



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

Appeal No: EA/2018/0270

ON APPEAL FROM:

The Information Commissioner's Decision Notice Nos: FER0751857
Dated: 7 November 2018

Appellant: Cabinet Office

First Respondent: The Information Commissioner

Second Respondent: Greenpeace UK

Heard at Field House on 4 and 5 July 2019

Before
HH Judge Shanks
and
Marion Saunders and Alison Lowton

Representation:

Colin Thomann for Cabinet Office

Ben Mitchell for Information Commissioner

Alice Goodenough for Greenpeace

Subject matter:

Environmental Information Regulations 2004

Regulation 12(4)(e): internal communications

Regulation 12(5)(e): confidentiality of commercial information

Regulation 12(5)(f): interests of person who supplied information.

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal to a limited extent, allows the cross-appeal in full and issues the following substituted decision.

SUBSTITUTED DECISION NOTICE

Public Authority: The Cabinet Office

Complainant: Greenpeace UK

Decision

For the reasons set out below, the Tribunal decides that the Public Authority failed to deal with the Complainant's request for information made on 30 January 2018 in accordance with EIR in that they ought to have made the parts of the PMIU report on the state of the UK shale industry dated April 2016 referred to below available to the Complainant.

Steps to be taken

The Public Authority must by 17:00 on 25 November 2019 supply to the Complainant the following:

- (1) the Background and Executive Summary part of the report, redacted only to the extent indicated in the Schedule hereto; and
- (2) those parts of the main body of the report indicated as being disclosable in the Schedule.

HH Judge Shanks

21 October 2019

REASONS FOR DECISION

Factual background

1. This appeal concerns an information request made on behalf of Greenpeace UK to the Cabinet Office on 30 January 2018 by Zachary Boren, a reporter with “Unearthed”, Greenpeace’s “editorially-independent” journalism website, seeking disclosure of a report prepared by the Prime Minister’s Implementation Unit (PMIU) on the UK shale industry in April 2016.
2. The PMIU is a team based on the Cabinet Office that works on behalf of the Prime Minister and Cabinet Secretary. An important part of its work is to undertake reviews into the progress of policy delivery, to identify barriers to implementation and develop solutions to those barriers.
3. It is a matter of public record that the government elected in 2015 supported the creation of a native shale gas industry (ie the industry whereby gas is extracted from shale by means of the so-called fracking process). The government’s position remained supportive to the industry; they believed that shale gas had the potential to be a home-grown energy source which could lead to jobs and economic growth, contribute to security of supply and help achieve the UK’s climate change objectives. In 2016 the industry was at an early stage of development with only four active players (Cuadrilla, Third Energy, IGas and INEOS) and a few exploratory sites; that remained the position in 2018 which is the relevant date for the purposes of this appeal.
4. We have been provided with a document issued by the Department of Energy and Climate Change (DECC) in December 2015 about the regulatory process in relation to onshore oil and gas which is of relevance. The document indicates

that it is necessary to go through the following steps before fracking can take place:

- (1) It is first necessary for the operator to have an exclusive licence to drill in a certain area from the Oil and Gas Authority (OGA);
- (2) Then the operator has to negotiate access with landowners;
- (3) Then the operator must obtain planning permission from the local planning authority (or on appeal, the Secretary of State);
- (4) The planning authority and the operator are obliged to consult with the Environment Agency (EA);
- (5) The operator must obtain an environmental permit from the EA;
- (6) The Health and Safety Executive (HSE) must be notified and satisfied with the well design.

5. The PMIU report we are concerned with was commissioned by the No 10 Policy Unit to focus on four issues:

- (a) the potential state of the UK shale industry in 2020;**
- (b) the challenges and barriers to progress in the run-up to 2020;**
- (c) how the Government could address the challenges and help accelerate industry progress;**
- (d) what could be learnt from the experience of other countries.**

In order to compile its report the PMIU interviewed 28 “stakeholders” including, in addition to governmental bodies, ten “industry players” (including existing and potential “operators”) and nine outside experts. Information from such external stakeholders was provided on the condition of confidentiality as explained at the start of individual interviews and the workshops where views were collated.

6. In April 2016 the report was distributed within government to No 10, the Cabinet Office, HM Treasury, the DECC and the Department of Communities and Local Government (DCLG). In June 2016 the PMIU made a presentation to a meeting of the “Cross-Whitehall Group on Shale”, which included a number of other government departments and the EA and HSE; a Presentation

document which contains extracts from the report was prepared for this purpose. We deal with this in more detail at paras 32-36 below.

7. Later in 2016 the 14th Licensing Round in relation to oil and gas took place. The OGA awarded licences covering 93 out of a potential 159 blocks. There is an issue between the Cabinet Office and Greenpeace about the significance of the remaining 66 blocks. Based on a statement in the Executive Summary to the PMIU report which has been disclosed which states that “the key shale areas will have been licensed in the 14th [Round]” (see OB/184), it appears likely that the bulk of the land from which it would be possible to drill for shale was the subject of exclusive licences from 2016.
8. The Conservative Party manifesto for the June 2017 election contained the following statements in relation to shale gas:

Natural gas from shale

The discovery and extraction of shale gas in the United States has been a revolution ... We will ... develop the shale industry in Britain.

We will only be able to do so if we maintain public confidence in the process, if we uphold our rigorous environmental protections, and if we ensure the proceeds of the wealth generated by shale energy are shared with the communities affected.

We will legislate to change planning law for shale applications ... when necessary, major shale planning decisions will be made the responsibility of the National Planning Regime.

We will set up a new Shale Environmental Regulator, which will assume the relevant functions of the Health and Safety Executive, the Environment Agency and the Department of Business, Energy and Industrial Strategy. This will provide clear governance and accountability, become a source of expertise, and allow decisions to be made fairly but swiftly ...

The Conservatives were elected in the 2017 election albeit with a reduced majority.

9. On 17 May 2018 the Secretaries of State for Business, Energy and Industrial Strategy and for Housing, Communities and Local Government issued a written statement relating to government plans to consult on aspects of the planning regime relevant to fracking. It referred to plans to treat non-hydraulic fracturing shale exploration as “permitted development” and to the fact that consideration was being given to the criteria required to bring shale production projects into the Nationally Significant Infrastructure Projects regime. It was stated that the government would continue to take measures to speed up the planning process in relation to shale and would set up a Shale Environmental Regulator to bring the work of the OGA, EA and HSE together.

10. As at May 2018 the industry remained in a similar position to that in 2016: there was a small number of players; only four shale wells had been or were being drilled; and the government was still in the process of developing its detailed policies in relation to shale.

The request and the Cabinet Office’s response

11. In November 2017 Greenpeace made an information request under the Freedom of Information Act 2000 (FOIA) addressed to the Department for Business, Energy and Industrial Strategy (“BEIS”) seeking to find out the number of “unconventional gas wells” projected to have been drilled in the UK by 2030. BEIS responded on 2 January 2018 giving various tentative figures up to 2025 and stating in particular:

According to a 2016 Cabinet Office Report, by 2020 we have estimated that there will be approximately 17 sites, with around 30 to 35 sites by 2022. We have not produced estimates beyond this date. In terms of wells, we have estimated that there could be around 155 wells by around 2025. We do not hold any estimates beyond 2025.

12. Mr Boren told us that the figures given by BEIS were very different from those which were being relied on publicly by the fracking industry, which were based in particular on the projections in a report by Ernst & Young from 2013. He

said that in order to try and understand the discrepancy he made the request we are concerned with on 30 January 2018.

13. The Cabinet Office's formal response is dated 14 March 2018. It confirmed the existence of the PMIU report but stated that it would be withheld in reliance on the exceptions provided by EIR regulations 12(4)(e) (internal communications), 12(5)(e) (commercial confidence) and 12(5)(f) (interests of suppliers of information) as well as analogous exemptions provided by FOIA. In the context of potential damage to commercial interests it stated:

The British shale gas industry is still an emerging market. Release of information from 2016, even with the passage of time, could call into question the industry's viability.

14. Following an internal review, the Cabinet Office confirmed their decision to withhold the report in a letter to Mr Boren on 15 May 2018.

Commissioner's investigation and decision notice

15. Greenpeace applied to the Information Commissioner under section 50 of FOIA complaining about the Cabinet Office's refusal to supply the PMIU report. It was accepted in the course of the Commissioner's investigation that the whole report contained "environmental information" and thus fell to be considered under the EIR rather the FOIA. In the course of their submission to the Commissioner's investigation dated 12 October 2018 the Cabinet Office stated:

We confirm that the report was distributed only to officials (and, in some cases, Ministers and Special Advisers) in the following central government departments: Cabinet Office (including No 10), HM Treasury, DECC, and DCLG. As the report was not shared outside government we consider that regulation 12(4)(e) applies.

16. The Commissioner's decision notice is dated 7 November 2018. She decided that regulation 12(4)(e) (internal communications) applied to the whole of the

PMIU report and that the public interest favoured the maintenance of that exception in relation to the body of the report but not in relation to the Background and Executive Summary, although some parts thereof (which were highlighted in yellow) were also covered by regulation 12(5)(e) (commercial confidentiality) and the public interest favoured their being withheld. Thus the Commissioner required the Cabinet Office to disclose the Background and Executive Summary with the parts highlighted in yellow redacted.

Appeal and cross-appeal

17. The Cabinet Office appealed against the Commissioner's decision notice on 5 December 2018. By their appeal they seek to withhold a number of further passages from the Background and Executive Summary to the report on the basis of regs 12(4)(e), 12(5)(e) and/or (f); these passages (which are marked in blue in the our closed copy of the Background and Executive Summary) and the Cabinet Office's justifications for them are set out most conveniently in a closed exhibit ("AH1") to the statement of Andy Heath made on behalf of the Cabinet Office dated 17 February 2019. By a closed summary presented to us at the hearing the Information Commissioner has indicated her position in relation to each of these passages, accepting that some should be withheld. Greenpeace, although they have not for obvious reasons seen the passages which the Cabinet Office seek to withhold by their appeal, would seek to uphold the Commissioner's original position that they should be disclosed; they also maintain in effect that regs 12(5)(e)/(f) did not apply to the yellow passages or that, in any event, the public interest favoured their disclosure.

18. In his statement dated 17 February 2019 Mr Heath also said at para 20 that certain parts of the report had been shared with officials from the EA and the HSE, as well as with officials and ministers from government departments. This led to Greenpeace's cross-appeal by which they maintain that, in so far as the report has been shared with the EA and HSE, which are non-departmental public bodies (NDPBs) and independent of central government, the Cabinet Office cannot rely on the regulation 12(4)(e) exception and the report should

have been disclosed. The Cabinet Office's position in response is that the whole report retains the benefit of the reg 12(4)(e) exception notwithstanding the involvement of the EA and the HSE.

Procedural matters

19. We have been provided with witness statements from Mr Boren on behalf of Greenpeace and from Mr Heath and Jonathan Nancekivell-Smith on behalf of the Cabinet Office. Mr Heath was the Head of Performance Strategy at PMIU from April 2017 and was subsequently Acting Deputy Director for Strategy; he dealt with Mr Boren's request for information but was not involved in drafting or submitting the report itself; like all those who were involved he has now left the PMIU and did not appear before the Tribunal. Mr Nancekivell-Smith is the Executive Director of the PMIU, having joined in January 2019; he claimed no direct knowledge of the report or the UK energy sector but attended the Tribunal and made himself available to be questioned on behalf of the Cabinet Office. In accordance with normal practice, the Cabinet Office statements necessarily contained some "closed" material and exhibited on a closed basis the full (unredacted) PMIU report and the Presentation prepared for the Cross-Whitehall Group on Shale.

20. At the hearing we heard evidence in open session from Mr Boren and Mr Nancekivell-Smith. However, most of the hearing took place in closed session with Mr Nancekivell-Smith answering questions about the report and the involvement of the EA and HSE and with closed submissions from the Cabinet Office and the Commissioner. A written gist of what had happened in the closed session was agreed by counsel, approved by the Tribunal and provided to Greenpeace before the open session resumed. We are satisfied that they were provided with as much information as possible and that the procedure was as fair as it could be without disclosing the very material that was in issue in the appeal.

21. In the course of the hearing it became evident that if we upheld the cross-appeal the Cabinet Office may seek to rely on exceptions other than that provided by reg 12(4)(e) in relation to parts of the PMIU report other than the Background and Executive Summary which had been shared with the EA and HSE.

Although we considered that the Cabinet Office ought to have anticipated this and raised these exceptions before the hearing, in view of the importance of the matter we were prepared to give them an opportunity to raise and argue them in writing after the hearing. We therefore directed that they set out their position in writing by 19 July 2019 with replies from the Commissioner and (in so far as they could) Greenpeace by 2 August 2019. We made clear to the parties that the effect of this further material and the intervening summer break may well be that the Tribunal's decision could not be promulgated before the end of September.

22. Unfortunately the Cabinet Office's written submissions dated 19 July 2019 were, as pointed out by the Commissioner, unsatisfactory in two ways: first, because they were made by reference to the Presentation document rather than the PMIU report which is the subject matter of these proceedings; and, second, because they sought to expand the argument in relation to parts of the Presentation document which were in the Background and Executive Summary part of the PMIU report, although the Cabinet Office had already put forward a full case in relation to that part of the report by way of their appeal and it should have been obvious (if we did not expressly say so) that our intention was to allow new points to be raised only in relation to the main body of the PMIU report. In the event, we have not had regard to the Cabinet Office's latest submissions in so far as they relate to material in the Background and Executive Summary and have treated them as referring to the relevant part of the main body of the report rather than the Presentation.

The legal framework

23. Regulation 5 of EIR requires a public authority to make “environmental information” which it holds available on request. Regulation 5 is subject to Regulation 12 which, so far as relevant, provides as follows:

(1) Subject to paragraph (2) ... a public authority may refuse to disclose environmental information requested if:

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

(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.

...

(4) ... a public authority may refuse to disclose information to the extent that

...

(e) the request involves the disclosure of internal communications.

(5) ... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

...

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

(f) the interests of the person who provided the information where that person-

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it;

(iii) has not consented to its disclosure;

...

(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

24. The EIR were passed in order to give effect to EU Council Directive 2003/4/EC, which was itself passed to give effect to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters. The purpose of the Convention and the Directive are encapsulated in the certain recitals to the Directive:

(1) 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.

...

(8) It is necessary to ensure that any natural or legal person has a right of access to environmental information held by or for public authorities without his having to state an interest.

(9) It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible ...

The EIR are to be interpreted purposively in accordance with the Directive.

25. However, so far as the exceptions to disclosure are concerned, Recital (16) and Art 4.2 of the Directive make clear that grounds of refusal should be interpreted in a restrictive way. Further, there is a specific presumption in favour of disclosure provided in reg 12(2) of the Regulations. And, by virtue of reg 12(1)(b), a public authority can only rely on an exception to disclosure if the public interest in maintaining the exception “outweighs” the public interest in disclosure. It is important to note that the relevant public interest against disclosure is specifically the public interest in “maintaining” the relevant exception, not just any general public interest against disclosure; it is therefore

necessary to identify the nature of the public interest served by the exception before weighing it in the balance. It is clearly established by European Court of Justice authority (see: *Office of Communications v IC* [2011] PTSR 1676 at [32]) that if more than one exception applies to requested information, the public interests in maintaining the exceptions may be amalgamated when the balancing exercise is carried out, but, still, the relevant “amalgamated” public interest is only that in maintaining such exceptions as apply. It is axiomatic that a refusal to disclose information is only “to the extent that” the relevant exception applies; thus, if a substantial document is requested only those parts of the document which come within the terms of the relevant exception can be withheld and the balance must be disclosed if the information can sensibly be divided up. The resulting process of analysing a document and considering numerous proposed redaction is one that the Commissioner and this Tribunal habitually carry out.

26. **Reg 12(4)(e)** provides an exception where a request for information “... involves the disclosure of internal communications”. There is no definition of “internal communications” save for the provision at reg 12(8) that it includes communications between “government departments” (also undefined). It is clear that if reg 12(4)(e) does apply it is for the public authority to identify the damage to the public interest that would flow from its disclosure; there is no presumption that such damage will result. The relevant public interest is “the effective conduct of public affairs” and it is not limited to the need for a “safe space for policy formulation and development”, though often that may well be the relevant consideration (see *Amin v IC and DECC* [2015] UKUT 0527 (AAC) at para [102]). When considering the public interest in providing such a “safe space” it is clear that the public interest will lessen over time but it does not automatically disappear just because the relevant policy has been formulated: it all depends on the particular circumstances of the case (see *DEFRA v IC and Badger Trust* [2014] UKUT 0526 (AAC) at para [52]).

27. The exceptions provided by **regs 12(5)(e) and (f)** are different but overlapping and can be considered together. It is a moot point whether there is a requirement for a potential adverse effect on a “legitimate economic interest” to be shown before reg 12(5)(e) applies at all but we prefer to interpret the exception as requiring, as its wording suggests, only an adverse impact on the confidentiality of the information at the first stage; but, in any event, the extent of any potential damage to economic interests is in most cases (including this one) likely to be the main factor in assessing the public interest in maintaining the exception, so that the interpretation issue we identify is in practice of little importance. The adverse effect contemplated by reg 12(5)(f) is to “the interests” (without more) of the person providing the information but, again, in this case, the relevant interests are most likely to be economic and the extent of any potential damage to such interests is likely to be the main factor in the assessment of the public interest in maintaining the exception.

28. It is important to note in the context of these exceptions that the fact that information is provided subject to a legal obligation of confidentiality is not determinative against disclosure: the public interest balance must come down in favour maintaining the relevant exception. Thus, no-one providing environmental information to a public authority can ever be given an absolute assurance of confidentiality and those who enter into confidential discussions with a public authority must be taken to recognise that there may be circumstances which require the public authority to disclose information which was considered confidential (see *DEFRA v IC and Badger Trust* [2014] UKUT 0526 (AAC) at para [56]).

29. As to the timing of the consideration as to whether the information should be disclosed and in particular as to where the public interest balance lies, Ms Goodenough for Greenpeace submitted that the Tribunal should consider the public interest balance as at the date of the appeal rather than as at the date of the Cabinet Office’s final refusal to provide the requested information in accordance with the normal approach. Whilst we recognise that there may be legitimate arguments in favour of her approach (as well as strong arguments the

other way) we do not think that it would be appropriate for this First-tier Tribunal to depart from the approach which has been followed for many years and which appears to have been endorsed by the Supreme Court in *R (Evans) v Attorney General* [2015] AC 1787 at [72] (at least in relation to FOIA) and we have therefore not considered this issue further. The relevant date for considering the public interest balance and whether the Cabinet Office complied with their obligations under EIR so far as we are concerned is therefore May 2018, when they finished their review.

30. On hearing an appeal it is open to this Tribunal under section 58 of FOIA to make any relevant finding of fact based on the material produced and to consider completely afresh the question of what the Cabinet Office should have disclosed in response to Greenpeace's request in the light of such findings of fact and the Tribunal's own judgment. This is the approach we have taken.

The cross-appeal

31. It seems to us that logically the issue raised by the cross-appeal needs to be determined first because, if Greenpeace's submission is correct, reg 12(4)(e) will not apply at all to the parts of the report that are reproduced in the Presentation regardless of any public interest balance. Before considering the rival arguments we should make the following findings of fact relevant to the cross-appeal, noting that the evidence was not entirely satisfactory, largely because Mr Nancekivell-Smith had no first-hand knowledge of the events in question.

Relevant findings of fact

32. The original report was commissioned by the No 10 Policy Unit and produced by PMIU in April 2016. It would have been written by a member of the team in the PMIU and signed off by Mr Nancekivell-Smith's predecessor. It was sent by email only to No 10, the Cabinet Office, HM Treasury, the DECC and

DCLG. It was designed to be read by the ministers in its entirety rather than to be presented to them by officials.

33. Certain parts of the report were then shared with a so-called “Cross-Whitehall Group on Shale” in June 2016. This was a cross-government group including officials from government departments (in particular, we infer, DECC who were the co-ordinators, Department for Environment Food and Rural Affairs (DEFRA), Department for Business, Innovation and Skills (DBIS) and the Department of Health) as well as the EA and HSE, who clearly have important regulatory functions in relation to shale (see para 4 above). The Group met monthly but its meetings were not part of any formal decision-making structure. It was considered to be an internal group where policy choices and lessons in relation to the shale industry could be shared with a view to informing policy decisions.
34. We have been provided with a copy of the Presentation document prepared by PMIU for these purposes. The front page contains the same warnings as the report (see OB/181): it states that it is confidential and commercially sensitive, that it should not be released under FOIA being exempt under sections 41 (confidential information) and 43 (commercial interests) and that it should not be shared within or beyond government without the explicit consent of the PMIU. The first page of the Presentation document states under the heading “Context”: “Asked by No 10 Policy Unit, the Implementation Unit has reviewed the perspectives of industry and others on the potential state of the UK shale industry by 2020”. The Presentation contains material which appears in the Background and Executive Summary to the report, other statements from the body of the report and a selection of recommendations from the report which are relevant to the bodies on the Group (the report states they are “Selected from full report for discussion” and they include specific recommendations for action by the EA), along with some additional material which appears to have come from ministers in response to the report. Most of the material taken from the PMIU report is reproduced verbatim. The final page of the Presentation lists

some questions for the Group which include seeking views on the insights from industry and views on the recommendations.

35. It seems that an oral presentation was made to the Group by PMIU based on the Presentation document. The Cabinet Office's evidence is that this presentation lasted about 20 minutes, including 10 minutes for questions and discussion. Only one paper copy of the Presentation was provided at the meeting to each organisation and no electronic copies were shared. There is no record of any requests to copy or otherwise distribute the Presentation document after the meeting.

36. Mr Nancekivell-Smith said that his understanding of the purpose of sharing the Presentation with the Group was to seek advice and feedback on government policy and next steps from the Group. However, we do not think that there would have been time for any meaningful discussion of that nature on the day the PMIU made their presentation, given that PMIU spent only 20 minutes at the meeting and Mr Nancekivell-Smith was not aware of any feedback coming to the PMIU following the meeting, so it is hard to see what useful advice and feedback would have been obtained for the PMIU as a result of the Presentation. It seems most likely to us that the reason for the PMIU presentation was to inform the bodies represented on the Group (including the EA and HSE with their important regulatory functions) of No 10's approach to supporting the shale industry and to encourage them to take certain steps in response to the recommendations.

The Environment Agency and the Health and Safety Executive

37. We were provided with quite a lot of material about the EA and the HSE, both through evidence and submissions. In particular we were provided with Framework Documents which have been drawn up between them and the relevant sponsoring department which summarise their respective functions and relationship with the department (see: OB/251 and 281).

38. As we have said, both the EA and HSE are “non-departmental public bodies” (NDPBs). They are both set up by statute as bodies corporate with many and various functions, including that of being an “independent regulator” in their respective fields. They each have sponsoring departments (DEFRA and the Department for Work and Pensions respectively), which are responsible for appointing their members and can give them general directions through the relevant Secretary of State; we note that any such directions addressed to the EA must be published as soon as possible after the giving of the direction (see para 3.5 Framework Document at OB/256). There is express statutory provision that the EA provide the Secretary of State with such advice and assistance as requested (see section 37(2) of the Environment Act 1995).

39. The legislation establishing the two bodies has contrasting provisions about their relationship to the Crown. Section 1(5)(a) of the Environment Act 1995 states that the EA “shall not be regarded ... as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown.” Section 10 of the Health and Safety at Work etc. Act 1974 provides at section 10(3) that the functions of the HSE “shall be performed on behalf of the Crown” and at section 10(4) that the Crown Proceedings Act 1947 apply to the HSE “ ... as if it were a government department within the meaning of that Act”.

Argument and findings on cross-appeal

40. It is Greenpeace’s case on the cross-appeal (supported by the Commissioner at least in relation to the EA) that, since parts of the report were shared with the EA and the HSE, which they say are bodies external to government, those parts could not benefit from the exception provided by reg 12(4), which applies only where the request involves the disclosure of “internal communications”. This case raises two fundamental issues:

- (1) whether the contents of the Presentation document reproducing parts of the PMIU report can properly be considered to be part of the same information as that requested by Greenpeace under EIR; and

(2) whether the sharing of the Presentation document with the EA and HSE in the context of the Cross-Whitehall Group on Shale, was an “internal communication” (so that the reg 12(4)(e) would continue to apply in any event).

Issue (1)

41. The Cabinet Office’s position on this issue is that the PMIU report and the Presentation are different documents, prepared for different purposes and different audiences at different times and that their contents differ considerably. The Presentation is therefore a distinct document and if Greenpeace seek disclosure of any part of it they must make a new information request. The Information Commissioner rightly reminds us that the EIR, like FOIA, gives a right of access to information and not to documents as such, whatever the form of the request. The fact that the Presentation is a distinct document cannot therefore provide the answer to this issue: it is necessary to consider whether the Presentation contains the same “information” as is in the PMIU report.

42. On the facts, we consider that the answer to that question is clear: the parts of the Presentation which reproduce parts of the PMIU report contain the same information as is contained in the report and therefore came within the EIR request made by Greenpeace. It is clear from the timing and context and, indeed, from the terms of the Presentation itself, that the intention was to share parts of the report itself with the Group: we note in particular the statement at the start of the Presentation under the heading “Context” and the statement that the recommendations in the Presentation have been selected from the “full report” and we also note that most of the parts of the report which are in the Presentation are simply reproduced verbatim.

43. It follows from this finding that, in so far as the PMIU report was reproduced in the Presentation it was communicated to the Group and, if that involved a communication that was not “internal”, Greenpeace’s request would not involve the disclosure of “internal communications” so that reg 12(4)(e) would not

apply to it; the second issue is whether the communication to the EA and HSE as part of the Group was itself an “internal communication”.

Issue (2)

44. The Cabinet Office’s position on this issue is that the communication of the Presentation to the EA and the HSE should be regarded as an “internal communication” within central government because of (a) the EA and HSE’s close connection with central government and/or (b) the particular circumstances of the communication which was made in the context of the Cross-Whitehall Group on Shale. The Commissioner accepts that the HSE constitutes an “internal body” (ie that it is part of central government), mainly it seems because of the specific provisions in section 10 of the 1974 Act to which we refer at para 39 above, and she therefore accepts that the communication with the HSE was indeed “internal”; however, she submits that the EA is an external body. Greenpeace do not accept that the HSE is an internal body but, in the event, we do not consider we need to decide that issue and we shall concentrate our consideration on the EA. In doing so, we remind ourselves that grounds for refusal of information should be interpreted restrictively and that there is a presumption in favour of disclosure. We also note that there is no definition of “internal communications” save for the inclusive one at reg 12(8) which states that communications “between government departments” are internal. There is also no definition of “government department” although the parties have referred us to the inclusive definition of these words in section 84 of FOIA, which states that government department includes “... any body exercising statutory functions on behalf of the Crown”.

The EA’s relationship to central government

45. The Cabinet Office point out that the Commissioner accepts in her guidance on the topic that “internal communications include communications between an executive agency and its parent department” and submit in effect that the EA is in the same position as an executive agency of DEFRA. Having regard to its statutory underpinnings we cannot accept the analogy between the EA and

executive agencies of government departments. The EA is a “non-departmental public body”; its primary responsibility is that of an independent regulator with responsibilities quite independent of DEFRA; it is expressly not an agent of the Crown. It is clear to us that it is not a government department or part of a government department and that it is a body quite distinct from DEFRA and central government.

The particular context and circumstances of the communication

46. The Cabinet Office refers to Mr Nancekivell-Smtih’s evidence about the Cross-Whitehall Group on Shale at para 16 of his witness statement to the effect that the Group is considered an “internal one” and that the EA was participating on it as an advisor to government. The statement refers to the need to share information about policy development with NDPBs like the EA so that they can provide scrutiny and advice and states that this needs to take place within a “safe space” on a confidential basis without the danger of disclosure. The Cabinet Office say in effect that because information was shared with the EA in the context of the Group which was “internal” it amounted to “internal communications” regardless of the EA’s exact status, and that the reg 12(4)(e) exception therefore continued to apply to the information shared with the EA.

47. As we have indicated already, the evidence as to the purpose of the Group and the EA’s role on it was not entirely clear; nor was the purpose of PMIU’s presentation to the Group; and there was certainly no evidence of the EA providing feedback of any sort. But, even assuming the EA was provided with the Presentation document so that it could give advice on government policy, that would not in our view make the communication of its contents to the EA an “internal communication”. The EA, as we have described, is an independent NDPB with regulatory and advisory functions; the PMIU (or government as a whole) may have wanted to consult the EA but that in itself does not make its communications with the EA “internal”, any more than such a communication with an outside lawyer would be internal. As we have noted the EIR exceptions are to be interpreted restrictively and we see no reason in those circumstances to

give reg 12(4)(e) an extended purposive interpretation as we were invited to do by Mr Thomann.

48. We note in this context that there has been a case at First-tier Tribunal level where communications with an individual from outside government have been found to be “internal” on the basis that he was “embedded” in a department when commissioned to write a report for the department (*Secretary of State for Transport v IC EA/2008/0052*). Without doubting the correctness of that decision we note that the facts of this case are very different and we can see no basis for a finding that the EA had become “embedded” in central government by virtue of being on the Cross-Whitehall Group on Shale.

Conclusion on cross-appeal and consequences thereof

49. For those reasons, we have concluded that it is not open to the Cabinet Office to rely on regulation 12(4)(e) in relation to the parts of the PMIU report which featured in the Presentation and were thus shared with the EA. This finding effectively covers the Background and Executive Summary, a small section of the body of the report and a number of the recommendations at the end. The only possible exceptions on which the Cabinet Office can rely in relation to those parts of the report are therefore regs 12(5)(e)/(f); and in assessing the public interest balance in any case where those regs apply it is only the interests protected by those exceptions (broadly speaking, the commercial interests of those who provided confidential information to PMIU) which are relevant in relation to the public interest against disclosure.

The Schedule

50. In the Schedule below we have set out our conclusions on the applicability of regs 12(4)(e) and/or 12(5)(e)/(f) and the public interest balance in relation to (a) each of the yellow and blue passages in the Background and Executive Summary to the PMIU report and (b) each of the passages in the main body of the report which also feature in the Presentation document. Although we give

only brief reasons in relation to each passage, we make it clear that we have taken into account all the circumstances of the case in assessing the public interest balance, including the general public interest considerations we have set out below at paras 51-63. We have also had regard to all the submissions made to us about specific passages save, as we have said above in para 22, that we do not consider it was open to the Cabinet Office to make further submissions in relation to the Background and Executive Summary after the conclusion of the hearing.

Public interest in disclosure

51. There is clearly a general public interest in openness and transparency relating to government decisions. As demonstrated by the recitals to Directive 2003/4/EC which we mention in para 24 above there is a particular public interest in the public having the fullest possible access to environmental information to enable them to participate in decision-making with the ultimate aim of improving the environment, which is fundamental to human existence.

52. There can be no doubt that fracking was (and remains) extremely controversial and that those who oppose it do so for legitimate reasons. It is unpopular with sections of the public because of the perceived danger of seismic activity, water contamination and noise and air pollution. Greenpeace have a more fundamental objection to the development of fracking: they say that there is an urgent need to tackle climate change by reducing CO₂ emissions by 80% by 2050 and that the development of shale gas will not contribute to achieving that end but will divert resources away from what is really required, renewable energy.

53. We are of course not in any position to resolve these controversies but the concerns clearly relate directly to the environment and are substantial and, as we say, legitimate. In particular, we have no doubt that Greenpeace's point of view is worthy of respect and that their motives in seeking the information are proper and genuine.

54. There are a number of particular factors which in our view tend to increase the public interest in disclosure of the PMIU report:

- (1) The report was prepared for decision makers at the highest level of government;
- (2) The report was meant to identify barriers and challenges to the progress of the fracking industry: it was in the public interest for the public to have an insight into the problems as perceived by government; in this connection we noted an unfortunate tendency on the part of the Cabinet Office to be content for positive information about the fracking industry to be released but anxious to withhold more negative information; we consider it was in the public interest for a full, rounded, picture to be disclosed;
- (3) It is no secret that the government supported the development of the industry and the report was designed to address how the government could help it to develop; it was in our view in the public interest that the public should know how far officials were suggesting government might go in doing so;
- (4) As Mr Boren told us, there was (and remains) considerable confusion about the predictions as to where the fracking industry would be in the forthcoming years; it is clear that the figures in the report were not consistent with those which were being relied on by the industry and it was in the public interest that the public should see the authors' considered view on the matter based on what they were being told by "industry players" and experts in 2016.

55. All these considerations point in our view to there being a very weighty public interest in the public having access to the report.

Public interest in maintaining exception in reg 12(4)(e)

56. We refer at para 26 above to the nature of the public interest protected by reg 12(4)(e).

57. In so far as the report continued to benefit from the exception for “internal communications” we recognise that they were internal communications at the highest level of government and related to a very important and controversial topic which remained so at the time of the request. There is clearly a very strong public interest in decisions about government policy on such topics to be made in a “safe space” where there is no inhibition on free debate.
58. By the time of the request in 2018 two years had gone by since the preparation of the PMIU report. The government’s overall policy in relation to fracking had been clear from 2015 and detailed policies were being publicised. Nevertheless, it is fair to say that the matter was still very much on-going and that the industry and policy in relation to it were still at an early stage of development.
59. The PMIU report was prepared by officials as advice to No 10 and others at the heart of government; but it does not disclose the thoughts or opinions of ministers themselves. As in many of these cases there was reliance by the government on the “chilling effect” which may result from disclosure, ie it was suggested that disclosure may cause officials to be reticent and less robust in their advice to ministers and/or not to record as much in future. This is not a factor to which we can ascribe much weight: we do not think that officials working in the PMIU on a report for No 10 would (or should) be put off or influenced by the thought that their work may be subject to disclosure under EIR; indeed, we would hope the contrary would apply.

Public interest in maintaining exception in regs 12(5)(e)/(f)

60. We refer at para 27 above to the nature of public interests protected by these regulations.
61. There is obviously a strong public interest in maintaining the confidentiality of information provided on a sensitive issue to senior government officials on the

basis that it will remain confidential; it is important that those providing the information are not discouraged from speaking frankly to government. On the other hand, those consulted in the preparation of the PMIU report would clearly have been sophisticated and hard-headed and well aware of the existence of FOIA and EIR and the fact that they could never be guaranteed absolute confidentiality. Further, as Greenpeace maintain, the likelihood is that those consulted by government will continue to provide information if it is in their interests to do so.

62. As we say in para 27 the main determinant of the weight to be ascribed to the public interest in maintaining these exceptions in this case is the extent of any potential damage to the economic interests of the industry players who provided information. In this context it is relevant to note again that two years had passed between the time the information was supplied and the request and that in the meantime the 14th Licensing Round had taken place (see para 7 above). Greenpeace say (and the point has not been contradicted) that by this stage there were no external competitors seeking access to the UK shale gas market.

63. There are in the report references to specific plans and intentions on the part of individual operators. We accept that the disclosure of such references may have had the potential to cause commercial damage. The report also contains what the Cabinet Office called “distilled information” which is information based on what officials were told by a number of interlocutors. We take the point that, given the very small number of industry players, there may be distilled information which can be specifically related to particular operators whose disclosure might damage their interests; but in general we observe that such information is at a high level of generality and its disclosure was less likely to cause appreciable damage, so that in the case of “distilled information” the public interest balance was much more likely to come down in favour of disclosure.

Conclusion

64. For all the reasons set out above and in the Schedule, we allow the cross-appeal and, to a limited extent, the appeal. The Schedule indicates the parts of the Report which we consider should have been disclosed and those which were properly withheld and we have issued a Substituted Decision Notice accordingly.
65. In the normal way a copy of this decision was sent to the Cabinet Office and the Commissioner for them to check the draft and make representations as to whether any parts of the decision should not be disclosed; the version of the decision to be provided to Greenpeace and promulgated generally will have been redacted and/or edited if necessary in the light of such representations.
66. This decision is unanimous.

HH Judge Shanks

21 October 2019

Promulgation date 28 October 2019