

Environmental Information Regulations 2004

Decision Notice

Date: 18 March 2008

Public Authority: South Downs Waste Services Ltd
Address: Veolia House
154A Pentonville Road London
N1 9PE

Summary

The complainant wrote to both Veolia ES South Downs Ltd and South Downs Waste Services Ltd to request information regarding a Best Practice Environmental Option assessment in respect of the East Sussex and Brighton & Hove Integrated Waste Management Contract. Both companies refused the request on the grounds that they are not obliged to comply with requests for information under the Environmental Information Regulations. The Commissioner has considered this matter and is satisfied that South Downs Waste Services Ltd constitutes a public authority for the purposes of EIR and that by failing to comply with the request it breached regulation 5(1). During the course of his investigation South Downs Waste Services Ltd disclosed a copy of a document entitled "Initial Qualitative BPEO Appraisal of the Onyx Aurora Proposals & Scoping Exercise for Detailed Quantitative BPEO" and the Commissioner is satisfied that it holds no further information falling within the scope of the request. The Commissioner requires no steps to be taken.

(N.B. Throughout this Decision Notice there are references to Veolia ES South Downs Ltd, Veolia Environmental Services Plc and South Downs Waste Services Ltd, these are all part of the Veolia group of companies. For the avoidance of any doubt, the Commissioner believes that EIR apply to South Downs Waste Services Ltd. Where references are made to contact with Veolia ES South Downs Ltd the Commissioner considers this company to be acting on behalf of South Downs Waste Services Ltd for the purpose of dealing with this complaint.)

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part IV of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 6 March 2006 the complainant wrote to Veolia ES South Downs Ltd to request information under EIR. The request read as follows:

I have read with interest your document headed 'Best Practicable Environmental Option Strategic Compliance Report (October 2005)', submitted as a supporting document to your application for an EFW facility at North Quay, Newhaven. Paragraphs 4.3 – 4.5 of that document is headed 'Qualitative BPEO assessment – submitted with BAFO'.

Please would you provide me with a copy of:

- 1. all documents setting out the terms or scope of the qualitative assessment to be undertaken*
 - 2. all documents containing findings of that assessment*
 - 3. all documents containing commentary on those findings*
3. Veolia ES South Downs Ltd responded to the request on 16 March 2006. It said that Veolia Environmental Services Plc (its parent company) was not subject to EIR and that therefore it was not obliged to provide the requested information.
4. The complainant responded to this letter on 30 March 2006. The complainant said that this time he was resubmitting the request to South Downs Waste Services Limited and that he believed that this company is covered by EIR.
5. Veolia ES South Downs Limited replied on behalf of South Downs Waste Services Ltd on 7 April 2006. It said that EIR do not apply to South Downs Waste Services Limited either and that therefore it was not obliged to provide the requested information.

The Investigation

Scope of the case

6. On 11 April 2006 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant explained that it was making its complaint on behalf of Mr T Mouzer who had made the original request for information. The complainant specifically asked the Commissioner to consider whether EIR apply to either Veolia ES South Downs Ltd or South Downs Waste Services Ltd. The complainant also asked the Commissioner to consider whether either Veolia ES South Downs Ltd or South Downs Waste Services Ltd were correct to withhold the information requested on 6 March 2006 and 30 March 2006.

Chronology

7. On 23 February 2007 the Commissioner contacted Veolia ES South Downs Ltd with details of the complaint. The Commissioner said that, having reviewed the case he was of the opinion that South Downs Waste Services Ltd incorrectly refused the request on the grounds that it was not subject to EIR. The Commissioner explained that in reaching this view he had considered the nature of the relationship between South Downs Waste Services Ltd, and Brighton & Hove City Council and East Sussex County Council.
8. The Commissioner said that he was satisfied that South Downs Waste Services Ltd is a public authority, for the purposes of this request, under regulation 2(2)(d) of EIR. In light of this the Commissioner invited South Downs Waste Services Ltd to reconsider its response to the complainant's request.
9. Veolia ES South Downs Ltd responded to the Commissioner on behalf of South Downs Waste Services Ltd on 20 March 2007. It said that it was prepared to disclose the requested information in this case but that it was reserving its right to dispute the classification of South Downs Waste Services Ltd as a public authority for the purposes of EIR in the future. It added that, to its knowledge, the full range of documents requested by the complainant did not exist and that therefore it was unable to release them. It said that it would forward the existing information to the Commissioner as soon as possible.
10. On 1 May 2007 the Veolia ES South Downs Ltd provided the Commissioner with a copy of a document entitled "Initial Qualitative BPEO Appraisal of the Onyx Aurora Proposals & Scoping Exercise for Detailed Quantitative BPEO". The Commissioner agreed to forward this information to the complainant. At the same time the Commissioner asked South Downs Waste Services Ltd to clarify its earlier statement when it said that, to its knowledge, the full range of documents requested by the complainant did not exist.
11. The complainant responded to the Commissioner on 16 May 2007. It said that it wished to pursue its complaint and did not accept that South Downs Waste Services Ltd had disclosed all of the information it held. It pointed out that annexes to the report had not been disclosed.
12. Veolia ES South Downs Ltd wrote to the Commissioner on 15 June 2007. It said that the "Initial Qualitative BPEO Appraisal of the Onyx Aurora Proposals & Scoping Exercise for Detailed Quantitative BPEO" document was the only information held falling within the scope of the complainant's request. Referring specifically to parts 1 to 3 of the complainant's request, it made the following comments:

1. the qualitative assessment was undertaken and produced internally by Veolia employees and there are therefore no documents setting out the terms or scope of the qualitative assessment

2. the document containing the findings of the assessment has been provided

- 3. the document containing the commentary on those findings has been provided*
13. On 17 July 2007 Veolia ES South Downs Ltd provided the Commissioner with all annexes to the document. It also confirmed that “all earlier drafts, comments or other input into the creation of this document have...been destroyed and the documentation provided is the only information falling within the scope of the request”.
 14. The complainant was not satisfied with the print quality of the copies of the annexes. The Commissioner agreed that the quality was unsatisfactory and asked Veolia ES South Downs Ltd if better quality copies were available.
 15. Veolia ES South Downs Ltd explained that it was searching for a clearer copy of the annexes and that if they could be found they would be made available to the complainant as soon as possible. It subsequently explained that it had had to approach its client, the councils, to see if it had clearer copies of the annexes.
 16. Veolia ES South Downs Ltd provided the Commissioner with clearer copies of the relevant annexes on 8 January 2008. The Commissioner arranged for these documents to be forwarded to the complainant.

Findings of fact

17. In March 2003 Brighton & Hove City Council and East Sussex County Council entered into a long term integrated waste management services contract with South Downs Waste Services Ltd.
18. The contract was entered into in accordance with provisions of Part II of the Environmental Protection Act 1990.
19. Under the contract South Downs Waste Services Ltd is responsible for:
 - Managing household waste collected from Brighton & Hove and East Sussex.
 - managing and operating the household waste recycling sites in Brighton & Hove and East Sussex and the disposal/recycling of materials deposited at the sites.
 - providing recycling facilities for household waste collected through Brighton & Hove's kerbside recycling scheme.
 - developing waste transfer stations and processing plants.
20. The contract provides for South Downs Waste Services Ltd to apply for permission to develop (and then to run) a waste incinerator facility (described in the contract as the Newhaven ERP (energy recovery plant)) in Newhaven.
21. Details of the contract and related schedules are available at:

<http://www.brighton-hove.gov.uk/index.cfm?request=c1147524>

22. The information originally withheld from the complainant is a copy of a document entitled, "Initial Qualitative BPEO Appraisal of the Onyx Aurora Proposals & Scoping Exercise for Detailed Quantitative BPEO". This document is labelled as being published in January 2002.
23. BPEO refers to the "Best Practicable Environmental Option". According to the Department for Environment Food and Rural Affairs BPEO "is the option which provides the most benefit or the least damage to the environment as a whole, at an acceptable cost in both the long term and short term."

Analysis

24. A full text of the relevant statutes referred to in this section is contained within the legal annex.

Procedural Matters

25. The complainant has argued that either one or both of the companies Veolia ES South Downs Ltd or South Downs Waste Services Ltd are public authorities for the purposes of EIR under regulation 2(2)(d). The complainant has not suggested that the one or both of the companies are public authorities under regulations 2(2)(a), 2(2)(b) or 2(2)(c) of EIR. However, for the avoidance of any doubt, the Commissioner is of the opinion that these regulations do not apply to either company.
26. The complainant's view is that the companies fall within all three sub provisions of regulation 2(2)(d) of EIR and therefore both companies can be considered a 'public authority'. Referring to the three sub-provisions of regulation 2(2)(d) the complainant made the following comments:
 - *The companies have public responsibilities relating to the environment – namely their waste disposal responsibilities under, or by reference to, the contract.*
 - *The companies exercise functions of a public nature relating to the environment – namely their waste disposal functions under or by reference to, the contract.*
 - *The companies provide public services relating to the environment – namely their waste disposal functions under or by reference to, the contract.*
27. For a body or person to be covered by regulation 2(2)(d) of EIR it must first be shown to be under the control of a government department; any other public authority as defined in section 3(1) of the Act or any other body or person that carries out functions of public administration. It must also fulfil one of the requirements set out in the sub-provisions (i) to (iii) of regulation 2(2)(d).

28. The complainant is silent on the issue of the extent to which the companies can be said to be under the control of a government department; any other public authority as defined in section 3(1) of the Act or any other body or person that carries out functions of public administration. However, the Commissioner has considered this point and is of the opinion that the company, South Downs Waste Services Ltd, can be said to be under the control of Brighton & Hove City Council and East Sussex County Council by virtue of the integrated waste management contract it entered into with the two Councils. The Commissioner notes that Veolia ES South Downs Ltd is not a party to the contract and so cannot be considered a public authority in this instance.
29. The Commissioner has reviewed the nature of the relationship between South Downs Waste Services Ltd and the councils and in particular the Commissioner has considered the terms of the Integrated Waste Management Services Contract.
30. Having reviewed the contract the Commissioner wishes to highlight the following clauses in the contract the existence of which suggest that South Downs Waste Services Ltd is under the control of the two councils.
31. Clause 42 of the contract provides that the contractor is required to take such steps as are necessary to ensure the impact of any of its operations carried out under the contract upon the environment are adequate and sufficiently considered, supervised, controlled and monitored. In addition, each year the contractor has to provide a report to the Councils including statements as to the effectiveness of clause 42 of the contract in relation to the environment.
32. Clause 44 of the contract provides that the councils can take action in connection with any part of the services performed by the contractor if there is, for example, an imminent and serious risk to the environment or to discharge a statutory duty where the need to do so arises because of a failure by the contractor to comply with its obligations under the contract.
33. The Contract provides that the statutory duties do remain the responsibility of the councils but they have contracted the provision of the services to meet those duties to the contractor. The Commissioner is of the opinion that South Downs Waste Services Ltd is carrying out the responsibilities of the councils but under their control and that this is demonstrated by the performance levels required under the contract.
34. The Commissioner is satisfied that the level of control is sufficient to find that South Downs Waste Services Ltd is under the control of Brighton & Hove City Council insofar as it carries out duties on behalf of that council, and under the control of East Sussex County Council insofar as it carries out duties on behalf of that Council. Both Councils fit the criteria in regulation 2(2)(b) insofar as they are both local authorities listed in schedule 1 of the Act.
35. The Commissioner is of the opinion that South Downs Waste Services Ltd provides public services relating to the environment, namely its waste management and recycling services and as such fulfils part (iii) of regulation

2(2)(d) of EIR. Therefore, the Commissioner finds that South Downs Waste Services Ltd constitutes a public authority for the purposes of EIR. From hereon in South Downs Waste Services Ltd shall be referred to as “the public authority”.

36. The Commissioner has gone on to consider whether the information requested by the complainant is environmental information as defined in EIR.
37. The information deals with the public authority's plans for its implementation of the integrated waste management contract and the effects this will have on the environment. The Commissioner is of the opinion that the information requested by the complainant is information on waste, affecting or likely to affect elements of the environment such as air and atmosphere and is therefore satisfied that the information requested by the complainant constitutes environmental information under regulation 2(1)(b) of EIR.
38. The complainant has also argued that the public authority holds further information beyond the information disclosed during the course of the Commissioner's investigation. The complainant has said that its request was broad in scope and that it is unlikely that the document that was disclosed would exist in isolation. The complainant has suggested that the preparation of the document would have involved both internal communications as well as external communications. It has also said that it believes that the public authority must hold records of the preliminary and drafting work as well as any comments on the draft(s). It said that it also anticipated that there must be some project scoping documentation setting out the terms of the disclosed document.
39. These points were addressed by the public authority and are referred to in paragraph 12, above. The public authority has repeatedly stated that no further information, beyond that which has already been provided, is held. Furthermore, it has stated that any information that was held had subsequently been destroyed. The Commissioner had twice asked the public authority to provide him with details of its records management policy or procedures but this has not been forthcoming. The Commissioner feels that it is not unreasonable to conclude that the public authority does not have a policy of this kind.
40. The Commissioner is satisfied that, without any evidence to the contrary, the public authority holds no further information falling within the scope of the request, beyond that which has already been disclosed to the complainant. In reaching this decision the Commissioner is mindful of the fact that the report was produced in January 2002 and the public authority has said that any further information has been destroyed.

The Decision

41. The Commissioner's decision is that South Downs Waste Services Ltd is a public authority for the purposes of EIR.

42. The Commissioner has found that by refusing the complainant's request the public authority breached regulation 5(1) of EIR that environmental information shall be available on request. However the public authority has now disclosed the requested information it holds and the Commissioner is satisfied that it holds no further information falling within the scope of the request.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 18th day of March 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations 2004

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 2(2) provides that:

Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.

Regulation 5(1) provides that:

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Freedom of Information Act 2000

Section 3(1) provides that:

In this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”