



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

Appeal Reference: EA/2019/0224

Between

CHRISTOPHER COX

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

SECRETARY OF STATE FOR TRANSPORT

Second Respondent

**TRIBUNAL: Judge Moira Macmillan
Mr Pieter de Waal
Mr Dave Sivers**

Heard at Field House, London EC4 on 9 January 2020

Date of decision: 17 February 2020

Subject matter:

ss. 24 (1) Freedom of Information Act 2000
ICO Decision Notice FS50800204

In Attendance:

For the Second Respondent - Mr Adam Heppinstall,
(instructed by Government Legal Department)

DECISION

1. For the reasons set out below, the appeal is dismissed.

REASONS

Background

2. This appeal concerns an information request made by Mr Cox on 22 June 2018 to the Department for Transport ('DfT') in the following terms:

"Please could you confirm that the West London Line is still a Restricted Zone as defined in the Channel Tunnel Security Order 1994, and also provide a list of other Restricted Zones currently in force".

Restricted Zones

3. Article 12 of the Channel Tunnel Security Order 1994 ('the 1994 Order') allows the Secretary of State for Transport to designate particular areas of the Channel Tunnel infrastructure as Restricted Zones ('RZ').
4. The Channel Tunnel is a private enterprise. The UK government's obligations in respect of the Tunnel's security arise from the 1986 Treaty of Canterbury ('the Treaty') between the UK and France. The Treaty governs the construction and operation of a Channel 'Fixed Link' by 'private concessionaires'. It also creates an obligation on both States to ensure the defence and security of the Tunnel, notwithstanding its private ownership.
5. A 25 November 1991 Protocol to the Treaty defines an RZ as that "*part of the Fixed Link situated in each State subject to special protective security measures.*" Parts of this Protocol have been incorporated into UK domestic law through the Channel Tunnel (International Arrangements) Order 1993 ('the 1993 Order'), where this definition is reproduced in Schedule 2.
6. The 'Fixed Link' includes not just the tunnels but also all associated works, facilities and installations¹. Article 14 of Schedule 2 of the 1993 Order

¹ article 2 (3) of the 1993 order gives 'Fixed Link' the same meaning as is given to 'the tunnel system' by section 1(7) of the Channel Tunnel Act 1987.

stipulates that the plans for the Fixed Link will include the delimitation (i.e. the boundaries/limits) of RZ.

7. The 1994 Order was made by the Secretary of State for Transport under section 11 of the Channel Tunnel Act 1987. Once an area has been designated as an RZ under article 12, the Secretary of State may restrict who is allowed to be present (article 16). Both of these powers may only be used in order to protect the Tunnel/trains from acts of violence as defined in article 10.
8. Article 31 creates the criminal offence of trespass within an RZ in the following terms:

Unauthorised presence in restricted zone

31. – (1) *A person shall not –*

(a) go, with or without a vehicle, onto or into any part of a restricted zone except with the permission of the person in control of the restricted zone or a person acting on behalf of that person and in accordance with any conditions subject to which that permission is for the time being granted, or

(b) remain in any part of such a restricted zone after being requested to leave by the person in control or a person acting on behalf of that person or by a constable.

(2) Paragraph (1)(a) above does not apply unless it is proved that, at the material time, notices stating that the area concerned was a restricted zone were posted so as to be readily seen and read by persons entering the restricted zone.

(3) A person who contravenes paragraph (1) above without lawful authority or reasonable excuse is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) A constable or the person in control of the restricted zone, using such force as is reasonable in the circumstances, may remove from the restricted zone a person who contravenes paragraph (1)(b) above.

(5) In this article the “person in control of the restricted zone” means in the case of a restricted zone of the tunnel system, the Concessionaires and in the case of any other restricted zone, the owner, occupier or manager of the land, building or works constituting the restricted zone.

9. On 9 July 2018 DfT responded to Mr Cox’s request, informing him that there have been no RZ on the West London Line since 2007. The DfT

further explained that the names of the current RZ had been withheld under section 24(1) & 31(1) of the Freedom of Information Act 2000 ('FOIA').

10. At Mr Cox's request DfT conducted an internal review of this decision but did not change it. On 7 November 2018 Mr Cox applied to the Information Commissioner ('the Commissioner') under section 50 FOIA for a decision as to whether DfT had dealt with his request in accordance with Part 1 FOIA.

The Commissioner's Investigation and Decision Notice

11. During the course of the Commissioner's investigation, DfT reviewed its position again and decided to disclose the identity of the larger RZ. On 19 March 2019 DfT sent Mr Cox a list of 3 stations and a Eurotunnel site where RZ were located. It explained to Mr Cox that revealing the existence and location of smaller RZ would '*raise their profile and could make them a possible target for hostile acts, whether terrorism or criminality*'.
12. Having received this information, Mr Cox contacted the Commissioner to say that he believed any request for a list of RZ must be interpreted as including a description or map of the boundary of the zones. As such, he did not accept that DfT's disclosure in respect of the larger RZ fully complied with his request.
13. The Commissioner issued Decision Notice FS50800204 ('the DN') on 21 June 2019. The Commissioner's decision was that DfT had correctly applied the section 24(1) exemption. She had considered whether it was reasonably necessary for the identity of RZ to be withheld for the purpose of safeguarding national security. She noted that safeguarding in this context includes protecting potential targets in circumstances where there is no evidence that an attack is imminent.
14. The Commissioner agreed with DfT's assessment that publication of RZ would identify those parts of the Channel Tunnel that were considered most vulnerable to potential terrorist attacks and would, indirectly, identify less well protected areas of the Tunnel infrastructure. She took into account the methods, tactics and motivation of potential terrorists, and the fact that the RZ were situated at the locations that are most sensitive in terms of the operation of the Tunnel.
15. The Commissioner noted that the smaller RZ were not identifiable as such from public sources, that they have a private security presence and tended to be more remote. She also noted that it could take longer for the police to respond to an incident at such a location. She concluded that these sites rely on anonymity as part of their security regime and that, overall, withholding

the identity of smaller RZ was reasonably necessary for safeguarding national security.

16. The Commissioner went on to consider the balance of public interest. She noted the importance of the public being aware of locations where they might commit a criminal act by merely being present, but concluded that this risk was sufficiently mitigated by the use of signage at each RZ. The Commissioner accepted that there was a public interest in knowing about potential vulnerabilities in the Channel Tunnel infrastructure.
17. The Commissioner concluded that these public interests did not outweigh the significant public interest in safeguarding national security.
18. The Commissioner did not agree with Mr Cox's contention that any request for a list of RZ must include a description or a map of the boundary of the zones, similar to those required by the Serious Organised Crime and Police Act 2005. In her view the wording of the request should be understood by reference to the dictionary definition of a 'list'.
19. On 1 July 2019 Mr Cox appealed to the Tribunal under section 57 FOIA.

The Legal Framework

20. The qualified exemption at section 24 of FOIA provides as follows:

24. National security.

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

21. Section 23 relates to information supplied by, or relating to, bodies dealing with security matters.
22. The section 24 exemption is subject to the public interest balancing test set out in s.2(2)(b). This means that the general right to have information communicated does not apply where "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*".
23. Section 57 provides a right of appeal to the Tribunal against a DN served by the Commissioner under section 50. The Tribunal's powers are set out in section 58:

58 Determination of appeals.

(1) *If on an appeal under section 57 the Tribunal considers –*

(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.*

Grounds of Appeal

24. In Grounds of Appeal dated 1 July 2019 Mr Cox explains that he has a longstanding interest in the criminalisation of trespass. He accepts that section 24 FOIA may be engaged by his request but contends that this has not been properly established. Mr Cox submits that the Commissioner has wrongly weighed the balance of competing public interests. He relies upon 5 main Grounds.

- a. The Commissioner has interpreted his request too narrowly. Because an RZ is defined in article 12 of the 1994 Order as the application made to the Secretary of State, his request for ‘a list’ should be understood as including the content of such an application, where that is relevant to designation. Mr Cox submits that the Commissioner’s process was procedurally flawed because she considered the content of the withheld information before interpreting his request.
- b. The evidence relied on by DfT does not go far enough to support the application of the section 24(1) exemption. Although the Channel Tunnel is part of the UK’s important national infrastructure, the link between release of the identity of RZ and the risk to national security has not been made. DfT has not shown that withholding publication is required for the purposes of safeguarding national security.
- c. The section 31(1)(a) exemption does not apply, because it is perverse to argue that publication of the RZ would lead to an increase in trespass, or to the displacement of crime to another area.

- d. The Commissioner has failed to give sufficient weight to the strong public interests in favour of disclosure. These include the risk of a person unwittingly committing a crime, or of being deterred from action that would otherwise be legal. These risks arise from inadequate and out of date RZ signage. Further, there is a strong public interest in allowing the public to review whether the Secretary of State's powers to designate RZ has been used appropriately.
- e. The Commissioner's decision was procedurally flawed because the DN does not consider the section 31(1) exemption upon which DfT also relied.

Submissions

25. In submissions dated 1 August 2019 the Commissioner responds as follows:

- a. Mr Cox's request has not been interpreted too narrowly. It is for 'a list of other' RZ. DfT have provided a list of locations where the larger RZ are found. 'A list' as requested does not include exact locations of RZ, times of operation and plans of the boundary.
- b. The DN sets out why the section 24 exemption is engaged in adequate detail and by reference to the nature of the withheld information.
- c. (& e). The Commissioner made no finding on section 31(1) FOIA, having decided that the section 24 exemption applied. There is no requirement for the Commissioner to consider multiple exemptions, as confirmed by the Upper Tribunal in *Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC)*.
- d. The Commissioner accepts that there is a strong public interest in ensuring clarity and transparency where there is a risk of prosecution. However, there are barriers and signs in place at the RZ that make the risk of a person unknowingly committing the offence of trespass remote. The Commissioner also accepts that there is a general public interest in transparency and openness about decisions taken by DfT, but maintains that this is outweighed by the weighty public interest in maintaining and protecting national security.

26. The Secretary of State's position is set out in submissions dated 9 September 2019 and a skeleton argument dated 20 December 2019. DfT has in addition provided a witness statement by Mr Frederick Symons, who is

Head of Channel Tunnel Security Policy at DfT and Deputy Co-Chair of the Anglo-French Joint Security Committee.

27. The Secretary of State's position is that RZ have been designated because they require protection from acts of violence including terrorism. Publishing the location of RZ might indicate to threat actors that these locations are vulnerable to attack. It could also serve as a piece in a jigsaw of information that can be assembled and deployed for attack planning purposes.
28. The Secretary of State has published the identities of larger RZ because he decided, on review, that he cannot credibly withhold the locations at well-known stations which the Channel Tunnel trains serve. He submits that the smaller RZ are in a different position because they are not well known. Withholding this information is part of a deliberate strategy designed to make an attack on the Tunnel system more difficult. It means that an attack planner would have to carry out hostile reconnaissance in order to identify the smaller RZ. The Secretary of state therefore seeks to withhold the balance of the list.
29. In his written submissions the Secretary of State also relies on the exemptions in section 31 (law enforcement) and section 27 (international relations) FOIA. We have not considered these exemptions in detail for the reason given.
30. In relation to the balance of public interest, the Secretary of State describes the need to protect the Tunnel's infrastructure from acts of violence as being vital. He submits that the risk of a person inadvertently trespassing in an RZ is remote because they are located on private land without public rights of way. RZ are protected and display signs in such a way as to leave members of the public in no doubt that it is an RZ should they approach it.
31. In closing submissions the Secretary of State directed our attention to a number of authorities, including the FTT decision *TfL v IC EA/2012/0127*. Although this is not a binding authority, we note that it contains a helpful summary of relevant binding decisions. We have considered all of these when making this Decision.
32. Mr Symons gave evidence at the hearing. He explained that the names of RZ are kept on a secure government server to which access is restricted. The list of the larger RZ sent to Mr Cox, and the list of RZ in the Closed bundle, have both been created for the purposes of these proceedings. DfT also holds physical documentation relating to each RZ site, and this is kept in secure filing cabinets.

33. Mr Symons has a professional background in protective security arrangements. He confirmed the existence of the security concerns summarised in the DN and in the Respondents' submissions. Mr Symons explained that RZ are an essential part of the measures taken to protect the most vulnerable parts of the Tunnel's infrastructure from terrorist attack.
34. DfT's decision to release the names of the larger RZ was taken because these sites were publicly well known. The smaller RZ are not, and they are not located in areas to which the public have access. Mr Symons said that part of his job was to make hostile reconnaissance of the Tunnel's infrastructure as difficult as possible. Publishing the locations of the smaller RZ would make attack planning easier and would provide official confirmation of attack planning research. Mr Symons explained that, individuals who were forced to conduct hostile reconnaissance at physical locations are more likely to be identified and apprehended.
35. Mr Symons explained that any documents relating to RZ were protectively marked by DfT as 'Official Sensitive' and were shared with a limited number of people on a need to know basis. If they were shared with personnel in private companies, this would be on an 'in confidence' basis. The locations of RZ are not published.
36. All existing RZ were longstanding. Were a new RZ to be proposed under article 12 of the 1994 Order, any necessary consultation would be with designated security personnel within the railway bodies. Mr Symons confirmed that employees of the private companies would only be aware of the location of an RZ if they needed to know about it because, for example, it had an impact on their work.
37. Mr Symons confirmed that the French authorities do not publish the locations of the corresponding RZ within those parts of the Tunnel infrastructure under French control.
38. Mr Symons described the risk of inadvertent trespass in an RZ as unlikely, since all RZ are protected by fences and guarded at access points. In the event of unauthorised access to an RZ, security staff are trained to take a staged approach and in, in the first instance, to seek to escort the person off the premises. A criminal prosecution for trespass under article 31 of the 1994 Order was not automatic.

The Tribunal's Decision

39. We find that the Channel Tunnel forms part of the UK's critical national infrastructure and, as such, is a potential target for attack by hostile actors, including terrorists. Although the Tunnel is a private enterprise, the UK

government has joint legal responsibility for the security and defence of the Tunnel's infrastructure. The UK is responsible for implementing appropriate protective security measures at those parts of the infrastructure situated on UK territory.

40. An integral part of the maintenance of security is the Secretary of State's ability to designate parts of the infrastructure as RZ, where it has been assessed as requiring protection from 'acts of violence'. Acts of violence are defined in article 10 of the 1994 Order. An act of terrorism, which is defined in the UK by section 1 of the Terrorism Act 2000, is an act of violence for these purposes.
41. We find that one purpose of an RZ is to protect the Tunnel's infrastructure from a hostile attack, which includes a terrorist attack. We are satisfied that the threat of such an attack on any part of the UK's critical infrastructure would also be a threat to the UK's national security. In reaching this conclusion we have taken into account the fact that there may be a risk to national security in circumstances where there is no direct or imminent threat².
42. We find that, by extension and in the context of this appeal, section 24(1) FOIA may be engaged in relation to information that could be used to plan a terrorist attack in circumstances where there is no evidence of active attack planning.
43. We have considered whether withholding publication of the location of smaller RZ is required for the purposes of safeguarding national security. In doing so we have interpreted 'required' as meaning 'reasonably necessary' as has been the practice of this Tribunal in other cases. We note Mr Cox's submission that DfT has not demonstrated withholding publication is required, but also that his Grounds of Appeal were submitted before he had seen the Secretary of State's submission and Mr Symon's witness statement.
44. We have considered detailed evidence of how the location of the smaller RZ could be used for attack planning purposes, either by itself or as part of a jigsaw with other information, put together to identify those parts of the Channel Tunnel infrastructure that may be most vulnerable to attack. We note that the location of the smaller RZ could be discovered by physically visiting each area, since each RZ displays signage that identifies its designation. We also note that the smaller RZ are located on private land with no public rights of way, which makes hostile reconnaissance more difficult. We give appropriate weight to Mr Symon's view, based on his professional experience, that individuals who conduct a hostile reconnaissance in person are more likely to be identified by the authorities.

² *Secretary of State for Home Department v Rehman* [2001] UKHL 47

45. We have taken into consideration the views of the Secretary of State, in particular his assertion that withholding the location of the smaller RZ is part of the security regime that protects them. We have also given appropriate weight to the views of the Commissioner as regulator.
46. We find, based on the evidence, that withholding the publication of the location of the smaller RZ is reasonably necessary for the safeguarding of national security.

Public interest in disclosure

47. We have considered whether, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
48. There is clearly a general public interest in openness and transparency about decisions taken by DfT, particularly in relation to the criminalisation of conduct which would otherwise be civil in nature. We have considered Mr Cox's submission on the importance of monitoring the use of such a power by the Secretary of State. We are satisfied from Mr Symons' evidence that designation of RZ follows a strict legal process. We find that the Secretary of State's discretion to designate an area as an RZ has been used sparingly, with proper consideration, and only on a case by case basis.
49. We accept Mr Cox's argument about the importance of publicising the risk of criminal trespass. However, we consider the risk of inadvertent trespass on an RZ to be remote. This is because all RZ have significant barriers at their perimeters and all access is controlled by security guards. We note that, should an inadvertent trespass occur, there is no presumption that a criminal sanction will follow.
50. We agree with the Commissioner's view that there is a public interest in knowing about the existence of vulnerabilities in the Channel Tunnel infrastructure.
51. However we find that, on balance, the significant public interest in safeguarding national security substantially outweighs all of the public interests in favour of disclosure. Our reasons for doing are the same as those we have given for why we consider withholding publication to be reasonably necessary for safeguarding national security.
52. We find the public interest in safeguarding the Channel Tunnel infrastructure from terrorist attack to be considerable. We also find that

publication of the locations of the smaller RZ could contribute to the ease with which such an attack could be planned.

53. Therefore we find that the balance of public interest favours maintaining the exemption.

Conclusions

54. We have considered whether Mr Cox's request for a 'list' of the RZ should be understood as including a request for the supporting information used when designating the RZ under article 12 of the 1994 Order. We have decided that it should not. We find that the definition of an RZ is to be found in Schedule 2 of the 1993 Order, rather than article 12 of the 1994 Order. The Schedule 2 definition is "*part of the Fixed Link situated in each State subject to special protective security measures.*"

55. We agree with the Commissioner's conclusion that the word 'list' should be understood by applying the dictionary definition, and that the information provided by DfT in relation to the larger RZ meets this definition.

56. We find that there was no procedural irregularity involved in the Commissioner's consideration of Mr Cox's complaint. The Commissioner could not have formed a view about the complaint without first seeing the underlying material. It is normal practice for the Commissioner to engage in private correspondence with a public authority during her investigation. We are satisfied that there is no basis upon which to conclude the Commissioner has seen material she ought not to have considered when assessing DfT's decision.

57. As we have found that the section 24(1) exemption applies to the withheld information, we have not gone on to consider whether the section 27 and 31(1) exemptions also apply.

58. We are satisfied that there was no procedural irregularity in the Commissioner not having considered whether the section 31(1) exemption also applied to the withheld information. The Commissioner was not required to do so, as confirmed by the Upper Tribunal in *IC v Malnick & ACOBA UKUT [2018] AACR 29*.

59. In the normal way a copy of this Decision was sent to the Commissioner and to the Secretary of State for them to check the draft and make representations as to whether any parts of the Decision should not be disclosed. The version of the Decision provided to Mr Cox and promulgated generally will have been redacted and/or edited if necessary in light of such representations.

Judge Moira Macmillan

17 February 2020
Date Promulgated 18 February 2020