



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

Appeal No: EA/2014/0034

BETWEEN

EDWARD PYBUS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Before

**Brian Kennedy QC
Jacqueline Blake
Gareth Jones**

DECISION

The Tribunal refuses the Appeal.

We direct that the Decision Notice in question is correct and should stand.

Introduction:

[1] The appeal is brought under section 57 of the Freedom of information Act 2000 (“FOIA”) as modified by regulation 18 of the Environmental Information Regulations 2004 (“the EIR”). The Tribunal and the parties worked from an Open Bundle (“OB”) indexed and paginated and from a smaller Closed Bundle (“CB”) also indexed and paginated. .

[2] The impugned decision under appeal is the Decision Notice (“DN”) from the Respondent dated the 2nd September 2013: Reference FER0489827.

Background to the Appeal:

[3] The Notice of Appeal in this case is in the form of an e-mail dated 13th February 2014 and the Background and the issues are helpfully summarised by the Respondent in his Response (to that Notice of Appeal) dated 9th June 201 and a further Supplemental Response dated 7th May 2014., thus;

“1. The Department of Energy and Climate Change (DECC) is responsible for allocating and administering licences for exploration, development and production of hydrocarbons in the UK. Such onshore licences are Petroleum Exploration and Development Licences (PEDL).

2. The documentation required for new oil and gas field authorisations is the Field Development Plan (FDP). The FDP should provide a summary description of the development and the principles and objectives that will govern the field’s management. FDPs will generally include details of all activities and processes required to develop a field, including environmental impact, geology, engineering, well design, economics and risk assessment.

3. On 26 October 2012, the Appellant wrote to and requested information in the following terms:

“I’m writing to you to request copies of the field development plans for license PEDL 133, for AIRTH COAL BED METHANE DEVT (Field approved under licence number: .327)

“I would also like to request copies for all field development plans that have been submitted to DECC for any Coal Bed Methane, Shale Gas or Underground Coal Gasification developments.”

4. DECC acknowledged the request on 29 October 2012. Subsequently the Appellant wrote again to DECC to add some further questions to his request. The Appellant asked:

“Could I receive details of any Extended Well Test periods for the above PEDL license (PEDL 133). For any Extended Well Test Periods could I receive copies of the monthly gas and water production figures the licensee holder supplied to DECC.”

5. DECC responded to the request on 21 December 2012 saying that the request had been considered under both FOIA and the EIR. DECC referred the Appellant to some relevant field development plans (FDPs) available online¹ and said it considered these plans exempt on the basis of section 21 FOIA. For the more recent FDPs DECC explained these would also be published on this website and were therefore exempt on the basis of section 22 of the

6. DECC further stated that for any information within the FDPs which was environmental it considered regulations 12(5)(d) and 12(5)(e) EIR would apply. Finally,

¹ www.onshoreuk.com

DECC confirmed no information was held in relation to the additional question asked regarding Extended Well testing.

7. On 11 January 2013 the Appellant requested an internal review. He stated that he did not consider information was reasonably accessible via the link provided in DECC's refusal notice as there were subscription costs. In addition to other concerns, the Appellant also argued that it was likely some of the information in the FDP's would be information on emissions and therefore required to be disclosed as regulation 12(5)(e) EIR would not apply.

8. On 8 February 2013 DECC wrote to the Appellant with the outcome of its internal review. It accepted section 21 FOIA would not apply and provided the two FDPs that had previously been withheld under that exemption. DECC stated that there were five FDPs which it had withheld on the basis of section 22 FOIA but it now also agreed that section 22 FOIA was not applicable. However, it maintained that those five FDP's were still exempt from disclosure on the basis of section 41 and 43(2) FOIA.

9. With regard to the question of emissions within the FDPs, DECC identified that the information on fracking and flaring operations was such information and it provided that information from the five remaining FDPs to the Appellant.

10. The Appellant contacted the Commissioner on 26 February 2013 to complain about the way his request for information had been handled. The Commissioner investigated in the normal manner.

THE DECISION NOTICE

11. The Commissioner considered that it was likely that all of the information in the FDPs was environmental information and that the request should have been considered under the provisions of the EIR. He advised DECC, who accepted that analysis.

12. During the Commissioner's investigation, DECC cited a further exemption – regulation 13(1) EIR – as a basis for withholding personal data contained within the FDPs (DN § 13)..

13. The Commissioner therefore directed himself that the scope of his investigation was to determine if DECC had correctly withheld the five remaining FDPs on the basis of regulation 12(5)(d) and (e) and 13(1) EIR (DN § 14).

14. The Commissioner considered whether there was any further information in the five FDPs which was information on emissions. To this end, the Commissioner directed himself to consider his own guidance on emissions and he considered the contents of the disputed information (DN § 17 – 33).

15. The Commissioner concluded that the remaining information in the FDPs was not information on emissions and the exceptions cited by DECC were applicable to the information in question. The Commissioner therefore went on to consider whether the exceptions at 12(5)(e) and (d) EIR had been correctly applied (DN § 24).

16. The disputed information identified by DECC was:

- Airth FDP – Composite 14 November 2006 (which was disclosed with minor redactions under regulation 12(5)(d) and (e));

- *Airth FDP Addendum – DART 27 June 2012 (withheld under regulation 12(5)(d) and (e));*
- *Doe Green – Nexen 16 December 2008 (withheld under regulation 12(5)(d) and (e));*
- *Potteries – Nexen 12 March 2009 (withheld under regulation 12(5)(d) and (e)); and*
- *Llangeinor – UK Methane 30 May 2011 (withheld under regulation 12(5)(d) and (e)).*

(DN § 25)

17. With regard regulation 12(5)(e) EIR, the Commissioner directed himself to consider the following points:

- *Was the information commercial or industrial in nature?*
- *Was the information subject to confidentiality provided by law?*
- *Was the confidentiality required to protect a legitimate economic interest?*
- *Would the confidentiality be adversely affected by disclosure?*
- *Was the information commercial or industrial in nature?*

(DN § 27)

18. The Commissioner accepted that the FDPs were commercial in nature (DN § 30).

19. The Commissioner considered the information was subject to confidentiality provided by law, particularly in respect of any FDPs within the five year period set out in the model clause at Schedule 8 of The Petroleum (Current Model Clauses) Order 1999. He was satisfied that the information in the FDPs was imparted in circumstances importing an obligation of confidence (DN §§ 31 – 34).

20. After considering the arguments put forward by DECC and the comments made in consultation with the relevant companies, the Commissioner accepted that the disputed information consisted of information of commercial value which, if disclosed, may negatively impact a company's commercial interests. As such the Commissioner accepted that disclosure of the disputed information would be likely to prejudice the commercial interests of such a company (DN §§ 35 – 40).

21. The Commissioner was satisfied that disclosure of the disputed information into the public domain would adversely affect the confidential nature of that information by making it publicly available. That would consequently harm the legitimate economic interests of the companies involved. Consequently, he found that the exception at regulation 12(5)(e) EIR was engaged in respect of the disputed information (DN § 41).

22. The Commissioner therefore went on to consider the balance of the public interest in maintaining the exception or disclosing the disputed information (DN §§ 42 – 55).

23. The Commissioner was of the view that, whilst there were strong public interest arguments on both sides, the public interest in disclosure was, in all the circumstances of the case, outweighed by the public interest in maintaining the exception at regulation 12(5)(e) EIR. In reaching that decision he placed considerable weight on the fact that the FDPs were all still live and within the period set out in secondary legislation during which confidentiality is assured. He noted that DECC has demonstrated that it was willing to provide most of the information from the FDPs once the non-disclosure period has passed. However, the Commissioner was satisfied that, in response to the Appellant's request, DECC had correctly withheld the information under regulation 12(5)(e) EIR (DN § 56).

24. The Commissioner therefore did not go on to consider the application of regulation 12(5)(d) EIR. For the same reason, although not explicitly stated in his DN, he did not go on to consider the application of regulation 13(1) EIR.

THE NOTICE OF APPEAL

25. The Appellant's Grounds of Appeal ("the Grounds") are set out in his email to the Tribunal dated 13 February 2014.

26. The Appellant does not, in general terms, appear to dispute the Commissioner's finding that regulation 12(5)(e) EIR is engaged by the information he requested in the present case. However, he believes that the Commissioner's decision is incorrect for several reasons.

27. **First**, he states he "was not given an opportunity to supply any arguments in favour of the release of the information".

28. **Second**, he disagrees with the Commissioner's analysis of the public interest balance under regulation 12(5)(e) EIR. He disputes the Commissioner's finding (at DN §51) that DECC, having disclosed the information about fracking and flaring from the FDPs, had disclosed the information likely to be of most interest to the public and the media and accordingly the strength of any public interest argument in favour of disclosure of the remaining information in the FDPs was reduced.

29. The Appellant says:

"This application is for a field development report for a series of gas fields. The information is in the public interest because it contains details on new techniques for recovering gas. ... Information on the method of stimulation is important regardless of whether Fracking is used or not. The public and media may be specifically interested in 'fracking' however the whole extraction and stimulation process is what is in the public interest when assessing the pros and cons of the technology. One paragraph

on flaring was released from one FDP. However this is meaningless without more details on how this relates to the production from the field.”

30. In his Grounds, the Appellant correctly draws a distinction between the public interest in disclosure and opposed the public and press's interest in the information. He says that the public interest favours disclosure of all material held on fracking and flaring together with all details of the extraction process as a whole. He argues it is illogical to suggest that only information on 'fracking' should be released.

31. **Third**, the Appellant takes issue with DN § 50. In that paragraph, the Commissioner states that the only information remaining in the Airth FDP which has been withheld under regulation 12(5)(e) relates to specific figures such as estimated production rates and costs. However, he points out that the version of the Airth FDP released under FOIA in fact also redacts a small amount of information relating to extraction and stimulation processes and techniques.

32. The Appellant notes that the reference to “processes or techniques that may be deployed...is not a “specific figure”. It is unclear how it could be considered commercially confidential - it seems instead that information that is of particular interest to the public has been removed instead. The ICO should have checked more clearly the information that DECC has removed from the edited FDP. As the full FDP is available, at a cost, the full FDP should have been released anyway.”

33. In advancing this particular argument, the Appellant appears to argue that regulation 12(5)(e) EIR is not engaged at all in respect of this specific subset of information.

34. **Fourth** the Appellant goes on to assert that the Commissioner’s finding that the disputed information in the remaining FDPs should be withheld was flawed, because “DECC hasn’t even released the information that the ICO seems to think is has...and with this further information the balance of the public interest could well be altered.”

35. **Finally**, the Appellant asserts that “it appears that ICO has considered the release of partial information from two FDP as grounds for refusing the release of any information from the remaining FDPs. This seems inconsistent and at the very least DECC should be releasing partial information from the remaining FDPs”.

THE COMMISSIONER’S RESPONSE

36. The Commissioner relies upon, and repeats, the matters set out in his DN in support of his resistance to this appeal. The Commissioner submits that the Appellant has failed to advance any grounds which undermine the conclusion reached in that DN. In addition he adds the following:

37. **The Appellant’s first point** does not provide the basis for a sustainable appeal. Notwithstanding that the Appellant did present public interest arguments in favour of disclosure to the Commissioner, which he took in to account (DN § 44), it is notable that the Appellant has not advanced any further detailed arguments in his Grounds.

38. The Commissioner is required to assess the overall balance of the public interest in maintaining the exception or ordering disclosure. This he necessarily does by reference to the disputed information itself, information not available to the Appellant. Consequently, the Commissioner is invariably better placed to make a full and bal-

anced assessment of the balance of the public interest for and against disclosure, both by taking into account the arguments presented to him and by reference to the disputed information itself.

39. However, an appeal to this Tribunal may be made in respect only of the decision reached by the Commissioner, not the mechanism by which the Commissioner reached that decision. In the present case, the public interest arguments in favour of disclosure are relatively self-evident and are set out in the DN. The Commissioner maintains that he got the balance right.

40. Nevertheless, if that assessment is incorrect, the remedy is by way of the full merits review undertaken by this Tribunal.

41. **The Appellant's second point** is essentially the assertion that the Commissioner simply got the public interest balancing exercise wrong in relation to regulation 12(5)(e) EIR.

42. The Commissioner denies this and he relies upon the reasoning in his DN in support of his position. The Tribunal will, however, have the opportunity to review the material before the Commissioner and to reach its own conclusion as to where the balance of the public interest lies.

43. **The Appellant's third point** is, in part, accepted; it would appear that DN § 50 contains an error. That paragraph says that the only information redacted by DECC from the Airth FDP of 2006 was "specific figures". That is not correct.

44. There are two redactions in the 2006 Airth FDP which do not relate to "specific figures". Those redactions are the sentence identified by the Appellant in his Grounds and the illustration at Figure 2.1. These two redactions comprise part of a limited number of redactions made by DECC to the 2006 Airth FDP, originally in reliance on sections 41 and 43(2) FOIA. DECC subsequently relied upon regulation 12(5)(e) EIR in relation to these redactions.

45. The Commissioner was content at the time of issuing his DN these two redactions were properly made in reliance on the exception at regulation 12(5)(e) EIR. Consequently, the reference to "specific figures" at DN §50 represents a straightforward error of wording on behalf of the Commissioner. That paragraph should have, more properly, referred not only to "specific figures" but to that further small amount of commercially sensitive or confidential information.

46. For the avoidance of doubt, the Commissioner considers that the reference referred to by the Appellant in his Grounds is likely to bear some commercial sensitivity; likewise, Figure 2.1 discloses certain information in respect of PEDL 133 which does not appear to be publically available.

47. However, in light of the Appellant's comments, the Commissioner has asked DECC to confirm its position in relation to these two particular redactions. Accordingly, he reserves his own position in relation to these redactions pending that confirmation from DECC.

48. The Commissioner notes the Appellant's statement that the entirety of the Airth FDP from 2006 is now available by subscription to a database. The Commissioner takes this to be an argument that regulation 12(5)(e) EIR does not apply to this particular information. The Commissioner also reserves his position as to how this may affect disclosure of this information under EIR.

49. *It is currently unclear from the Appellant's Grounds the nature of the database he refers to and precisely what terms, if any, may apply to its use. If the subscription imposes contractual or intellectual property obligations preventing users from disclosing the data to the world at large, the Commissioner's analysis of the engagement of the exception at regulation 12(5)(e) EIR would appear unshaken. Conversely, if there are absolutely no restrictions placed on wider publication of the information following the subscription referred to (which would appear unlikely given that may defeat the purpose of the subscription), that may have a bearing on the engagement of regulation 12(5)(e) EIR in this case.*

50. *Accordingly, the Appellant is invited to provide full details of the subscription database he refers to and the Commissioner will make such further submissions on this point as appear appropriate.*

51. **The Appellant's fourth point** *is rejected. With respect to the Appellant, an error at one discrete point in the DN does not serve to cast into doubt all of the Commissioner's conclusions contained in the DN; the Commissioner remains content with his broader conclusions. Nevertheless, the Tribunal will be able to satisfy itself as to the correctness of the Commissioner's conclusions as part of the full merits review it will undertake in determining this appeal.*

52. **The Appellant's final point** *is simply misconceived. The Commissioner did not simply consider the "release of partial information from two FDP as grounds for refusing the release of any information from the remaining FDPs." Rather, in undertaking his analysis of the balance of the public interest, the Commissioner had regard to that disclosure, but based his finding that the exception should be maintained upon the actual contents of the withheld disputed information itself. He maintains that he got that finding right."*

[4] A number of points arise in the Supplemental Response the from the Commissioner:

1. He confirmed he had received a reply from DECC who confirmed that the sentence redacted from the Airth FDP of 2006, but which was explicitly identified and referred to by the Appellant in his Grounds of Appeal remains of continuing sensitivity and should be withheld. We are informed that as far as the DECC and the Commissioner are concerned this material has not been disclosed in a readily available form.
2. With regard to the map at figure 2.1 of the Airth FDP of 2006, DECC agree that his may be disclosed and the Commissioner agrees.
3. With regard to the Appellant's clarification of the availability of the entire Airth FDP of 2006 by subscription to a website, the Commissioner notes that the terms of that subscription for a single licence user at a cost of £12,000, the Commissioner's position is stated as follows: Whilst DECC initially refused to provide this martial in reliance of section 21 of FOIA, the Commissioner found that the information requested in fact engaged the EIR and not FOIA. Further he argues, Section 39 FOIA provides that environmental information is exempt information under FOIA if the public authority holding it is obliged by the EIR to make the information available to the public in accordance with those regulations, or would be so obliged but for any exemption in the EIR (Section 39(1)(a)&(b). Accordingly , the Commissioner argues, the Airth FDP of 2006 falls to be considered under EIR.
4. The Commissioner argues that where the only access to information is by purchasing a licence to access information at a subscription cost of £12,000, (the Commissioner presumes, but has not seen evidence, that the licence will also include a clause protecting intellectual property rights and prohibiting further disclosure or publications of the licences information and this tribunal find that this is a reasonable presumption) that in-

formation is not easily accessible for the purposes of the EIR (reg. 4(1)(a) EIR). As such he argues that it reasonable to consider that it has not been been made publicly available. Accordingly the Commissioner is of the view that whilst such information, if it were not Environmental in nature, “*might*” (his emphasis) be regarded as reasonably accessible under section 21 FOIA, that he argues is not a consideration here. Therefore, he argues at as the particular information referred to by the Appellant in his grounds of appeal is, in these circumstances, not in the public domain then the arguments advance by the DECC for withholding it remain good. Accordingly the Commissioner holds that the exception at regulation 12(5)(e) EIR remains engaged and, for the reasons set out in the DN, the public interest favour maintaining the exception.

5. The Commissioner refer also to the e-mail of clarification fated 12th April 2014 from the appellant where, according to the Commissioner, he appears to assume that the Commissioner is : “*considering the legitimate commercial interest of the provider of the database service rather than the interest of the company that supplied the data to DECC initially.*” The Commissioner argues that is not correct as, he argues, whilst the commercial interest of the database provider may be a legitimate consideration in deciding whether or not the exception at regulation 12(5)(e) is engaged, that is not the basis on which the Commissioner reached his conclusion and the database provider’s commercial interest is not the only one to be considered. In this regard he refers to his reasoning in full as set out at DN § § 25 - 56.

The Legal Framework:

[5] Regulation 5(1) EIR provides that subject to regulation 12 EIR, a public authority that holds environmental information “shall make it available on request”.

5. Regulation 12 EIR provides, in relevant part:

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if:

(a) an exception to disclosure applies under paragraphs (4) or (5); 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.

(3)...

(4) ...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(a) ...

(b)...

(c)...

(d)...

(e) *the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.*

Reasons:

[6] The Appellant does not seem to take issue that information and the request in this case are to be considered under EIR and that regulation 12(5)(d)(e) is engaged. For the avoidance of doubt, the Tribunal finds that at the time of the request regulation 12(5)(e) EIR is engaged in the circumstances and on the facts pertaining to this case.

[7] The Tribunal, having considered the disputed information and agrees that it has commercial value, disclosure of which would be likely to prejudice the commercial interests of the companies concerned.

[8] We have considered the grounds of appeal sent by the Appellant by e-mail on 13th February 2014 and his further points in his e-mail of the 12th April 2014, which post dated the Commissioner's Response of 9th April 2014. The Appellant has failed to persuade this Tribunal that the Commissioner has erred in his DN and in the detailed reasoning therein. Further we accept and adopt the Commissioner's reasoning in his Response and Supplementary Response as referred to above. Having considered the Appellant's arguments we confirm that he has failed to persuade us that the Respondent was wrong in his exercising of the balance of the public interest test. Much information is in the public domain and the Appellant has failed to persuade us that the disputed information would add in any significant way to the public interest while the commercial sensitivity of the information, in our view, means the public interest is better served by non disclosure. We note that further information viz: the map at figure 2.1 of the Airth FDP of 2006 has been disclosed since the DN and we have taken this into account.

[9] In the factual circumstances outlined above and for the reasons given the Tribunal refuses this appeal

Signed:

Brian Kennedy QC

2nd September 2014.