



Case Reference: EA/2024/0023

Neutral Citation Number: [2024] UKFTT 405 (GRC)

First-tier Tribunal  
General Regulatory Chamber  
Information Rights

Heard: On the papers  
Heard on: 10 May 2024  
Further deliberations: 21 May 2024  
Date of Decision: 22 May 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY  
TRIBUNAL MEMBER JO MURPHY  
TRIBUNAL MEMBER EMMA YATES

Between

MARK ROBERTS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**Decision:** The appeal is dismissed.

## REASONS

### Introduction

1. The parties and the tribunal agreed that this appeal was suitable for determination on the papers.

2. This is an appeal against the Commissioner's decision notice IC-260843-Z2Z2 of 22 December 2023 which held that the Environment Agency was entitled to rely on regulation 12(5)(a) of the Environmental Regulations 2004 (EIR) (national security and public safety) to withhold the information.
3. The withheld information in issue in this appeal consists of a number of redactions to annex 2 of the first annual report under a section 20 agreement between United Utilities and the Environment Agency relating to Thirlmere reservoir (the Report).

### **Factual background to the appeal**

4. United Utilities hold a licence to abstract water from Thirlmere reservoir. United Utilities started to make releases of water from Thirlmere for flood storage purposes in November 2008 by way of a voluntary agreement with Keswick Flood Action Group (K FAG). The releases from Thirlmere to St John's Beck drawdown water levels in Thirlmere to accommodate flood waters in the reservoir and reduce flood risk downstream of Thirlmere.
5. The appellant is a member of the K FAG which was formed to give the local community a voice to address the Environment Agency and United Utilities.
6. This matter arises out of an agreement under section 20 of the Water Resources Act 1991 between United Utilities and the Environment Agency signed on 22 July 2021.
7. The agreement's purpose is to secure the management of releases of water into St Johns Beck and the delivery of habitat improvement works to provide 'Mitigation Measures'. The Mitigation Measures are to ensure no adverse effect on the integrity of the River Derwent and Bassenthwaite Lake Special Area of Conservation (SAC) from the operation of United Utilities' Thirlmere Transfer Scheme and the releases United Utility make to St Johns Beck acting in-combination.
8. Under that agreement United Utilities are obliged to produce an Annual Interpretative Report on, inter alia, the effectiveness of the monitoring and the Mitigation Measures. The first of those annual reports was produced in March 2022 and is referred to in this decision as the Report.
9. K FAG say that Thirlmere plays a key role in reducing flood risk to Keswick, because Keswick has never flooded when 'storm space' has been available in Thirlmere. K FAG's say that if insufficient releases are made before a storm this increases Keswick's flood risk from the river Greta.
10. K FAG say that 'the understanding of both the capability of installed kit and the environmental impact of releases is key to enabling K FAG to perform its function for the community' (appellant's request for an internal review).

11. There is a UK National Protocol for the Handling, Transmission and Storage of Reservoir Information and Flood Maps (the Protocol). It includes, at Annex 1, a checklist which provides indicative details of what should be considered sensitive information or aspects of vulnerability. The introduction to Annex 1 states:

“The general principle in releasing information is that it should not expose any vulnerabilities of a reservoir, such as structural details, faults, safety measures, etc. Requests for any documents, data or information not specifically mentioned in the table below, may be released following redaction in accordance with the principles above.”

### **Request and response**

12. Mr. Roberts made the following request to the Environment Agency on 16 December 2022:

“I am now formally requesting from the EA under FOI an unredacted copy of the 1st year Thirlmere S20 report.”

13. The Environment Agency replied on 5 June 2023. The Environment Agency supplied a copy of the Report but withheld certain information from annex 2 under regulation 12(5)(a) (public safety and national security) and the entirety of annex 3 under regulation 12(5)(e) (commercial information).
14. Information was withheld under regulation 12(5)(a) on that basis that it related to locations that relate to the supply and distribution of water. The Environment Agency said that disclosure of this information would have an adverse effect of the ability of United Utilities to protect the public from a drinking water perspective and potential acts of sabotage.
15. The Environment Agency upheld its position on Annex 2 but released a redacted version of annex 3.
16. The appellant complained to the Commissioner about the application of regulation 12(5)(a) to annex 2 of the Report.

### **Decision notice**

17. In a decision notice dated 22 December 2023 the Commissioner concluded that the Environment Agency was correct to withhold the information under regulation 12(5)(a). The Commissioner held that the Environment Agency did not comply with regulations 5(2) and 14(2) because it did not make information available or issue a refusal notice within 20 working days. The Commissioner did not require the Environment Agency to take any steps.

18. The Commissioner considered that the Environment Agency had given proper consideration as to whether the information was or was not already available in the public domain and the Commissioner accepted that it was not. The Commissioner has noted that if the information that the complainant is seeking was already in the public domain, they would not need to request it from the Environment Agency.
19. The Commissioner found that the Environment Agency was entitled to withhold the information under regulation 12(5)(a) because disclosing it would indicate potential vulnerabilities in the infrastructure concerned, which those so minded could exploit. Disclosing the information would therefore adversely affect public safety and the public water supply.
20. Having found that disclosing the information would adversely affect national security and public safety, and taking account of the presumption in favour of disclosure under regulation 12(2), the Commissioner concluded that he had not been presented with any public interest arguments for disclosing the information that would justify that effect.

### **Grounds of Appeal**

21. The Grounds of Appeal are in essence:
  - 21.1. The Commissioner was wrong to hold that disclosure would adversely national security or public safety, taking into account the information that is already in the public domain.
  - 21.2. The Commissioner was wrong to hold that the public interest favours maintaining the exception.
22. The appellant also raises issues about the Commissioner's investigation and concerns of bias in the Commissioner's approach to the arguments/the adequacy of his reasoning in the decision notice.

### **The Commissioner's response**

23. The Commissioner submitted that how the Commissioner conducts his investigation is not within the tribunal's jurisdiction.
24. The Commissioner accepted the public interest in transparency but submitted that this does not, in the absence of other compelling factors, outweigh the importance of safeguarding national security.
25. In relation to the public interest the Commissioner submitted that the appellant has not provided any compelling reasons for disclosure.

### **The appellant's reply**

26. The appellant disputed that the manner in which the Commissioner conducted his investigation is outside the remit of the tribunal.
27. The appellant relied on the public interest factors set out in his submission to the Commissioner. He also relied on the presumption in favour of disclosure. He argued that it was not 'more probable than not' that the alleged harm would occur without redaction in the light of the information already available in the public domain.

### Legal framework

28. As the Court of Justice of the European Union ("CJEU") has said:

"The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal". (Office for Communications v Information Commissioner Case C-71/10 at paragraph 22).

29. This is why the EIR is deliberately different from the Freedom of Information Act 2000 ("FOIA") in that all exceptions are subject to a public interest test and there is a presumption in favour of disclosure.
30. The EIR do not contain an express obligation to interpret grounds for refusal in a restrictive way, but, given the obligation to interpret the EIR purposively in accordance with the Directive the overall result in practice ought to be the same: the grounds for refusal under the EIRs should be interpreted in a restrictive way (Vesco v (1) Information Commissioner and (2) Government Legal Department [2019] UKUT 247 (TCC))
31. A three stage test applies, on the wording of Regulation 12:
  1. Would disclosure adversely affect national security or public safety? (Regulation 12(5)(a))
  2. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))
  3. Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))
32. The public interest test requires us to analyse the public interest. The starting point is the content of the information in question, and it is relevant to consider what specific harm might result from the disclosure (Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 paragraphs 26-28). The

public interest (or various interests) in disclosing and in withholding the information should be identified; these are “the values, policies and so on that give the public interests their significance” (O’Hanlon v Information Commissioner [2019] UKUT 34 at paragraph 15). “Which factors are relevant to determining what is in the public interest in any given case are usually wide and various”, and will be informed by the statutory context (Willow v Information Commissioner and the Ministry of Justice [2018] AACR 7 paragraph 48)

33. It has been recognised in cases under the Freedom of Information Act 2000 (FOIA) that there is a significant ‘in-built’ interest in the maintenance of legal professional privilege (DBERR v O’Brien and Information Commissioner [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. This applies equally in EIR cases.
34. The statutory context includes the backdrop of the Directive and Aarhus discussed above, and the policy behind recovery of environmental information. Once the public interests in disclosing and withholding the information have been identified, then a balancing exercise must be carried out. If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.
35. If application of the first two stages has not resulted in disclosure, we must go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was “common ground” in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

### **The Task of the Tribunal**

36. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### **Issues**

37. The issues we have to determine are:
  - 37.1. Would disclosure of the withheld information adversely affect the national security or public safety?

- 37.2. If so, in all the circumstances of the case, does the public interest in maintaining the exception outweighs the public interest in disclosing the information?
- 37.3. Does the presumption in favour of disclosure mean that the information should be disclosed?

### **Evidence and submissions**

38. We have read an open and a closed bundle of documents, which we have taken account of where relevant.
39. In accordance with its duty to keep any closed material under review and to minimise, to the fullest extent possible any disadvantage to the appellant arising from the use of a closed bundle, the Judge reviewed the closed bundle on the day of the paper hearing, adjourned the panel deliberations made a new rule 14 direction providing some of the documents to the appellant, summarising the closed bundle and giving the appellant an opportunity to make submissions on the new documents.
40. The appellant was also provided with the index to the closed bundle.
41. The tribunal was satisfied that it is necessary for the withheld information (i.e. the information that was the subject of the request for information) not to be disclosed to the appellant otherwise the purpose of the appeal would be defeated. For the benefit of the appellant I confirm that he has now been provided with all documents apart from those that he requested in the information request.
42. The submissions provided by the appellant went further than simply addressing the newly disclosed documents, but the tribunal determined that it was in accordance with the overriding objective to take those submissions into account. The tribunal accordingly conducted further deliberations before reaching its conclusion.

### **Discussion and conclusions**

43. The appellant raises issues about the Commissioner's investigation and concerns of bias in the Commissioner's approach to the arguments. These matters are outside our remit and are, in any event, subsumed in the full merits review undertaken by the tribunal.

#### *Regulation 12(5)(a)*

44. Underlying our reasoning is a recognition that there is a presumption in favour of disclosure under the EIR.

*Would disclosure of the withheld information adversely affect the national security or public safety?*

45. There is an overlap between national security and public safety in cases where the adverse effect on public safety is said to be an increased risk of sabotage. We have referred solely to public safety in our reasons but our conclusions apply equally to national security.
46. We have to be satisfied that it is more probable than not that the alleged harm would occur if the withheld information were disclosed. However, it is important to note that the harm in question is an adverse effect on public safety. We do not have to be satisfied that an incident of sabotage is more likely than not to happen as a result of disclosure. Making information available that could be used in an act of sabotage or that would make it more difficult to protect the public from such an act would, we find, adversely affect public safety.
47. We accept that there is already information in the public domain that could assist individuals who might wish to cause harm or commit an act of sabotage at this or other reservoirs. However, the redacted information contains specific content that is not in the public domain.
48. We reach this conclusion on two bases.
49. First, from a non-expert point of view we have compared the evidence of information in the public domain contained in the bundle with the information redacted from the report. Our non-expert conclusion based on this review is that there are specific details in the report that identify potential vulnerabilities that are not in those public documents.
50. Second, we take account of the evidence from the Environment Agency that their technical planning officers have conducted searches on the Lake District National Park's planning portal, additionally taking into consideration the appellant's argument that there is a plethora of other sources in the public domain from which a detailed description of the infrastructure at Bridge End, its connections to the Keswick water supply and to the new West Cumbria supply, can be easily construed. The result of that review was that:

“Whilst information about Bridge End Water Treatment Works, Thirlmere Reservoir and other associated infrastructure can be found in the Public Domain, the redactions from the report contain details about very specific operating conditions that, in the view of our specialist teams, could be used to identify potential vulnerabilities within the infrastructure that could have an impact on public safety and to the public water supply. It is our view that the redacted information is therefore not the same as the information that is already available to members of the public.”
51. On the basis of our own review, and that of the technical planning officers we conclude that the redactions contain information that is not already in the public



domain namely details about specific operating conditions that could be used to identify potential vulnerabilities.

52. In considering whether there is a causative link between disclosure of this additional information and an adverse effect on public safety, we take account of the Protocol which has taken what we consider to be a considered approach to the disclosure of information about reservoirs. The clear tenor of that Protocol is that releasing information which exposes the vulnerabilities of a reservoir increases the risk of that information being used for malicious purposes.
53. Further we take account of the fact that in deciding to rely on regulation 12(5)(a) the Environment Agency consulted widely within the organisation and spoke with technical specialists in the National Reservoir Team as well as the local teams in Cumbria and Lancashire and referred to the National Protocol. We take account of the fact that the view of the Environment Agency's specialist teams, even taking into account the information that is already in the public domain, is that the redactions from the report contain details about very specific operating conditions that could be used to identify potential vulnerabilities within the infrastructure that could have an impact on public safety and to the public water supply.
54. On that basis we accept that there is a causative link between disclosure and the alleged harm.
55. In terms of the likelihood of the alleged harm, we note in addition to those matters set out above that the current threat level in the UK is 'substantial'. Further, we accept that the risk of sabotage is increased because of information already in the public domain.
56. Whilst we find that the risk of an act of sabotage taking place is low, we find, on the basis of the evidence set out above, that the withheld information could be used in an act of sabotage and disclosure would make it more difficult to protect the public from such an act. On that basis we find that disclosure would adversely affect public safety.
57. For those reasons we conclude that the exemption is engaged.
58. Turning to the public interest balance, whilst sabotage is a low probability event, it carries with it a risk of very serious harm. For that reason we place very significant weight in the public interest balance on avoiding an adverse effect of this nature on public safety or national security.
59. In relation to the public interest in favour of disclosure, we are unable to ascertain the specific contribution that the particular technical information redacted from the report would have to the particular public interests identified by the appellant because that is outside our area of expertise.

60. However for the purposes of assessing the public interest balance we have resolved this uncertainty in favour of the appellant. We have looked at the public interest balance on the basis that the redacted information would materially illuminate the following issues, whether by providing reassurance that no such issues exist or by confirming that such issues do exist:
- a) Issues with the new infrastructure not being able to deliver its design requirements.
  - b) Issues with pre-existing infrastructure which is limiting the performance of the new infrastructure and therefore its ability to meet its design intent.
  - c) issues experienced with provision of the potable water supply to Keswick during operation of the new LSVs.
  - d) Issues that prevent the required environmental mitigations of the S20 being achieved
61. In addition we accept that enabling K FAG to perform its functions is in the public interest and that the understanding of both the capability of installed kit and the environmental impact of releases is key to enabling K FAG to perform its function for the community.
62. Finally we accept that there is a public interest in transparency which is heightened where there is any potential vulnerability relating to reservoirs and the supply of water to the public. In considering the weight of this aspect our decision is informed by the presumption of disclosure under the EIR.
63. Whilst these public interest factors taken together do carry significant weight in the balance towards disclosure, in our view they are clearly outweighed by the very significant weight of the public interest of maintaining the exemption. Because we have found that the public interest is not evenly balanced, the presumption of disclosure does not operate to tip the scales in favour of disclosure.
64. For all those reasons we find that the public authority was entitled to rely on regulation 12(5)(a) to withhold the information redacted from appendix 2 to the Report.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 22 May 2024

Promulgated on: 22 May 2024