First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0084

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Marion Saunders
Mr David Wilkinson

Determined, by consent, on written evidence and submissions

Between

Lancashire Fire and Rescue Service

Appellant

-and-

The Information Commissioner

Respondent

DECISION AND REASONS

The request, the response and the Decision Notice

1. On 27 July 2017, the complainant requested information from the Lancashire Fire and Rescue Service (the Appellant) relating to a hydraulic

fracturing operation (also known as fracking). The request is in eight paragraphs and is set out in full in the relevant decision notice number FER0703559 dated 5 April 2018 as follows:-

> "…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."

2. On 22 August 2017, the Appellant declined to confirm or deny whether it held the requested information. The Appellant cited the exemptions provided by various sections of FOIA: sections 24(2) (national security), 31(3) (law enforcement) and 38(2) (health and safety).

3. On 1 October 2017 the complainant contacted the Commissioner. The Commissioner informed the complainant on 15 November 2017 that it appeared likely that the requested information would be environmental information as defined by regulation 2 of the EIR, and that the Appellant should have dealt with the request accordingly under the EIR rather than FOIA. The Appellant was also advised to issue a fresh response to the complainant. However, the Appellant replied to say that, in its view, not all the information requested was within the scope of the EIR, although some of it was. Thus, the Appellant 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.

4. As a result, the Commissioner's approach in the decision notice was, first of all, to decide whether all the requests should have been handled under the EIR. The decision notice concluded that they should, and so continued to consider the refusal to confirm or deny whether the requested information was held under regulation 12(5)(a) / 12(6) EIR. The Commissioner concluded that the decision not to confirm or deny was wrongly made by the Appellant, and found that the Appellant was 'required to write to the complainant with confirmation or denial as to whether the information she requested is held' (paragraph 24). The Commissioner also stated that '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' (paragraph 3).

5. In its appeal, the Appellant stated that it appealed only against the decision that all of the requested information was environmental information. It said that it was able to communicate to the complainant whether or not the information was held, but that as it would seek to withhold the information, it was not able to set out the exemptions relied

upon until it had been determined whether the EIR applied to all the information or not. In her response the Commissioner accepts that it is necessary for the correct regime to be identified by the Tribunal, before the Appellant takes the next steps required by the Commissioner.

Legal Framework

6. The relevant part of regulation 2(1) of the EIR defines "environmental information":

> "'environmental information' has the same meaning as in article 2(1) of the [Parliament and Council] Directive [2003/4/EC of 28 January 2003], namely any information in written, visual, aural, electronic or any other material form on—
>
> > (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> > (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, 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, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements…"

7. The relevant legal framework as to what constitutes environmental definition under the EIR has recently been explored by the Court of Appeal in the case of *Department for Business, Energy and Industrial Strategy v Information Commissioner and another* [2017] EWCA Civ 844, [2017] P.T.S.R. 1644 (the *DBEIS* case). Beatson LJ explained at paragraph 13 that:-

13 Guidance as to the legal principles to be followed in construing and applying the definition of "environmental information" in article 2(1) of the [Parliament and Council] Directive [2003/4/EC of 28 January 2003] and regulation 2(1) of the EIR has been given by decisions of the Court of Justice of the European Union ("CJEU") and United Kingdom courts…

14 The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention. In *Fish Legal v Information Comr (Case C-297/12) [2014] QB 521* the CJEU stated:

> "35. First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by or for public authorities: see *Ville de Lyon v Caisse des dépôts et consignations (Case C-524/09) [2010] ECR I-14115* , para 36 and *Flachglas Torgau GmbH v Federal Republic of Germany (Case C-204/09) [2013] QB 212* , para 30.
>
> "36. As recital (5) in the Preamble to Directive 2003/4 confirms, in adopting that Directive the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a member state has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest: see the *Flachglas Torgau* case, para 31.
>
> "37. It follows that, for the purposes of interpreting Directive 2003/4 , account is to be taken of the wording and aim of the Aarhus Convention, which that Directive is designed to implement in EU law: see the *Flachglas Torgau* case, para 40."

15 The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and the Aarhus Convention. The first recital to the Directive states:

> "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in

> environmental decision-making and, eventually, to a better environment."

The recitals to the Aarhus Convention include: "citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters …" And:

> "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

8. Beatson LJ went on to explain that:-

> 16 It is well established that the term "environmental information" in the Directive is to be given a broad meaning and that the intention of the Community's legislature was to avoid giving that concept a definition which could have had the effect of excluding from the scope of that Directive any of the activities engaged in by the public authorities: see *Glawischnig v Bundesminister für soziale Sicherheit und Generationen (Case C-316/01) EU:C:2003:343* , para 24. That decision concerned Directive 90/313/EEC but it was common ground that the same approach applies to Directive 2003/4/EC , which replaced it, and with which this case is concerned. That a broad meaning is to be given to the term is also seen from the decisions of this court in *Venn v Secretary of State for Communities and Local Government [2015] 1 WLR 2328* , paras 10–12, per Sullivan LJ (referring to the decision of the CJEU in *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Case C-240/09) [2012] PTSR 822; [2012] QB 606*) and in *Austin v Miller Argent (South Wales) Ltd [2015] 1 WLR 62* , paras 17 and 30, per Elias and Pitchford LJJ.
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> 17 The *Glawischnig* and *Fish Legal* cases, however, also show the limits of the broad approach. In the *Glawischnig* case it was stated, at para 25, that the fact that the Directive is to be given a broad meaning does not mean that it intended:
>
> > "to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the

> environmental factors mentioned … To be covered by the right of access it establishes, such information must fall within one or more of the … categories set out in that provision."

9. At paragraph 37 Beatson LJ explains the somewhat different approaches to what constitutes information, in FOIA and in the EIR:

> 37 There is an important difference between the definition of "information" in section 1(1) of the FOIA and the definition of "environmental information" in section 2(1)(c) of the EIR . The former focuses on the information itself: see *Independent Parliamentary Standards Authority v Information Comr [2015] 1 WLR 2879* , paras 35–36. The latter also focuses on the relevant measure rather than solely on the nature of the information itself. It refers to "any information" "on … (c) *measures* … affecting or likely to affect the elements and factors referred to" in regulation 2(1)(a) and (b) " (emphasis added). It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question.

10. Thus, it seems to us that the information requested in this case will come within the FOIA definition of that word: the question is to what extent it also comes within the definition of environmental information in reg 2(1)(c) EIR as well. To answer that question it is necessary to for us to identify the measure and then decide whether the information is 'on' the measure, that is whether it is about, relates to or concerns that measure.

11. It is also important to note as Beatson LJ did in *BDEIS* at paragraph 39 that:-

> …the tribunal is not restricted by what the information is specifically, directly or immediately about. In my judgment, this is consistent with the language used in regulation 2(1)(c) . Nothing in that language requires the relevant measure to be that which the information is "primarily" on.
> …
>
> 42 Furthermore, … it is possible for information to be "on" more than one measure. … Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is

> only a single answer to the question "what measure or activity is the requested information about?" Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole…

12. This wide description as to whether information is on a 'measure' also appears to have an impact as to how the 'measure' itself is defined. The Court of Appeal said at paragraph 43 of the *DBEIS* case that:-

> 43 It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned…It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1) .

13. The Court explained also that there was a limit to what could be environmental information when it stated that:-

> *e) The role of a purposive interpretation in this context:*
> 45 A literal reading of regulation 2(1)(c) would mean that *any* information about a relevant "measure" would be environmental information, even if the information itself could not be characterised as having, even potentially, an environmental impact as defined. However, as recognised by the judge, at para 91, "simply because a project has some environmental impact", it does not follow that "all information concerned with that project must necessarily be environmental information". Interpreting the provision in that way would be inconsistent with the decision in the *Glawischnig case EU:C:2003:343* discussed at paras 16–17 above. Since that case also stated that the Directive is to be given a broad meaning, I have concluded that the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental.

> 46 The question is how to draw the line between information that qualifies and information that does not…..
>
> 47 In my judgment, the way the line will be drawn is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information "on" the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.

Discussion and decision

14. The Commissioner's decision notice deals with the issue as follows:-

> 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 [Appellant] 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 [the Appellant] 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 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 [the Appellant] 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.

15. The Appellant's appeal makes a number of points in response. These can be summarised as follows:-

(a) The fracking operation has a much wider effect than affecting the environment, and this can include (i) local policing capacity and priorities; (ii) journey times; and (iii) employment. Questions 'on' the site 'cannot simply be designated as environmental'.

(b) If the request for example in 3(e) about emergency lighting systems and generators had been made in isolation, 'it is extremely difficult to envisage how this could be designated as environmental information'.

(c) '[I]nformation about the site relates to a much wider scope than simply environmental considerations'. An example is given which is information concerning 'a multi-agency meeting to do with the site' which covers a wide range of factors including, as the Commissioner notes in her Response 'a road traffic accident on the M55'.

(d) The argument is made that 'all factors, measures and any other consequences must be linked to an affect on the elements of the environment in order to come with the terms of reference' of regulation 2(1) EIR. The information should 'be seen as affecting the environment', before the EIR applies

16. Applying the approach in the *DBEIS* case we agree with the Commissioner that all the information sought is environmental information.

17. For the purposes of Reg 2(1)(c) EIR the 'measure' in question what the Commissioner calls the 'the Preston New Road operation': an 'activity' which is likely to affect many of the elements and factors referred to in regulations 2(1)(a) and (b) EIR.

18. All the information sought is 'on' this activity, in that it is 'about, relates to or concerns the measure in question'. This is the case even if, as the Appellant argues, some of the information would not have the fracking operation as its main focus. That does not matter, for the reasons set out in paragraph 42 of the *DBEIS* case: the information can be 'about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole'. All the information which is the subject matter of these requests will come within that definition. In particular, as the Commissioner argues in her Response to the appeal 'the scope of the information requested in this particular case concerns essentially on broad issue, namely the issue of safety on the site'.

19. In our view the information in request 3(e), about the presentation to the Appellant about emergency lighting systems at the site (about which the

Appellant makes specific submissions (see above)), even when taken in isolation, is clearly 'on' the measure of the Preston New Road 'activity'. Likewise, it seems to us that information about a 'multi-agency meeting to do with the site' must also be 'on' the activity. This would include matters such as the road accident referred to which, as the Commissioner notes in her Response 'came under the heading 'Disruption Tactics' which related to disruption to traffic caused by protestors on site'.

20. Taking the Appellant's point summarised in paragraph 15 (d) above, the Appellant appears to misunderstand the proper interpretation of regulation 2(1) EIR. It is not a question, as the Appellant claims, of establishing that the information should 'be seen as affecting the environment', before the EIR applies. As set out above the question is whether there is a 'measure' (for example an activity such as the fracking site operation) 'affecting or likely to affect the elements and factors referred to in (a) and (b)' of regulation 2(1) EIR. The Appellant does not seem to argue that the fracking site operation is not such a measure. "Environmental information" is then defined as information which is 'on' that measure (the fracking site operation) as that is defined in the case law set out above. We note that Beatson LJ at paragraph 45 of the *DBEIS* case said that 'the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental'.

21. In further considering which side of the line the information falls, we note the need to consider the recitals to the Directive and the Aarhus Convention and whether the requested information is consistent with or advances the purpose of those instruments. As set out above the first recital to the Directive states:

> "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views,

> more effective participation by the public in environmental decision-making and, eventually, to a better environment."

22. The recitals to the Aarhus Convention include:

> "citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters …" And:
> "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

23. It seems to us that the requested information, if disclosed, would advance the purposes of these instruments in that the public would have fuller knowledge of the matters raised in the request and be better able to express concerns and participate in the decision-making process.

24. We have been provided with a bundle of material which the Appellant has submitted as relevant to the request. Some of the material post-dates the request on 27 July 2017 and so we have not considered that at all as it outside the scope of the request. Of the other material, the Appellant helpfully accepts that very much of it is 'information' for the purposes of FOIA, as well as 'environmental information' for the purposes of the EIR (which of course is perfectly possible). In fact, it appears that the disputed information now amounts only to a number of emails which, in our view, are clearly 'on' the measure in question and which would advance the purposes of the instruments described above.

Conclusion

25. For the reasons set out above we are satisfied that all the information sought by the requester in this case is 'environmental information' and the

appeal is therefore dismissed, and the Appellant will need to deal with the request on that basis.

26. This decision is unanimous.

Signed

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 6 December 2018.

(Case considered by Panel on 2 November 2018).

Promulgation Date: 10 December 2018