



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

Appeal No: EA/2014/0224

BETWEEN

RODNEY WHEELER

Appellant

and

INFORMATION COMMISSIONER

Respondent

Tribunal

Brian Kennedy QC
Roger Creedon
Narendra Makanji

Hearing: 25 February 2015.
Location: Field House, London.
Decision: Appeal Refused.

Subject Matter: 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”) and reliance on regulation 12(5)(a) of the EIR by the Oil and Pipelines Agency (“the Public Authority”)

Regulation 12(5)(a) of the EIR states that a public authority may refuse to disclose information if such disclosure would probably have an adverse effect on at least one of the following interests: international relations, defence, national security or public safety.

Introduction:

1. This decision relates to an appeal brought under section 57 of the FOIA. The appeal is against the decision of the the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 1 September 2014 (reference FER0511546) which is a matter of public record.
2. A paper hearing took place on 25 February 2015 when the Tribunal deliberated on the issues in this appeal.

Background:

3. The Appellant made a request for information to the Public Authority on 14 March 2013 (“the Request”). The Public Authority, is a public corporation formed in 1986 by virtue of the Oil and Pipelines Act 1985. It operates and maintains the Government Pipelines and Storage system (“GPSS”) on behalf of the Ministry of Defence (“the MOD”).
4. The Request was in the following terms; *“Please could I receive a copy of the following report under the FOIA? ABB Redcliffe Bay Fire Risk Assessment, Report 300039088 Draft 4, 9 December 2011 (or a later draft).”*
5. On 11 April 2013 the Defence Equipment and Support Secretariat (DE&S) responded to the Request and refused to provide the requested information, stating that the information was exempt under section 22 FOIA, and the public interest in maintaining the exemption outweighed that in disclosure.
6. On 12 April 2013 the Appellant replied to the DE&S, disputing that section 22 was applicable. On 22 April 2013 the Appellant appears to have directed his concerns about the response to his request (as well as another request) to the MOD.
7. The MOD treated the Appellants e-mail of 22 April as a request for an internal review and on 11 July 2013 explained that it considered that it had been incorrect to rely on section 22 FOIA because the applicable regime is the EIR. It claimed that the information was excepted from disclosure under regulation 12(4)(d) EIR [information in the course of completion] and the public interest in maintaining the exception outweighed that in disclosure.
8. As a result of a complaint by the Appellant the Commissioner investigated. The MOD then sought also to rely on regulation 12(5)(a) EIR (and the public interest test) and regulation 13 EIR in relation to particular parts of the named report.
9. The Appellant confirmed to the Commissioner that he did not require the disclosure of any personal data included in the named report and so that issue (and the MOD’s reliance on regulation 13) was not considered by the Commissioner, and it does not need to be considered by the Tribunal.

The Decision Notice:

10. In his DN, the Commissioner concluded that: a) Regulation 12(4)(d) EIR did not apply in this case as the Appellant had requested “version 4 or later” of the named report. As at the time of the request the named report was held in final form, the Commissioner decided that the exception did not apply and; b) Regulation 12(5)(a) EIR was engaged where claimed by the MOD (Paragraphs 19 -24 DN).

The Notice of Appeal:

11. The Appellant essentially argues that: a) the Commissioner was wrong to find that regulation 12(5)(a) EIR was applicable or in any event the Commissioner wrongly assessed the Public Interest test.
12. The Commissioner clarifies some outstanding issues at paragraph 22 of his Response to the Notice of Appeal in that it appears the MOD sent a redacted version of the named report to the Appellant on 30 September 2014. The redactions were in respect of personal data (which the Appellant agreed) and the information withheld under regulation 12(5)(a) EIR.

REASONS

13. The Tribunal essentially agree with the Commissioners approach to this appeal. We agree with and adopt the assessment on the engagement of regulation 12(5) (a) EIR at Paragraphs 19 to 24 of the DN and paragraphs 23 to 25 of his Response. The Appellant has failed to persuade us otherwise.
14. The Appellant argues that the Public Interest test favours disclosure but again we are not persuaded that the Commissioner is wrong in his assessment of the balance as set out at paragraphs 26 29 of the DN and paragraphs 26 to 29 of his Response and we agree with and adopt his findings and reasoning as set out therein.
15. This Tribunal also accept the personal concerns of the Appellant but there is a bigger picture to be considered and we are not persuaded that the Public Authority are wrong to claim the exception under regulation 12 (5)(a) and in fact on balance we agree that they are correct to do so in the circumstances of this particular case for the reasons they have given and which have been accepted by the Commissioner after a detailed investigation.
16. The Appellant argues that most of the information is in the Public Domain anyway and while this is correct it also supports the case for maintaining the exception claimed for the most sensitive parts on which the Public Authority rely. The Appellant argues that there is significant public interest in public safety in knowing where the “risks” lie. That is true and has been accepted but the disputed information, in our view does not add significantly to the public knowledge of the risks while it in fact adds to the risk in the way that concerns the Public Authority.

17. In his e-mail to the Commissioner of 5 March 2014 the Appellant states, inter-alia; *“If there is a real security concern, why do the MOD/OPA not retract on their previous decision not to give me a copy of the report in confidence? I am not a security risk. After 36 years in government service in the UKAEA I am well accustomed to keeping restricted information separate from public documents”*. What the Appellant seems to fail to grasp is that disclosure under EIR is to the general public and not just to one person.
18. The Appellant and other concerned citizens have been invited on site. He has the redacted document. The papers before us demonstrate that the MOD and the OPA are working well with the local community. The OPA has had several meetings with the local community to discuss their concerns.
19. We note and take into consideration at page 100 and 101 of the OB the detailed issues recorded by and on behalf of the Public Authority. Similarly we note and take into consideration the HSE guidance referred to at page 99 of the OB and the Off site Emergency Plan at page 110 of the OB. We note the Local Authority have a significant duty to ensure risk assessment and give notice to the public and residents through the public domain. All of this we find demonstrates the high level of information available within the public domain.
20. We note and take into consideration the MOD’s position as set out in the letter to Mr. Lawanson from Jory Bennet dated 4 March 2014 at page 98 of the OB. Issues identified and addressed as of concern by the MOD do not seem to be challenged by the Appellant.
21. Accordingly we agree with the DN for the reasons given by the Commissioner and for the reasons given above.

Brian Kennedy QC

8 April 2015.