

Decision Notice 053/2022

Hunterston Offsite Emergency Plan

Applicant: the Applicant

Public authority: North Ayrshire Council

Case Ref: 202100715



Scottish Information
Commissioner

Summary

The Council was asked for a copy of the Off-site Emergency Plan (OEP) for Hunterston Power Station. The Council disclosed some information to the Applicant, but withheld other information on the basis that its disclosure would substantially prejudice national security. Additional information from the OEP was disclosed during the investigation.

The Commissioner found that the remaining information was excepted from disclosure, but that the Council had breached the EIRs by initially withhold information which it later disclosed.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2) (Duty to make environmental information available on request); 10(1), (2) and (5)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 4 February 2021, the Applicant made a request for information to North Ayrshire Council (the Council) for a copy of the Off-site Emergency Plan (OEP) for Hunterston Power Station as required by regulation 11 of the Radiation (Emergency Preparedness and Public Information) Regulations 2019 (REPPIR 2019).
2. The Council responded on 12 March 2021. It repeated a statement made previously by South Ayrshire Council to the Applicant that the Hunterston B Off-Site Plan was prepared by the Ayrshire Civil Contingencies Team (ACCT), that South Ayrshire Council is the lead authority for ACCT, and that the plan was publicly available¹.
3. On 16 April 2021, the Applicant wrote to the Council requesting a review of its decision. He considered the OEP was very heavily redacted and was of limited value by way of public information. He also considered that what had been disclosed did not comply with REPPIR 2019.
4. The Council notified the Applicant of the outcome of its review on 10 May 2021. It reiterated that the information requested was prepared by the ACCT and that South Ayrshire Council was the lead authority. It told the Applicant to contact South Ayrshire Council if he remained dissatisfied.
5. On 8 June 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that he was dissatisfied with the outcome of the Council's review because he considered the published OEP was heavily redacted and this was, in his view, a clear breach of REPPIR 2019.

¹ <https://www.north-ayrshire.gov.uk/Documents/CorporateServices/ChiefExecutive/hunterston-off-site-plan.pdf>

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 17 June 2021, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council told the investigating officer that, if the Applicant remained unhappy, he should approach South Ayrshire Council.
8. Following a discussion with the investigating officer, the Council confirmed, on 20 October 2021, that it did hold an unredacted copy of the OEP in its own right.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was again asked to provide an unredacted copy of the OEP and was invited to comment on this application and explain why the remaining information – i.e. the information redacted from the OEP – was being withheld.
10. On 29 October 2021, the Council confirmed that the information withheld within the OEP was considered excepted from disclosure under regulation 10(5)(a) of the EIRs. On 17 November 2021, an unredacted copy of the OEP was obtained from the Council.
11. As minimal information had been withheld from the OEP, the Applicant was asked why he believed the remaining information within the OEP should be disclosed. The Applicant replied that reference had been made to Annexes within the OEP, and asked if this information could also be provided.
12. On 31 January and 18 February 2022, the Council disclosed a redacted copy of Annex A and an unredacted copy of Annex B to the Applicant.
13. On 22 February 2022, the Applicant was asked again for any specific comments he wished to provide as to why he considered the public interest favoured disclosure of the remaining information. He reiterated that he did not consider the OEP fulfilled the requirements of REPPiR 2019.
14. On 22 February 2022, the Council was asked for its submissions as to why the remaining information should be withheld. The Council replied on 4 March 2022 and also referred to other relevant information it had published.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner considered all the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Matters to be investigated

16. Throughout the investigation, the Applicant submitted that the redacted copy of the OEP for Hunterston not only failed to comply with REPPiR 2019, but was not fit for purpose, and that the true reason for the redactions imposed were to disguise that fact. He considered that REPPiR 2019 gave him the right to receive all information in an un-redacted form.

17. The Commissioner notes that REPPiR 2019 ensures members of the public are provided with information, both before and during an emergency, so that they are properly informed and prepared, in advance, about what they need to do in the unlikely event of a radiation emergency occurring. For example, regulation 21(1) requires local authorities with responsibility for an area covered by an off-site emergency plan with a detailed emergency planning zone to ensure that members of the public are made aware of the information set out in Schedule 8 to REPPiR 2019 and, where appropriate, provided with it. The information must be made available at intervals not exceeding three years or, if it is revised, as soon as reasonably practicable after the revision (regulation 21(9)).
18. The Applicant was advised throughout the investigation that the Commissioner's remit under the EIRs did not extend to considering whether the OEP published by the Council complied with the requirements of REPPiR 2019. The Commissioner cannot comment on whether a Scottish public authority should provide information to an applicant under any other rights or legislation: he can only reach a decision on whether a Scottish public authority complied with the requirements of the EIRs (or FOISA) in responding to the Applicant's information request.
19. In its submissions, the Council referred to information that had been published on its website since REPPiR 2019 came into force, which relates to people who do not live within the Detailed Emergency Planning Zone but are living within the 30km Outline Emergency Planning Zone. The Council considered that this document² provided the information the Applicant was concerned about. The Applicant was provided with the above information, but still disputed that any of the information published fulfilled the requirements of REPPiR 2019.
20. Although the Applicant clearly believes there has been a breach of REPPiR 2019 (which the Commissioner cannot investigate), it is clear from his application and correspondence that he is dissatisfied because the information has been redacted. Therefore, the Commissioner's decision will consider this dissatisfaction: i.e. whether the exception in regulation 10(5)(a) of the EIRs applied to the information withheld by the Council.
21. As the Applicant has not expressed any dissatisfaction with his request now being handled under the EIRs, rather than in terms of FOISA, the Commissioner will not consider that point, other than to acknowledge that the request is for information that would fall within the definition of environmental information regulation 2 of the EIRs.

Regulation 10(5)(a)

22. The Council withheld the remaining redacted information in the OEP (including Annex A) on the basis that regulation 10(5)(a) of the EIRs applied. As stated in the published redacted report, the Hunterston Off-site Contingency Plan is a set of documents describing an integrated emergency management document designed to bring together the emergency arrangements of all the off-site agencies with a role to play in the response to a radiation emergency occurring at Hunterston "B" Nuclear Power Station.
23. Under regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. This exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)). An authority applying this exception must be able to demonstrate that there is a real risk or likelihood that

² <https://www.north-ayrshire.gov.uk/Documents/CorporateServices/ChiefExecutive/opz-information.pdf>

actual harm would follow disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote or hypothetical possibility.

24. The Council provided its reasoning for redacting each item of information within the OEP and Annex A. It did note that information about the media liaison point would be provided to the media at the time of an incident and not in advance. However, it concluded that the withheld information could be used unwittingly by members of the public, press or media (or deliberately by terror/activist/other groups) to disrupt, obstruct or complicate the response to an incident and so considered that the information was excepted from disclosure.

The Commissioner's view

25. The Commissioner notes that the Council has withheld minimal information in the OEP and Annex A. It has withheld only the specific information it has concern in disclosing, but has disclosed descriptive information that, for an informed reader, will make it apparent the type of information being withheld and most probably why it is being withheld. The information withheld includes cascade charts, locations, contact details, actions to be taken, numbers of household/staff and detailed planning maps.
26. In its submissions, the Council advised that, if a radiation emergency occurred at Hunterston B, then some of the information withheld would be provided to the relevant parties, for example the media liaison point.
27. Following, the initial discussion in this investigation, in which the Council accepted that it did hold the information in its own right, it has disclosed a substantial volume of the information contained within the documents.
28. The Commissioner has considered in detail the submissions made by the Council and has taken into account the reasons why the Applicant considers the information should be disclosed, along with the extent to which information is, or was, already publicly available. The Commissioner must take into the consideration all the circumstances at the time of the information request (or, where relevant, at review stage). The application of an exception may change with the passage of time.
29. The information redacted relates to detailed emergency planning should there be a radiation emergency occurring at Hunterston "B" Nuclear Power Station. The Commissioner notes that MI5's published threat level at the time of this request was (and remains) "substantial", meaning the threat to the UK from a terrorism attack is "likely"³.
30. The Commissioner accepts that disclosure of the minimal remaining withheld information, in the current context, and the fact that it relates specifically to radiation emergency planning, would provide an opportunity for exploitation by those with malevolent intent, with a resulting substantial danger to immediate residents and beyond. The Commissioner cannot consider this risk to national security and public safety to be unduly remote. The Commissioner is therefore satisfied that the exception applies to the remaining withheld information in the OEP and Annex A.
31. However, as the Council initially withheld information in the OEP which it later disclosed, the Commissioner finds, in the absence of arguments from the Council as to why the information was originally excepted from disclosure, that this was a breach of the EIRs.

³ <https://www.mi5.gov.uk/cy/threat-levels>

The public interest test

32. Having accepted that the exception in regulation 10(5)(a) applies, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The Council's submissions

33. The Council recognised there was a public interest in disclosure of the redacted information in order to allow interested parties to be able to understand more fully the local risks, given the potential consequences for the safety of local residents and the environment. The Council also recognised the wider public interest in there being transparency of the actions that would be taken were an incident to occur at the site. However, it considered that there is a significant public interest in ensuring that the safety of the Hunterston site is not compromised by disclosure of information which could be used by individuals unwittingly, or deliberately, to disrupt a response to an incident, thus endangering local residents and the wider environment.
34. When considering the public interest arguments, the Council stated that it had regard to key areas: the safety of the public and the environmental damage caused if the information was used unwittingly by members of the public, press or media (or deliberately by terror/activist/other groups) to disrupt, obstruct or complicate the response to an incident at the site, impacting emergency responders and leading to a potential human and environmental catastrophe.
35. The Council maintained the position that the public interest in maintaining the exception was more persuasive and favoured withholding the information.

The Applicant's submissions

36. The Applicant submitted that the redacted information provided to date was ambiguous, contradictory, mis-informative and was clearly not fit for purpose as a standalone document. Unless information was provided that fully and clearly advised what the local residents should do in the event of a radiation emergency, then the lives of those residents are placed at extreme and significant risk. Only when the complete OEP is disclosed would the local residents be able to decide whether it is necessary to take up the matter with the nuclear regulators and elected representatives.
37. The Applicant considered that, in deciding this matter, the Commissioner potentially holds in his hands the wellbeing of hundreds of vulnerable children who may be trapped, without coordinated assistance, in various primary schools under a life-threatening radiation emergency.

The Commissioner's conclusions

38. The Commissioner recognises that there is a significant public interest in disclosure of the redacted information in order to allow interested parties to be able to understand more fully the local risks, given the potential consequences for the safety of local residents.
39. However, the Commissioner considers that the public interest is met by the information that has been published from the OEP. If the main concern of the Applicant is that the OEP does not fulfil the requirements of REPIR 2019, then the Commissioner considers that the information disclosed will enable the Applicant to raise his concerns with the relevant

authorities, who will be in a position to access a full un-redacted version of the OEP and reach a conclusion on the Applicant's complaint.

40. The Commissioner notes that minimal information has been withheld, and that which has been withheld are specific details such as contact telephone numbers that would be used if such an emergency would occur. The Commissioner notes and concurs with the Council's position that disclosing such specifics now (and especially if such information is changed or updated in the interim) could lead to substantial issues if people and organisations acted on information that was not current or was used for malevolent purposes.
41. The Commissioner also notes that REPPIR 2019 would require the Council to provide relevant information to relevant parties, if an emergency occurs. This deal, to an extent, with the comments made by the Applicant in relation to the responsibility of the Commissioner (paragraph 37).
42. The Commissioner recognises that there is a significant public interest in ensuring that the safety of this site is not compromised by disclosure of information which could be used by those with malevolent intent, thus endangering local residents and the wider environment. Having carefully balanced both arguments, the Commissioner concludes, in all the circumstances of the case, that the public interest in making information which the Commissioner has found to be excepted from disclosure available is outweighed by the public interest in maintaining the exception.

Decision

The Commissioner finds that North Ayrshire Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Council was entitled to withhold information under regulation 10(5)(a) of the EIRs. However, by initially withholding information that it later disclosed, the Council failed to comply fully with regulation 5(1) of the EIRs.

The Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

11 May 2022

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - (a) international relations, defence, national security or public safety;

...

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