

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 August 2012

Public Authority: Health and Safety Executive
Address: Redgrave Court
Bootle
Merseyside
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested various pieces of information relating to the development of an underground gas storage facility. The Health and Safety Executive (the "HSE") provided some information, but withheld some information on the basis that its disclosure would adversely affect national security or public safety [regulation 12(5)(a)]. It also applied the exception for the personal information of third parties [regulations 12(3) and 13(2)]. The complainant complained about the use of these exceptions, and also argued that the HSE had not identified all the relevant information that would fall under this request.
2. During the investigation of this case, the complainant provided further details as to the scope of his request. Having been provided with this, the HSE informed the Commissioner that it was now treating the request as manifestly unreasonable [regulation 12(4)(b)].
3. The Commissioner's decision is that the HSE has incorrectly applied regulation 12(4)(b) to this request.
4. Therefore the Commissioner requires the HSE to take the following step to ensure compliance with the legislation:
 - Respond to the request in compliance with the requirements of regulation 5(1) of the EIR.
5. The HSE must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. The complainant contacted the HSE on 8 February 2011 and requested the following information in relation to the development of an underground gas storage facility at Stublach Grange Farm in Cheshire:
- "1. any technical information, advice from third parties and the source, written and/or graphical, relied upon to consider and provide the original consents for the development and storage of gas. We understand that three wellheads were relocated due to a geological fault therefore we also require any technical information, advice from third parties and the source, written and/or graphical, relied upon to consider and provide the consent for the relocation of the three wellheads;*
- 2. communications passing between the HSE and owner/operator and any supporting documents relating to relocation of the three wellheads;*
- 3. technical or geological reports and supporting documents or other evidence in relation to the discovery and evaluation of geological faults; and*
- 4. any documents including risk assessments submitted to the HSE under the Control of Major Accident Hazards Regulations 1996 and Pipeline Safety Regulations 1996 which demonstrate:*
- 4.1 confirmation that the owner/operator has taken the necessary measures to prevent any identified accident hazards; and*
- 4.2 the owner/operator has established adequate independent audit arrangements."*
7. Following an exchange of correspondence the HSE wrote to the complainant on 12 April 2011 and provided a substantive response. It confirmed that it held information that fell under the request. It also disclosed some information, although this was partially redacted under regulations 12(3) and 13, and regulation 12(5)(a).
8. On 20 April 2011 the complainant requested an internal review. In particular, he complained about the redaction of the information, and also stated that the HSE held other relevant information that had not been identified or provided, such as the Major Accident Prevention Policy.
9. On 6 July 2011 the HSE wrote to the complainant with the details of the result of the internal review. It disclosed some additional information

that had previously been withheld under regulations 12(3) and 13. However, in relation to the remaining withheld information it upheld its use of regulations 12(3) and 13, and regulation 12(5)(a).

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he complained that the HSE had not identified all the information it held that fell under the scope of the request; and that it had wrongly relied upon regulation 12(5)(a) to withhold some of the redacted information.
11. During the investigation of this case the HSE provided the Commissioner with its response to the details of the complaint. In relation to the complaint that it had failed to identify all the relevant information it held, the HSE stated that it believed that following the receipt of the request the complainant had verbally agreed with it to refine (and effectively limit) its scope. It explained that initially it had considered that the request placed a substantial and unreasonable burden upon it, and as such may have been exempt under regulation 12(4)(b) (on the grounds that it was manifestly unreasonable). In order to ensure that the request was not refused on these grounds, it had verbally agreed with the complainant (prior to the deadline for a response) to narrow the scope of the request. However, it was unable to provide the Commissioner with a written record of the complainant agreeing to narrow his request in this way.
12. Subsequently the Commissioner wrote to the complainant with the details of the HSE's remarks about the alleged narrowing of his request, and asked for his comments. In response the complainant argued that no such agreement had been reached, and that the scope was as set out in his request.
13. The Commissioner wrote to the HSE on 22 May 2012, and informed it of this. He explained that given the complainant's comments, and in the absence of any written evidence to the contrary, he could not consider that the request had been narrowed in any way. Bearing this in mind, he asked the HSE for further submissions in relation to the relevant information that the complainant had argued had not been identified in relation to his request.
14. On 22 June 2012 the HSE wrote to the Commissioner and set out its response. Taking into account the Commissioner's comments that he could not consider that the request had been refined, it stated that it was now relying upon regulation 12(4)(b) to refuse the request, on account of it being manifestly unreasonable.

15. Although this exception has been applied late, given the circumstances of the case, and in particular that the HSE has stated that its original intention was to apply regulation 12(4)(b), the Commissioner considers that it would be unreasonable to refuse to accept the late application of this exception. Therefore, the scope of this case is to consider whether the HSE can rely upon this exception to refuse this request.

Reasons for decision

Regulation 12(4)(b) – Was the request manifestly unreasonable?

16. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
17. The Commissioner considers that for information to be withheld under this exception, the request must be more than simply unreasonable. Manifestly means that there must be an obvious or clear quality to the unreasonableness referred to.
18. The Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances – where it is vexatious, and where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources. The Commissioner also accepts that there may well be other situations where regulation 12(4)(b) can apply. In this instance the HSE has argued that this request would have placed a substantial and unreasonable burden on its resources. Therefore he has had to consider whether the HSE would incur unreasonable costs if it were to comply with this request.
19. In determining whether the cost of complying with a request would be manifestly unreasonable for the purposes of this exception, the Commissioner considers that the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations (the “Fees Regulations”) provide a useful point of reference. The Fees Regulations set out the activities that a public authority can take into account when calculating the cost of complying with a request under the Freedom of Information Act 2000 (the “FOIA”). These are:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and

- extracting the information from a document containing it.
20. However, despite these rules being a useful starting point, the Commissioner considers that regulation 12(4)(b) has a broader scope. This means that there may be circumstances where it is reasonable to also take into account some costs that fall outside the Fees Regulations, although the justification for doing so would have to be clear. Therefore the Commissioner will consider whether those costs are reasonable in all the circumstances of the case.
 21. In this instance the HSE has argued that this request would be unreasonably costly, and would have placed a substantial and unreasonable burden on its resources. The resource cost of complying with this request would be disproportionate, diverting its resources so as to significantly disrupt its normal activities.
 22. In particular, it has pointed out that there is a large volume of information that would fall under the request. Given the nature of this information, and what it pertains to (a proposed underground gas storage site where dangerous substances would be kept), responding to this request would require specialist HSE frontline inspectors to be removed from their normal duties in order to read through the requested information on a word by word basis in order to ensure that any information that might breach national security and/or endanger public safety was identified. This, it has argued, would be manifestly unreasonable.
 23. However, although the HSE has referred to the volume and nature of the information in question, and the potential diversion of its resources, the Commissioner notes that it has not argued that it is unable to identify and locate the requested information without this causing a costly and unreasonable burden. Indeed, it has confirmed to him that it has been able to identify the information that it holds that would fall under the request. Instead, its arguments have focused on the resource cost of examining the requested information, identifying the information which it considers to be exempt under regulation 12(5)(a), and redacting this exempt information.
 24. Under the FOIA, a public authority cannot take into account the cost of considering whether any exemptions apply to requested information and/or the redaction of any exempt information, when considering

whether the cost of responding to a request would take it over the 'appropriate limit' (as set out in the Fees Regulations).¹

25. Although, as noted above, the Commissioner accepts that the Fees Regulations do not, in themselves, apply to the EIR, he does consider that they provide a useful starting point in establishing what would or would not amount to an unreasonable burden or cost to a public authority. Bearing this in mind, he considers the fact that a public authority cannot take into account the cost of identifying and redacting exempt information (when considering the cost of dealing with a FOIA request) is of primary importance in considering the HSE's arguments in this case.
26. Taking into account the presumption in the EIR in favour of disclosure for environmental information, and that the exceptions under the EIR should be interpreted restrictively, the Commissioner does not consider that it is reasonable for a public authority to be able to take into account the cost of identifying and redacting exempt information when considering the application of this exception.
27. Bearing these factors in mind, and taking into account that the HSE has not made any arguments about the cost or burden of identifying and locating the requested information, the Commissioner does not consider that this request is manifestly unreasonable. Therefore, he does not consider that this exception is engaged.

¹ *The Chief Constable of South Yorkshire Police v the ICO* [EA/2009/0029].

Right of appeal

28. 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

29. 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.
30. 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

Gerrard Tracey
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