



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

Appeal No: EA/2016/0016

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0584593

Dated: 14th. January, 2016

Appellant: Cormac McAleer
First Respondent: The Information Commissioner ("the ICO")
Second Respondent: The Police Service for Northern Ireland ("the PSNI")

Before

David Farrer Q.C.

Judge

and

Narendra Makanji and Jean Nelson

Tribunal Members

Date of Decision: 2nd. November, 2016

Date of Promulgation: 17th. November 2016

The Appellant appeared in person.

Aidan Sands appeared for the PSNI.

The ICO did not appear at the hearing but submitted a written response to the grounds of appeal.

Subject matter: EIR 12(5)(a)

Whether disclosure of the requested information would adversely affect national security or public safety.
It would, whether the public interest in withholding such information would outweigh the public interest in its disclosure.

The Tribunal's decision

- (i) Disclosure of those elements of the requested information that related to the location of and access to the temporary explosives store and the nature and quantity of the stored explosive would not endanger national security or public safety because such information was available to the public at the date of the request. This information, as identified in the Closed Annex, is to be provided to Mr. McAleer within 28 days of publication of this decision.
- (ii) Further disclosure relating to the techniques for handling or using the explosive or to its reception at the site would endanger national security or public safety and the balance of the public interest requires that such information be withheld. This class of information is also identified in the Closed Annex.

To the extent indicated above, this appeal is allowed.

David Farrer Q.C.

Tribunal Judge

2nd. November, 2016

The relevant statutory provisions

EIR 12(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.

12(2) A public authority shall apply a presumption in favour of disclosure.

12(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) national security or public safety."

Abbreviations In addition to those relating to the parties and those indicated in the text the following are used in this Decision –

The EIR	The Environmental Information Regulations, 2004.
HSENI	The Health and Safety Executive for Northern Ireland
The DOE	The Department of the Environment
The DN	The Decision Notice.

The Decision

The Background

1. In 2013 Dalradian Gold Limited (“Dalradian”) applied to the Department of Justice in Northern Ireland for a licence to store explosives required for a gold mining exploration near Camcosy Road, Curraghinalt, Gortin in County Tyrone.
2. In February, 2013 Dalradian applied to the DOE for planning permission for a number of developments involved in the project, including the erection of temporary buildings on “Lands approximately 165 metres west of no. 45 Camcosy Road. Approval, subject to conditions, was granted in January, 2014. Permission to relocate the explosives store, which, as approved, would not have complied with the required minimum separation distance from existing dwellings, was subsequently sought by way of a “minor amendment”. On 19th. August, 2014 the DOE decided that a further full planning application was required for the relocation of the explosives store and its layout. The further application was granted in due course.
3. This sequence of planning procedures is relevant to this appeal only because the three applications resulted in a substantial body of submissions, drawings and plans which were posted on the Planning Portal, hence accessible to any member of the public.

The Request

4. Mr. McAleer was deeply concerned as to the environmental impact of this project on the adjoining property and on the wider surroundings, which are areas of outstanding natural beauty and special scientific interest. He was also suspicious as to the operation of the

planning process, which had permitted this exploration. Neither of those concerns is relevant to the Tribunal's decision but it is evident and indeed unsurprising that the first of them was widely shared.

5. On 28th. January, 2015, Mr. McAleer made the following request for information to the HSENI –

"I request copies of any and all correspondence about and records relating to a meeting in or around October 2013 involving representatives of HSENI, HSEGB and HM Inspectorate of Mines together with follow – up clarification from HSEGB or other re separation distance of a proposed explosives store, from mine vent shafts, from mine egresses etc.. We request copies of any email or other correspondence from or to any of the aforementioned parties and/or any such correspondence to/ from the DOE, SPD or the developer".

His letter proceeded to explain the basis for his concerns.

6. The HSENI, relying on the EIR 12(5)(a) exception in so far as it specified national security or public safety, initially refused to provide any of the requested information but modified its refusal following an internal review so that part of it was disclosed. Mr. McAleer nevertheless complained to the ICO as to the withholding of the remainder.

The DN

7. In the light of later developments the reasoning of the DN is of academic interest only. The HSENI identified two facts, disclosure of which would adversely affect national security and public safety, namely the precise location of the explosives store and the quantity of explosives to be stored.
8. The ICO upheld the engagement of the exception as regards those matters. He rejected Mr. McAleer's claim that the location was widely known among local residents. Mr. McAleer appealed.
9. The fresh evidence which was then presented by Mr. McAleer quite transformed the picture. Without in any way underestimating the possible value of the other witnesses and documents that he marshalled in support of his case, the most telling was the witness statement of Dermot Monaghan, a Chartered Town Planning Consultant, together with its appendices which included a body of information as to the store, its

access and the explosives, derived from the planning applications documents on the Planning Portal.

10. The ICO, having, by his initial response, resisted the appeal as to all the allegedly sensitive information, lodged further submissions arguing that, whilst information as to the contents of the store and the means of access would endanger public safety, that was not the case as regards the location of the store, which was a matter of public knowledge as a result of the planning process and the documents accessible on the Planning Portal. He argued further that other information contained in two emails was probably disclosable but indicated that he had not succeeded in obtaining a response from the HSENI.
11. The PSNI, the body primarily responsible for ensuring the safe transport of explosives in Northern Ireland, applied to be and was joined. The hearing was therefore postponed to a date in September, 2016 so that all parties could reflect on the altered state of the evidence and prepare accordingly.

The case for Mr. McAleer

12. He submitted that the plans and drawings showed exactly the location and layout of the explosives store. There was no room for confusion and it was not hidden in a large anonymous building but was purpose – built with the usual protective walls. Mr. Sands for the PSNI, very realistically conceded at the hearing that this was so and that publication of these plans and drawings on the Planning Portal amounted to publication to the world at large.
13. The Tribunal has no doubt that, if this had remained confidential information, its disclosure would have had an adverse effect on public safety and national security, perhaps especially in Northern Ireland, even today. However, disclosure of what is already known can have no such effect. The dangerous information, says Mr. McAleer, is already in the public arena. If that is right, it is hard to see how that could have been avoided, if fairness was to be achieved in the planning process.
14. As to the nature and possible quantity of explosive to be stored – once again a highly sensitive piece of information – Mr. McAleer, by reference to Mr. Monaghan's statement, pointed to the report submitted with the first application and posted on the Portal which identified the likely main charges as consisting of bulk ammonium nitrate - based

explosives. This information was repeated in the covering letter to the second full application which stated that this explosive would be stored in the temporary store. Again, this was accessible on the Planning Portal.

15. A drawing submitted with the minor amendment application referred to 3000kg. of explosive to be stored in the explosives store. That figure is consistent with the stated separation distance of 106m.
16. As to means of vehicular access to the store, he relied on repeated statements in both applications that the current access from Camcosy Road would be used, on what the accompanying drawings show, on the specified length of an extension to the existing access track and on arrangements detailed in the Pollution Prevention Management Plan. He argued that all these matters were in the public domain as Mr. Monaghan asserted.
17. The PSNI served a written submission and a background statement from Superintendent Philip Knox, Head of the Operations Policy Branch of PSNI. He stressed the continuing threat to commercial explosives from Northern Irish terrorism and the current "severe threat" status of possible attacks on police officers from such terrorism. He explained the involvement of the PSNI in mitigating risks arising from the use of explosives by Dalradian. Information as to the whereabouts and the type of explosive could assist terrorists or other serious criminals.
18. These points were underlined in the PSNI response, which described the explosives store as being "within a large building". If that implied that the building performed other functions so that the store might be hard to identify, that is not borne out by the drawings.
19. In oral argument Mr. Sands submitted that the references in the planning documents to the nature and quantity of the explosive did not demonstrate conclusively that ammonium nitrate – based materials would be stored nor in what quantity. In the course of a short closed session devoted to a detailed examination of the withheld material, Mr. Sands helpfully identified four short redacted passages, which related not to location, access or the nature of the explosives but to their handling, use and possible temporary vulnerability to theft. He argued that this was additional information which could benefit terrorists and other criminals and that such a risk adversely affected national security and public safety, not least because it created a need for further security precautions. In this context the dominant public interest was in withholding such information.

20. These redacted passages and their subject matter are dealt with in the closed annex.

The Tribunal's findings

21. This appeal involves exclusively environmental information, so the applicable regime is the EIR.

22. We preface these findings with the emphatic statement that the requested disclosure of information as to the location and nature of explosives or as to the means of access to them would unquestionably have engaged EIR 12(5)(a), if such information had remained confidential to Dalradian and the relevant public authorities at the date of this request. Moreover, whatever the need for transparency as to the proximity of explosives to residential property, there would have been a very powerful public interest in maintaining the Reg. 12(5)(a) exception. It is not easy to reconcile the rights of local people to know and, if so advised, resist the storage of explosives in the vicinity of their homes with the pressing demands of security to safeguard those very people and the wider community. The planning system may, for all we know, be powerless to do so. This Tribunal is not called upon to do so in this appeal.

23. That last statement reflects our fundamental finding that the store's location (as conceded) but also access to it and the nature and quantity of the explosives stored were in the public domain when this request was made. It was, inevitably, common ground that the planning portal is intended to provide information to the general public.

24. The original and amended locations are precisely defined on the drawings which accompanied the three applications and in distances stipulated in the supporting documents.

25. Bulk ammonium nitrate was described in the first application as likely to constitute the main charge and, in the covering letter to the second full application as the explosive that "will be stored". The difference is immaterial, in our view. It seems likely that a fresh licence would need to be obtained if some other explosive were to replace ammonium nitrate. The Tribunal accepts Mr. McAleer's submission on this issue as summarized in §14.

26. As to quantity, we similarly accept that the reference to 3000kg. in the drawing submitted with the minor amendments application placed this information in the public domain, as argued by Mr. McAleer (see §15). Obviously, the amount will continually vary according to use and replenishment. The planning letter reference is evidently to maximum storage. Disclosure of information enabling a criminal to calculate when the store would be full or (nearly) empty could threaten public safety but that is not, nor is it likely to become public knowledge as a result of this appeal.
27. As to means of access, whether pedestrian or vehicular, we accept the submission summarized in §16 which is, once again, based on incontrovertible evidence extracted by Mr. Monaghan from the Planning Portal. This information is in the public domain.
28. Therefore the Tribunal is satisfied that disclosure of information which includes these matters would not adversely affect national security or public safety. No consideration of the public interest is required.
29. The further matters discussed in closed session and briefly identified at §19 involve quite different considerations. They are not in the public domain and are of a nature to engage the EIR 12(5)(a) exception. Unlike the questions of location and type of explosive, they are matters, disclosure of which is of negligible public interest, whilst there is a strong security interest in withholding them. They will therefore be redacted from the further disclosed information.
30. Redacted names will also generally be withheld, save in the cases of some senior officials and the director of Dalradian, whose names will be a matter of public record. They are personal data. In the case of middle – ranking public officials there is no legitimate interest in identifying them and it would be unfair to do so.
31. This appeal is therefore allowed to the extent indicated above.
32. Our decision is unanimous.

David Farrer Q.C.
Tribunal Judge
2nd. November, 2016