



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Appeal Reference: EA/2020/0332
& EA/2020/0333**

**Decided without a hearing
On 13 July 2021**

Before

**JUDGE HAZEL OLIVER
DAVID COOK
DAVE SIVERS**

Between

OWEN BOSWARVA

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

ENVIRONMENT AGENCY

Second Respondent

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against two decisions of the Information Commissioner (the “Commissioner”) – IC-48075-B0D4 (dated 21 October 2020, “Decision Notice 1”) and IC-

64437-V6M6 (dated 21 October 2021, "Decision Notice 2"). The appeal relates to the application of the Environmental Information Regulations 2004 ("EIR"). It concerns information about Large Raised Reservoirs as held by the Environment Agency (the "EA").

2. These appeals have a relatively complex history, but the issues to be decided by the Tribunal are now relatively narrow. In summary, the appellant requested detailed datasets about maximum flood outlines, depths and speed. EA says that this detailed information could be used to inform a terrorist attack on a reservoir, and so disclosure under EIR would endanger national security and public safety.

3. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

4. On 9 August 2019, the appellant wrote to EA and requested the following information (the "Request"):

"I would like to request access to some information held by the Environment Agency about Large Raised Reservoirs in England, and also permission to re-use that information under the Open Government Licence.

Please provide the latest version of information contained in the following two unpublished EA datasets:

Large Raised Reservoirs (AfA134)

<https://data.gov.uk/dataset/aa916e73-f575-4752-ad4c-590029d3641c/>

Reservoir Flood Map Maximum Flood Outline (Extent) (AfA113)

<https://data.gov.uk/dataset/4d3cc201-01ee-4ad9-a1cb-4777a8c55a00/>

or the equivalent latest information if the above datasets are no longer maintained.

My understanding is that this information should include, at a minimum, for each reservoir:

- *reservoir name*
- *status (e.g. in operation)*
- *a national grid reference*
- *undertaker name*
- *undertaker address*

And for each maximum flood outline:

- *a polygon*
- *an EA unique reference number for the reservoir*
- *reservoir name*

Please provide any data on maximum flood depth and maximum flood speed (for risk of inundation from large raised reservoirs) that the EA holds for areas within the maximum flood outlines. I gather this data may be held as an ASCII grid and/or as part of an additional data product. At minimum I am requesting this data at a level of detail equivalent to the spatial data underlying the "flood depth" and "flood speed" layers described under the "flood risk from reservoirs" on this EA interactive map:

<https://flood-warning-information.service.gov.uk/long-term-floodrisk/map>

Please provide all of the above information to me in re-usable formats.

I am aware that some of the above information is available to view via the EA's long term flood risk information maps and via WMS. However, I do not consider that those services make the data reasonably accessible to me within the meaning of access to information laws."

5. EA responded by saying that it may be able to licence the Large Raised Reservoir dataset to the appellant. It did not refer to the other dataset. It stated that information on maximum flood depth and maximum flood speed was being withheld under the regulation 12(5)(a) (exception for international relations, defence, national security or public safety).

6. The appellant requested an internal review. EA maintained that the maximum flood depth and maximum flood speed information could be withheld under regulation 12(5)(a) as it would adversely affect national security and public safety. AfA134 was to be provided under a Conditional Licence (the original link sent to the appellant having been incorrect). EA referred to datasets AfA134 and AfA113 as potentially being available under licence. The appellant complained to the Commissioner on 3 November 2019.

7. The Commissioner dealt with the complaint in two separate decision notices. Decision Notice 1 dealt with the information that had been withheld. This was clarified to be (a) dataset AfA113 (the Reservoir Flood Map Maximum Flood Outline), and (b) the information on maximum flood depth and maximum flood speed. EA had withheld this information under Regulation 12(5)(a). The Commissioner decided that:

- a. Regulations 12(5)(a) was engaged, as there was a clear and tangible link between the requested information and the risk to public safety and national security – based on the risk that the information could be used to inform a terrorist attack.
- b. There were public interests in favour of disclosure – general openness and transparency, promotion of awareness and resilience in communities close to reservoirs, and public interest in reservoir safety after recent events at Todbrook reservoir. The appellant argued that disclosure of more detailed information would increase public safety.
- c. However, this was outweighed by the strong public interest in avoiding threats to national security or disclosing information which would put people in danger. The Commissioner also noted that the amount of information in the datasets is likely to go far beyond what the average member of the public would need to hold reservoir undertakers to account.

8. Decision Notice 2 dealt with the request for the Large Raised Reservoirs dataset AfA134. The Commissioner understood that this had been provided under a Conditional Licence. The Commissioner found that EA had placed unnecessarily restrictive conditions on re-use. The Commissioner required EA to permit re-use under the Open Government Licence.

9. EA had failed to provide a working link to dataset AfA134 to the appellant. It has now done so, and so complied with Decision Notice 2.

The Appeal and Responses

10. The appellant appealed against both decision notices on 17 November 2020. His grounds of appeal are:

- a. The Commissioner did not handle the part of his complaint that related to access to the information in the Large Raised Reservoirs (AfA134) dataset. This relates to EA's failure to provide the dataset to him. We note that this has now been provided to him on the basis of an Open Government Licence, and the appellant has confirmed this to the Commissioner by email (see paragraph 18 of Commissioner's response).
- b. EA relied on new arguments at the complaint stage to withhold information in the Reservoir Flood Map Maximum Flood Outline (Extent) (AfA113) dataset. He says that neither EA nor the Commissioner informed him of those new arguments before the decision notice was served. EA's review response had led him to believe that this would be available for re-use under a Conditional Licence. AfA113 is also listed in EA's Register of Licence Abstracts as "approved for access" and available on request for re-use under a Conditional Licence, which is the same as for AfA134.
- c. The Commissioner did not consider the minimum level of detail in his request for data on maximum flood depth and maximum flood speed. The appellant confirms that he is only appealing the decision on the minimum information he requested – he is not appealing the application of Regulation 12(5)(b) to any more detail than that. The Commissioner conflated this part of his request with a larger body of detailed technical data held by EA, and treated that body of data as indivisible. He had asked for the underlying simplified information that is used to create interactive maps which are available on the public flood warning information website. He says that these map images of simplified information about reservoir flood risk are publicly available, and so he does not think EA can sustain an argument that the underlying feature and attribute information would affect national security or public safety.
- d. The appellant says he is seeking re-use under the Open Government licence: (i) the information in the AfA113 dataset, and (ii) the simplified versions of the feature and attribute information that underlies the reservoir risk layers visualised on the public interactive flood map.

11. EA was joined as a party to the appeal. The Commissioner's response states that she would welcome sight of EA's evidence and submissions before formally confirming whether she intends to oppose some or all of the appeal. In response to the grounds of appeal:

- a. AfA134 has now been provided to the appellant.
- b. It is not clear that new and distinct arguments were raised during investigation, but there was a lack of clarity and confusion about which data was available to some extent and which withheld under Regulation 12(5)(a).

- c. The Commissioner is concerned by the submission that the AfA113 dataset is included in the register of data available on a Conditional Licence. It may be arguable that some if not all should be released on the same terms as the AfA134 dataset, although EA may be able to justify its position.
- d. The appellant has clarified that he is not asking for the full data on maximum flood depth, speed and outlines (contained in dataset AfA180), and he accepts this may be withheld. The Commissioner accepts that the appellant sought access to data underpinning the interactive maps published by EA. This dataset does not appear to be included in the register of data available on a Conditional Licence, so it may still be appropriate to withhold it under Regulation 12(5)(a). Underlying information, even if simplified, could be capable of providing more information of concern than a simple visualisation. Further information is needed from EA.

12. EA's response covers the following points:

- a. An explanation of how EA conducts risk assessments of datasets (covered in the discussion below)
- b. AfA134 was until recently only available in electronic format under a Conditional Licence as it contained personal details of reservoir undertakers and engineers. This has been reviewed and the dataset is publicly available with personal data redacted.
- c. Dataset AfA113 contains a polygon (or boundary) that defines the modelled extent of the largest area that might be flooded if a reservoir were to fail. This data is made available through geo-registered map images that can be displayed through a browser. EA considers that disclosure of the individual features contained within the database that underlies the visual images would have an adverse effect on national security and public safety, and is contrary to the public interest.
- d. Dataset AfA180 consists of detailed outputs that show the potential flood risk if reservoirs are breached. EA has a statutory obligation to publish hazard maps showing maximum flood depth and speed. They took advice from the Cabinet Office and Defra on how to do this. It was decided that banded classifications of flood depth and speed could be published in the same format as AfA113, but the data that underpinned the derived data would have an adverse effect on national security and public safety if it were to be released. EA therefore makes the polygon data available through geo-registered map images that can be displayed through a browser. EA considers that disclosure of the individual features contained within the database that underlies the visual images would have an adverse effect on national security and public safety, contravening the national protocol.
- e. EA does not consider that it introduced new arguments to support the withholding of AfA113 during the Commissioner's investigation, but accepts that its responses could have been worded more clearly.
- f. Inclusion of a dataset in the Register of Licence Abstracts does not mean a dataset will be licenced for use under a Conditional Licence - it means that if a dataset were to be considered acceptable for release, the conditions that would apply to that release would be those listed in the Register of Licence Abstracts.

- g. The appellant has asked for information on flood depth and speed that is derived from dataset AfA180. The Environment Agency considers that even the minimum level of detail requested by the Appellant would have an adverse effect on national security and public safety.

13. All parties have provided further replies, and these are addressed in the discussion below.

Applicable law

14. The relevant provisions of the Environmental Information Regulations 2004 (“EIR”) are as follows.

2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

.....
5(1) *...a public authority that holds environmental information shall make it available on request.*

.....
5(4) *For the purposes of paragraph (1), where the information made available is compiled by or on behalf of a public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.*

.....
12(1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*

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

(b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

.....
12(5) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*
(a) international relations, defence, national security or public safety.

15. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR, and it is well

established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

16. The test for whether disclosure “would adversely affect” the listed matters is whether this is more probable than not. National security includes threats posed by terrorism. This can include a “mosaic” effect, where seemingly harmless information may assist terrorists when pieced together with other information they possess or could obtain. Public safety covers hurt or injury to one or more members of the public.

Issues and evidence

17. The issues in the case are:

- a. Did EA apply Regulation 12(5)(a) to the dataset AfA113 for the first time at the complaint stage?
- b. Can EA withhold the dataset AfA113 under Regulation 12(5)(a)? This requires us to consider:
 - i. Is the exemption engaged, as disclosure would adversely affect national security and/or public safety?
 - ii. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
- c. Can EA withhold the data underlying the “flood depth” and “flood speed” layers described under the “flood risk from reservoirs” publicly accessible interactive map under Regulation 12(5)(b)? This requires us to consider:
 - i. Is the exemption engaged, as disclosure would adversely affect national security and/or public safety?
 - ii. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

18. The appellant’s appeal also raises an issue about the release of AfA134 to him in accordance with Decision Notice 2, but this has now been provided to him by EA under an Open Licence and he has confirmed in his first reply that this is not a live issue for the appeal.

19. In evidence we had an agreed bundle of open documents, final replies from all parties (with three replies in total from the appellant), and a small closed bundle.

20. After meeting to consider the case on 13 July 2021, we made Directions which asked EA to provide a response to a number of questions relating to the data on maximum flood depth and speed. We have considered EA’s response to these questions, and the appellant’s additional submissions in reply.

Discussion and Conclusions

21. EA’s response provides an explanation about their process for risk assessment of datasets.

22. The Open Data Risk Assessment (ODRA) is a series of checks by technical specialists that are used to ensure datasets can be released as Open Data. This means anyone can access, use and share the data without restriction. This data is made available under an Open Government Licence.

23. If a dataset is not considered safe to release following the ODRA, it may be considered for a full Approval for Access (AfA) risk assessment. This is done by a specialist team. Historically, datasets that included information that would have an adverse effect on national security did go through the AfA process, with an outcome that they were not approved for release under any form of licence (although now datasets only go through the AfA process if there is a realistic chance they will be approved for publication). An AfA risk assessment results in guidance about which licence may be used to share the data, and under what conditions. The majority of datasets approved for release under the AfA process are released under EA's Conditional Licence.

24. There is a National Protocol for the handling, transmission and storage of reservoir information and flood maps, latest version June 2018, which we have seen (the "National Protocol").

25. ***Did EA apply Regulation 12(5)(a) to the dataset AfA113 for the first time at the complaint stage?*** We agree that it was not clear from EA's response to the Request and its internal review outcome that Regulation 12(5)(a) was being relied on in relation to AfA113 at that stage. However, a public authority is entitled to rely on new exemptions at any point in proceedings, including at the stage of tribunal proceedings. Even if Regulation 12(5)(a) was relied on for the first time at the stage of the complaint investigation by the Commissioner, EA was entitled to do this, and there was no requirement for the Commissioner to obtain additional comments from the appellant before making her decision.

26. ***Can EA withhold the dataset AfA113 under Regulation 12(5)(a)?*** This is the Reservoir Flood Map Maximum Flood Outline. EA seeks to withhold the entirety of this dataset.

27. ***Is the exemption engaged, as disclosure would adversely affect national security and/or public safety?*** The appellant disputes that the exemption is engaged. He says that this is on the same register as AfA134 which has been released, and the Commissioner failed to address this due to an oversight in dealing with the failure to release AfA134. The appellant says that AfA113 is in the Register of Licence Abstracts. He also says that maps have been distributed as "official" rather than "secret", and points out that metadata provided to the Commissioner is not all marked sensitive. The appellant accepts that EA may have revised its risk assessment, but queries why the outputs of this risk assessment are not included in the documents.

28. EA says that inclusion on the Register of Licence Abstracts does not mean that AfA113 is suitable for release, and maintains that the underlying data is a threat to national security/safety. EA says that there is a difference between making information available to the public under freedom of information legislation, which can be used without restriction, and sharing with professional partners for specific purposes under the Civil Contingencies Act 2004. Information withheld from disclosure under EIT can be classified as either "official sensitive" or "secret". EA says that at the time of the Request, the derived data was published in copy protected form only – this was to meet the requirement to make the data publicly available while maintaining

recommendations on national security and public safety, as agreed by Defra and the Civil Contingencies Secretariat and documented in the National Protocol.

29. The Commissioner accepts EA's explanation that inclusion on the Register of Licence Abstracts does not mean the data will actually be licenced for release.

30. Having considered all of the above arguments, we find that regulation 12(5)(a) is engaged in relation to dataset AfA113, because disclosure would adversely affect national security and public safety. We accept that, in principle, release of detailed information about large reservoirs would adversely affect national security or public safety. This is because this information can be used as the basis for a terrorist attack, which would put the public in serious danger. The issue is whether AfA113 poses this danger.

31. We note the appellant's position that AfA113 is in the Register of Licence Abstracts, but we accept EA's explanation that inclusion on this register does not mean that the dataset is suitable for release to the public. We also accept that withheld information may be classified as either "official sensitive" or "secret" (and note this is reflected in paragraphs 2 and 27 of the National Protocol). It is important to remember that disclosure under EIR is disclosure to the world at large, with no restrictions on how the information may be used. We note that there is a process for deciding whether data should be released under an open licence or a conditional licence, as set out in paragraphs 22 and 23 above. The modelled extent of the largest area that might be flooded if a reservoir were to fail is made available through geo-registered map images that can be displayed through a browser. EA's position is that disclosure of the full AfA113 dataset, which gives the individual features contained within the database that underlies these visual images, would have an adverse effect on national security and public safety. We accept EA's position, and find that disclosure of dataset AfA113 would include a level of detail that would endanger national security and public safety due to the risk of terrorist attack. EA have provided an explanation of their position, and we have no reason to doubt that explanation. Put simply, we accept that detailed data about how the maximum flood outline for a large reservoir has been calculated could be used by those intent on causing harm to the public in order to cause a catastrophic flood.

32. *If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?* As identified by the Commissioner, there is public interest in disclosure of this detailed information about maximum flood outlines. As well as a general interest in openness and transparency, this would potentially promote awareness and resilience in communities close to reservoirs. The appellant makes the point that disclosure of more detailed information would increase public safety, and we agree this may assist those living close to reservoirs to understand the risks of flooding.

33. However, we find that the public interest in maintaining the exception does outweigh the public interest in disclosing dataset AfA113. We note that basic maps showing maximum flood outlines are available online, which goes some way towards assisting those living close to reservoirs to understand the risks of flooding. As noted by the Commissioner, the amount of information in the full dataset AfA113 is likely to go far beyond what the average member of the public would need to assess risks and/or hold reservoir undertakers to account. We agree with the Commissioner that there is a strong public interest in avoiding threats to national security or disclosing information which would put people in danger. The severe danger posed to the public by a terrorist attack on a reservoir clearly outweighs the relatively limited public interest in disclosure of the detailed data in AfA113.

34. ***Can EA withhold the data underlying the “flood depth” and “flood speed” layers described under the “flood risk from reservoirs” publicly accessible interactive map under Regulation 12(5)(b)?*** The appellant is asking for the data underlying these simplified maps. This simplified information on flood depth and flood speed is derived from the wider dataset AfA180 (which the appellant is not asking for). EA maintains that this data can be withheld.

35. ***Is the exemption engaged, as disclosure would adversely affect national security and/or public safety?*** The appellant says he is not seeking data that underpinned derived data – he is asking for underlying information at the same level of simplification as the published visualisation (map). He maintains that this cannot be a risk to national security or public safety, as it is the same information as is shown in the published map.

36. EA says that the derived data is published in protected form only. This meets the requirement to make certain information publicly available while maintaining security recommendations. EA explained this further in its response to the Tribunal’s questions. In 2009, EA considered it was under a statutory obligation to publish maps showing maximum flood depth and speed. Previously this information had not been publicly available due to prejudice to national security and public safety. An assessment was made in conjunction with the Cabinet Office and Defra. This resulted in the data being made available in a fixed format, through map images that can be displayed in a web browser.

37. EA agrees that the data requested by the appellant includes the same simplified information as already contained in the maps themselves. However, EA maintains that the specific format this data has been requested in is exempt from disclosure. This is because a recipient of data provided in that specific form could use it to then query and modify the data, integrating and analysing it alongside other published datasets. Combining the requested data with other data that is publicly available would enable those intent on doing harm to target sites where inundation could do most harm to both human life and the infrastructure of the country. This was the basis of the assessment made with the Cabinet Office and Defra. If information were to be released in a form that could be manipulated and combined with other information, this could inform and assist those intent on doing harm. Detailed knowledge about the speed and depth of inundation from a reservoir could be used to identify sites to target to cause maximum harm.

38. The appellant has provided a reply. He says that he has been able to download fixed images and use these to derive new feature data that can be manipulated, and so the data can be queried and modified. He agrees that the data could be used to produce a statistical analysis of the relative potential for harm from inundation from reservoirs in different locations. He argues that this would support wider public understanding and awareness of flood risk from reservoirs, and potentially be useful for other lawful purposes, such as estimates by property insurers. He argues that the risks of targeting of sites where inundation would do most harm already exist as a result of information already available, and that disclosure of the requested data would not make much difference. He refers to EA’s published flood risk maps for river basin districts which include maps that mark locations where the risk to people is greatest, and other maps that highlight risks to economic activity and to the natural and historic environment.

39. The Commissioner says there is still disagreement on what information is available and on what basis, and has not provided a response following EA’s response to the Tribunal’s questions.

40. Having considered all of the above arguments, we find that regulation 12(5)(a) is engaged in relation to the data underlying the “flood depth” and “flood speed” layers described under the “flood risk from reservoirs” publicly accessible interactive map, because disclosure would adversely affect national security and public safety. As with AfA113, the issue is whether disclosure of this information could be used as the basis for a terrorist attack, which would put the public in serious danger. We have noted the appellant’s point that he is only asking for underlying information at the same level of simplification as the published maps, which is why we asked EA specific additional questions. We accept EA’s explanation as to why release of this data would adversely affect national security and public safety. Unlike the fixed maps available online, this underlying data could be combined with other publicly available data and manipulated in order to target reservoir sites where floods could do most harm. This assessment was made in consultation with the Cabinet Office and Defra, and the information is provided in a fixed format in order to meet statutory obligations while minimising the risk of harm. EA says that the fixed image “reduces” the prejudice to national security and public safety that could result from full disclosure. EA is striking a balance between transparency and public safety.

41. The appellant says that he has been able to derive the underlying data from the maps, and has provided a copy of a blog post which explains how this has been done. The Tribunal has not been able to assess whether this is an accurate method of obtaining the underlying data. The fact that an individual may be able to use complex methods to obtain some underlying data from published maps is very different from publication of all underlying data in an accessible format by EA. Disclosure of the requested information would still adversely affect national security and public safety, as it provides all the information in an immediately accessible and manipulable form. The appellant also refers to published flood risk maps for river basin districts, and other maps that show risk of flooding. However, this is very different from the specific risks posed by large raised reservoirs, which are built structures that are particularly vulnerable to attack by those wishing to cause harm.

42. *If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?* The public interest in disclosure is the same as for AfA113 as discussed above - a general interest in openness and transparency, promotion of awareness and resilience in communities close to reservoirs, and possible increase in public safety. Again, these interests are partly served by the published maps. There is a strong public interest in avoiding threats to national security or disclosing information which would put people in danger, and the severe danger posed to the public by a terrorist attack on a reservoir clearly outweighs the relatively limited public interest in disclosure of the requested underlying data on flood depth and speed.

43. The appellant’s further final submissions (11 May 2021) complain that the Commissioner was not able to view even samples of the withheld datasets, due to not having access to the relevant software. He says that the Commissioner cannot have adequately scrutinised EA’s application of the exemption. We disagree. Neither this Tribunal nor the Commissioner is in a position to analyse detailed data in this way, or make our own assessment of whether or not disclosure would adversely affect national security or public safety based on viewing the detailed data itself. We have assessed the appellant’s arguments and the explanations from EA, which included asking EA additional questions in order to clarify our understanding, and made our decision on this basis.

44. We dismiss the appeal and uphold the decision of the Commissioner.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 16 October 2021

Promulgation Date: 19 October 2021