

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision Notice**

Date: 24 October 2011

Public Authority: Advantage West Midlands
Regional Development Agency

Address: 3 Priestley Wharf
Holt Street
Birmingham Science Park
Aston
Birmingham B7 4BN

Decision

1. The complainant requested information concerning the nature and scale of contamination of the former IMI site in Walsall.
2. The Commissioner's decision is that the regional development agency, Advantage West Midlands, incorrectly applied the exceptions at regulations 12(4)(d), 12(5)(e) and 12(5)(f) of the EIR in order to withhold the information.
3. He requires the public authority to disclose the withheld information to the complainant within 35 calendar days of the date of this decision notice.
4. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

5. On 22 March 2011 the complainant requested the following information from the regional development agency, Advantage West Midlands (AWM), regarding the former IMI site ¹ in Walsall:

"Can AWM provide me with information it does hold on the extent, nature and scale of the contamination on that land. That is, what sort of contamination is on the site e.g. heavy metals etc. Also how deep does that contamination go e.g. 40 metres, 60, 80? And what size area does it cover?"

6. On 15 April 2011 the agency stated that the information was exempt from disclosure under s43(2) of the Act.
7. The complainant appealed and following an internal review on 1 February 2011 the agency upheld its decision to withhold the information under s43(2).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant registered his concern that the site is in a built up area, close to residents' homes, a school and local businesses. He was concerned that excavations to the heavily contaminated site would impact on the local environment. The site is the subject of potential sale to a private sector company leading to possible opencast coal mining and ultimate redevelopment.
9. The Commissioner requested a copy of the information from AWM. He considered the information to be environmental information as defined in regulation 2 of the Environmental Information Regulations (EIR). This is because it related to plans and activities which have a direct impact on

¹ The James Bridge IMI (Imperial Metal Industries) site next to the M6 in Walsall was the last copper refinery in the UK. The copper works closed 12 years ago. The 35 acre site has 244 disused mine shafts and is described by Walsall Council as one of the most contaminated in Europe. The site is owned by AWM.

the use of land and landscape. Accordingly, he asked AWM on 5 July 2011 to reconsider the request under the EIR.

10. On 19 July 2011 AWM provided the Commissioner with its reconsideration of the request under the EIR. The agency holds reports from contractors commissioned to carry out ground investigations and geo-environmental assessments of the site. These reports were withheld by AWM under the following exceptions of the EIR:

Reports by Envirocheck were withheld under regulation 12(5)(e).

Reports by Morrison Construction were withheld under regulations 12(4)(d) and 12(5)(e).

Reports by WSP, Stanger (later BAE Systems) and the Ministry of Transport were withheld under regulations 12(5)(e) and 12(5)(f).

11. The Commissioner's investigation concerns whether the information contained within these reports has been withheld appropriately by the regional development agency.

Reasons for decision

Regulation 12(4)(d)

12. Regulation 12(4)(d) of the EIR states that:

"... a public authority may refuse to disclose information to the extent that the request relates to material which is still in course of completion, to unfinished documents or to incomplete data."

13. The report by Morrison Construction is in two parts. AWM informed the Commissioner that at the time of the request the first part of the report was complete but that the second part was in draft form in the course of checking and verification. AWM received the final version of the second report on 29 July 2011.
14. The Commissioner has been supplied with copies of both the draft and final versions of the second report. He is satisfied that the exception was applied appropriately in view of the fact that information in the report required verification at the time the request was made.
15. Regulation 12(4)(d) is subject to the public interest test. Accordingly, the Commissioner is required to consider the public interest arguments submitted in favour support of maintaining the exception and those in favour of disclosing the information.

Public interest arguments in favour of maintaining the exception

16. Whilst AWM submitted public interest arguments in relation to the exceptions it had applied, none were relevant to the specific issues involved in 12(4)(d). The agency's arguments related entirely to the exceptions at 12(5)(e) & 12(5)(f). Those exceptions are determined later in this notice to be not engaged. Also, AWM's arguments only related to the alleged prejudice regarding 12(5)(e) and 12(5)(f) and not the public interest test per se.

Public interest arguments in favour of disclosing the information

17. (i) There is a strong public interest in being informed about matters concerning the contamination of the environment and the potential of harm to the public health of local communities.
- (ii) There is a strong public interest in the openness, transparency and accountability of government agencies such as AWM.
- (iii) Disclosure of the draft report would reveal how the final verified version had been arrived at. Its disclosure would assist the public's knowledge of that process and inform public debate concerning the findings of the report.
- (iv) The Commissioner does not consider the verified version of the report to be exempt from disclosure. Release of the draft would increase public confidence in the verified version by revealing that careful checking and revision had taken place. Equally, should the draft report indicate that inadequate scrutiny had been applied then it would be in the public interest to reveal that shortcoming.
- (v) The awareness by report writers of the prospect of disclosure under EIR and their recognition of the resultant public scrutiny that such disclosure affords will improve the accuracy and content of future documents.
- (vi) The EIR requires a public authority to apply a presumption in favour of disclosure.

Balance of the public interest arguments

18. The Commissioner recognises the public interest argument inherent in 12(4)(d) in favour of avoiding un-adopted positions being exposed to public scrutiny. This is in order to avoid public resources being expended in explaining draft documents. Balanced against this is the strong public interest in disclosing draft positions so that the public is given a fully informed picture of the report making process. This

promotes full transparency and accountability of a public authority's activities. In this instance, the agency did not provide reasons why any un-adopted positions should not be referenced after final verification of the report. Therefore the Commissioner gives more weight to the case for disclosure. Having also taken into account that no public interest arguments were submitted by the public authority to support the 12(4)(d) exception, the Commissioner has concluded that in all the circumstances of the case the public interest in disclosing the information outweighs that of withholding it.

Regulation 12(5)(e)

19. The exception at 12(5)(e) allows commercial or industrial information which is subject to the common law of confidentiality to remain confidential in order to protect a legitimate economic interest.
20. The Commissioner applies the following tests to regulation 12(5)(e):
 - (i) Is the information commercial or industrial in nature?
 - (ii) Is the information subject to a duty of confidence provided by law?
 - (iii) Is confidentiality required to protect a legitimate economic interest?
 - (iv) Would that legitimate economic interest and thereby its confidentiality be adversely affected by disclosure?

He asked AWM to explain with reference to each of the above criteria why the agency had concluded that the withheld information was exempt from disclosure under 12(5)(e).

21. With reference to the test at 20 (i) AWM argued that prior to development taking place there needed to be extensive remediation of the land to bring its contamination to acceptable levels. The agency maintained that as it is currently selling the site to a developer the reports are commercial in nature because they are intrinsic to understanding the scale, nature and costs of the remediation required.
22. The Commissioner's examination of the reports has found their content to be essentially geological and geotechnical in nature. Whilst a minor part of the information refers to constraints to development it contains limited reference to the costs involved in remediation or development. As such it is questionable how much of the information can be considered to be commercial per se. However, on the basis that the reports have been utilised for the purpose of assessing the viability of future development the Commissioner is prepared to accept that the information is commercial in nature.

23. AWM also maintained that the reports are industrial in nature as they relate to the condition of a former industrial site. On the basis that the information in the reports relates in large part to the industrial residue of a former copper works and to the sites of earlier mining activity, the Commissioner accepts that the information may be considered to be industrial in nature.
24. With reference to the test at 20 (ii), for a duty of confidence to be owed the information must have been imparted in circumstances which create an obligation of confidence and have the necessary quality of confidence.
25. The Commissioner considers that the reports were imparted in circumstances which created an obligation of confidence between the providers of the reports and the agency which commissioned them. He also considers the information in the reports to have the necessary quality of confidence on the basis that it is not trivial and apart from that derived from sources such as Ordnance Survey maps, the British Geological Survey, Coal Authority Mining Reports, Walsall Library and Google Earth it is largely unavailable from other sources.
26. AWM maintained that disclosure of the reports would be in breach of copyright held by third parties. The Commissioner does not agree with this submission. AWM's argument is based on the assumption that if information is deemed to be another's intellectual property it should not be disclosed. However, the fact that information may be someone's intellectual property does not preclude its legitimate availability to others. In complying with the statutory duty under the Act to disclose information to an applicant the Commissioner considers that a public authority will not breach the Copyright, Designs and Patents Act 1988.
27. With reference to the test at 20 (iii) AWM submitted two arguments:
 - (a) It stated that the end use for the site was still to be established by the purchaser. In light of this AWM argued that the confidentiality of the reports was fundamental to the purchaser's economic interests because confidentiality was key to the viability testing of the purchaser's commercial proposals. However, AWM did not explain how confidentiality of the reports was key to the testing of those proposals.
 - (b) AWM maintained that confidentiality of the reports was fundamental to the negotiating positions of both purchaser and AWM in agreeing a sale contract for the land. However, AWM did not explain why confidentiality of the information was fundamental in this respect.
28. In the Commissioner's view he has not been provided with any reasoned argument to support either of the above propositions.

Consequently, he considers that AWM has failed to demonstrate that there are legitimate economic interests on the part of either agency or purchaser which require the protection of confidentiality.

29. AWM also failed to demonstrate that either of the arguments purporting adverse affect to the purchaser by disclosure of the information originated from the purchaser itself. In the absence of any evidence from the purchaser to that effect the Commissioner is unable in any event to conclude that confidentiality of the information is required to protect the purchaser's economic interests.
30. For completeness and with reference to the test at 20 (iv) the Commissioner considered the extent to which AWM had been able to demonstrate that the legitimate economic interests of either party "would" be adversely affected by disclosure of the information.
31. In its initial correspondence with the Commissioner AWM declared its view that disclosure of the information "could" be used by other parties to negatively affect the purchaser's commercial plans. It submitted that disclosure could result in termination of the sale negotiations with abortive costs to both parties.
32. The Commissioner advised AWM that the wording of "would adversely affect" in regulation 12(5)(e) sets a high threshold in order for the exception to be engaged. He explained it was insufficient that disclosure "could" have some adverse effect. He therefore asked AWM to explain how disclosure "would" adversely affect the economic interests that it had identified.
33. AWM's response to the Commissioner was again that disclosure of the reports would only "be likely to" cause adverse affect to the parties involved in the sale of the site.
34. The agency submitted that disclosure of the site information risked others seeking to undermine or challenge the potential purchaser's commercial proposals before they were brought through the planning system. However, AWM had informed the Commissioner that the end use for the site was still to be established. Accordingly, it is difficult to see how as yet unidentified proposals for use of the site could be successfully challenged or undermined prior to their finalisation and submission for planning approval.
35. In any event the Commissioner is aware of the extensive range of information detailing the site's history and scale of contamination that

is already in the public domain.² He considers that the facility and ability to challenge future site proposals (if they were known) on the basis of contamination levels as suggested by AWM is already available if others chose to utilise this. It is only the additional level of detail that has been requested by the complainant that has not yet been disclosed.

36. AWM submitted that disclosure would be likely to result in negative press coverage adversely affecting the purchaser's assessment of their commercial proposals. However, the Commissioner had been informed by AWM that the ground condition information had already been supplied to the potential purchaser. Consequently, the Commissioner considers that any proposals to be submitted by the purchaser will have taken that information into account. In that case the possibility of any future press coverage could not alter the actual content of proposals already formulated on the basis of that information.
37. AWM further suggested that the likelihood of such press coverage would affect the developer's appetite for agreeing the contract. However, the Commissioner understands that large sums of publicly funded grant are being made available for restoration and development of the land which will in turn benefit the potential purchaser.³ He also recognises that the development promises a potentially lucrative business for the successful company. He notes that negative press reports concerning the prospect of opencast coal mining on the site by the potential purchaser and the effects this would have on local communities have already been widely published. Yet this has clearly not deterred the potential purchaser from continuing its tender for the contract. The Commissioner therefore considers it unlikely that the purchaser would willingly exclude itself from this source of revenue merely on account of the possibility of further such coverage by the press.
38. In the Commissioner's view the arguments deployed by the council have failed to demonstrate that disclosure of the information would adversely affect the confidentiality of commercial or industrial information relating to any of the parties.

² For example, the 2001 report on "Monitoring of Lead, Arsenic, Cadmium, Nickel and Mercury around Industrial Sites" – compiled by Stanger on behalf of DEFRA - which measured the concentrations of these pollutants in the vicinity of the IMI site.

³ Walsall Council has reported a bid for a government grant of £5.88 million to help with an £18 million investment plan with the Black Country Local Enterprise Partnership for the site area.

39. Because the exception at 12(5)(e) is not engaged the Commissioner is not required to consider the public interest test in respect of this.

Regulation 12(5)(f)

40. Regulation 12(5)(f) applies to information where disclosure would have an adverse effect upon:
- (i) the interests of a person who voluntarily provided the information to the public authority
 - (ii) where that authority is not entitled to disclose that information apart from under the regulations and
 - (iii) where the provider has not consented to the authority disclosing it.
41. AWM informed the Commissioner that some of the reports had been commissioned by other agencies (such as the previous Ministry of Transport) and that the information in the reports had been supplied voluntarily to AWM. AWM said it had not received consent from these agencies to disclose the reports. Upon being asked by the Commissioner for a copy of any statements to the effect that these organisations had refused their consent AWM said that it was unable to provide such a copy.
42. The exception at 12(5)(f) requires there to be an adverse affect to the interests of the information provider. However, despite invitations from the Commissioner to engage on this point AWM failed to demonstrate that any interests of the organisations which had commissioned the reports would be adversely affected should the information be disclosed. The Commissioner therefore finds that the exception at 12(5)(f) is not engaged.
43. Because regulation 12(5)(f) is not engaged the Commissioner has not gone on to consider the public interest test in respect of this exception.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. Any notice of appeal should be served on the tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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