessary."

6. The FRS responded on 22 August 2017. It refused to confirm or deny whether it held the requested information and cited the exemptions provided by sections 24(2) (national security), 31(3) (law enforcement) and 38(2) (health and safety) of the FOIA.

7. The complainant responded on 23 August 2017 and requested an internal review. After a delay, the FRS responded to the complainant on 13 November 2017 and stated that it had not previously been aware of her request for a review. The internal review process was shortly afterwards superseded by the Commissioner's intervention, as covered below.

Scope of the case

8. The complainant contacted the Commissioner on 1 October 2017 to complain at that stage about the refusal of her information request and about the failure of the FRS to carry out an internal review. The ICO contacted the complainant on 15 November 2017 and advised her that it appeared likely that the information specified in her request would be environmental information according to the definition given in regulation 2 of the EIR, hence her request should have been handled under the EIR rather than the FOIA.

9. On the same date the FRS was contacted and advised to issue a fresh response to the request under the EIR. The FRS responded and stated that it did not believe that all the information within the scope of the complainant's requests would be environmental, but that it agreed that some of it would. It therefore proposed to write to the complainant under the EIR in order to cover the elements of the request that were for environmental information.

10. The FRS wrote to the complainant on 19 December 2017 and stated that, to the extent that the requests were for environmental information, the FRS refused to confirm or deny whether the requested information was held under regulation 12(5)(a) / 12(6) of the EIR. The FRS later wrote to the Commissioner with further explanation about its position.

11. The following analysis covers first the issue of whether the requests should have been handled under the EIR. Following the conclusion that they should all have been dealt with under the EIR, it goes on to cover the refusal to confirm or deny whether the requested information was held under regulation 12(5)(a) / 12(6).

Reasons for decision

Regulation 2

12. The first question for the Commissioner to address here is whether the information is environmental in accordance with the definition given in the EIR. Environmental information is defined within regulation 2(1) of the EIR as follows:

> *"any information in written, visual, aural, electronic or any other material form on –*
>
> *(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands…*
>
> *(b) factors, such as substances, energy, noise, radiation or waste, emissions…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…and activities affecting or likely to affect the elements and factors referred to in (a) and (b)…".*

13. The information requests above all concern the Cuadrilla site at Preston New Road, Lancashire. This is a hydraulic fracturing, or "fracking", site. The Preston New Road operation is an activity which is likely to affect many of the elements and factors referred to in regulations 2(1)(a) and (b). For example, its construction and operation is likely to affect land and landscape, and will be likely to result in environmental factors such as energy and emissions.

14. The reasoning of the FRS was that, whilst for some of the requests any in-scope information would be environmental, for others any relevant information would not have the fracking operation as its main focus. Information within the scope of request 3(e) for instance would have as its focus emergency lighting, rather than the fracking operation. Whilst FRS accepted that information directly about the Preston New Road operation would be environmental, in essence its argument was that for some of the requests any information within their scope would be too far removed from the fracking operation itself to qualify as environmental.

15. For information to be environmental according to regulation 2(1), it must be "on" one of the definitions listed in that regulation. The Commissioner's guidance on identifying environmental information[1] states that the EIR should be interpreted broadly when considering whether information is "on" a matter and that the question a public authority should consider is whether information is on or about something that would be covered by the definition in regulation 2, rather than whether the information is about the environment directly.

16. The Commissioner agrees with FRS that for some of the requests any information falling within their scope may not immediately appear to be environmental. However, applying the approach described in her guidance, the Commissioner's view is that any information falling within the scope of the requests would clearly still be "on" the Preston New Road operation, which is an activity likely to affect elements and factors listed in regulations 2(1)(a) and (b). That information would, therefore, be environmental in accordance with the definition given in regulation 2(1)(c).

17. As a result, the Commissioner finds that the requests should have been in their entirety handled under the EIR. The remainder of this analysis covers whether the EIR required the FRS to disclose the confirmation or denial.

Regulation 12(5)(a) / 12(6)

18. The FRS cited the exception from the duty to confirm or deny provided by regulation 12(5)(a) in conjunction with regulation 12(6). This exception provides that a public authority may refuse to confirm or deny whether it holds requested information if provision of the confirmation or denial would adversely affect international relations, defence, national security or public safety. Consideration of this exception is a two-stage process; first, the exception must be engaged as giving the confirmation or denial would have at least one of the effects described in the exception. Secondly, this exception is qualified by the public interest, which means that the confirmation or denial must be given if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure.

19. The reasoning of the FRS for the exception being engaged related to national security and public safety. Essentially, it believed that

[1] https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

confirmation or denial as to whether the information requested by the complainant was held would result in an increased terrorist or criminal threat by disclosing information about the Preston New Road operation that could be utilised in planning an attack on that facility.

20. The Commissioner notes first that this argument is relevant to regulation 12(5)(a) / 12(6). She also accepts that the Preston New Road site, as part of the national infrastructure for the extraction of natural resources, may be targeted for a criminal or terrorist attack and that such an attack would threaten national security and public safety.

21. The next step is to consider whether provision of the confirmation or denial in response to the complainant's requests would provide information that could be exploitable in the planning of an attack on the fracking site. For the Commissioner to accept that the threshold of *"would adversely affect"* is met, the adverse outcome predicted by the public authority must be more likely than not to result. The issue here is whether provision of the confirmation or denial would be more likely than not to add to the threat of attack to the Preston New Road operation.

22. The Commissioner's view is that the knowledge that would be gained through confirmation or denial in response to these requests would be limited. The majority of the requests are phrased as questions. A confirmation or denial in response to these would only give an indication whether the FRS held information that would provide an answer to those questions; it would not provide an answer in itself.

23. The Commissioner also notes the considerable volume of information that is in the public domain that describes the fracking process. Given what can already be learned from the copious publicly available information about that process, what further knowledge could be gleaned through disclosure of the confirmation or denial is limited.

24. For these reasons, the Commissioner does not accept that provision of the confirmation or denial in response to the complainant's requests would be more likely than not to lead to a greater threat of attack to the Preston New Road site. Her conclusion is, therefore, that the exception from the duty to confirm or deny provided by regulation 12(5)(a) in conjunction with regulation 12(6) is not engaged. At paragraph 3 above the FRS is now required to write to the complainant with confirmation or denial as to whether the information she requested is held.

Right of appeal

25. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: http://www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.

27. 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 .....

Ben Tomes
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