

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 March 2014

Public Authority: Worcestershire County Council
Address: County Hall
Spetchley Road
Worcester
Worcestershire
WR5 2YA

Decision (including any steps ordered)

1. The complainant has requested information from Worcestershire County Council ("the council") about a proposed waste incineration plant. The council provided information in response. The complainant subsequently contested whether all held information had been provided.
2. The Commissioner's decision is that the council provided all relevant information that was held at the time of the request.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 8 May 2013, the complainant wrote to the council and requested information about a proposed waste incineration plant. This request is recorded in Annex A.
5. The council responded on 4 June 2013. It confirmed that some of the requested information was not held, and provided the remainder.
6. Following an internal review, the council wrote to the complainant on 17 July 2013. It maintained its position that part of the requested information was not held, and that the exception provided by regulation 12(4)(a) was therefore engaged. Additionally, the council advised that the exception provided by regulation 12(5)(e) was engaged in relation to part of the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 25 August 2013 to complain about the way her request for information had been handled. Specifically, she contested that not all held information had been provided, and that the council's application of regulation 12(5)(e) was incorrect.
8. During the Commissioner's investigation the council revised its application of regulation 12(5)(e), and advised that the specific information was not held.
9. The Commissioner considers the scope of this case to be the determination whether the council provided all information held at the time of the complainant's request, under the duty to do so contained within regulation 5(1).

Background of the case

10. The council formed a contract in 1998 with a waste management company to dispose of municipal waste. This contract included the development of an incineration plant at a specified site to destroy residual waste. The waste management company subsequently applied for planning permission to develop the incineration plant, but this was refused. That element of the contract was therefore 'frozen' to allow the council and the waste management company to consider alternative solutions to dispose of residual waste.
11. After considering alternative solutions, the waste management company and the council proposed the development of an incineration plant at another specified site. This site was then appropriated by the council. The waste management company then submitted a planning application to develop an incineration plant on the site, and this was subsequently granted in July 2012 by the Secretary of State for Communities and Local Government.
12. In February 2012, the parties had begun negotiations to implement a variation to the contract that would allow the plant to be provided by the waste management company. These negotiations included a re-assessment by the council of all the available options to dispose of residual waste, and the costs associated with them.
13. This information was consolidated in a report to the council's cabinet during December 2013 in order for the true cost and 'value for money'

of the incineration plant to be considered, and a final decision to be made about whether to proceed with that option.

14. The cabinet agreed to the option for an incineration plant, which then required the council to take steps to execute a contract variation to the original contract. At the time of the Commissioner's investigation, this process was still ongoing, and the contract variation had not yet been executed.

Reasons for decision

Is the information environmental?

15. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(c), any information on activities affecting or likely to affect the environmental factors listed in regulation 2(1)(b) will be environmental information. One of the factors listed is emissions. The contested matter relates to information about a proposed incineration plant. This matter can be identified as affecting emissions. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 5(1) – Duty to make information available on request

16. Regulation 5(1) of the EIR states that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions or exclusions that may apply.
17. The EIR provides a right of access to information in recorded form, and only that which exists at the time of the information request. The EIR does not require a public authority to generate new information, such as in the form of an explanation or opinion, in order to respond to a request. Additionally, the EIR does not allow a request to be made in advance of the information being held.

The Commissioner's investigation

18. On 23 December 2013 the Commissioner wrote to the council to request supporting evidence for its response to the complainant. The Commissioner also invited any supporting comment from the complainant on her assertion that the information should be held. The request is made up of varied parts, and the Commissioner has considered each part individually.

Part 1

19. The complainant has requested information about energy generated by the incineration plant. The council responded that no information was held. However, the complainant has suggested that this information should be held as a matter of necessity, as the council would need to be aware of it in reaching a decision to vary the contract.
20. The council has advised the Commissioner that it has consulted with a specialist officer involved in this matter, who has confirmed that the information was not held at the time of the request, and the council would not expect to hold the information until any contract variation had been executed.
21. While the complainant contests that the council should hold the requested information as part of its deliberations, the Commissioner can only consider the likelihood, on the balance of probabilities, of the information being held. He cannot enter into disputes about whether a public authority should or should not hold specific information in relation to its duties. Having considered the council's position that it would not expect to hold the information until the execution of the contract variation, the Commissioner must conclude that the information was unlikely to be held at the time of the request.

Part 3

22. The complainant has requested the costs of a public consultation in relation to the plant. The council has advised the complainant that no public consultation has been undertaken, and has since confirmed the same to the Commissioner. The Commissioner is not aware of any contrary evidence, so he must conclude that the requested information was therefore unlikely to be held.

Part 7

23. The complainant has requested information about site selection, and has contested the accuracy of information that the council has provided. The council has advised the Commissioner that it has provided held information that refers to the site selection issues that the council has considered in the matter, and has specifically provided the complainant with the URL to the online documents that detail the site selection process. The Commissioner cannot enter into disputes about the accuracy of recorded information that the complainant has referred to, and having considered the circumstances, must conclude that it is unlikely that further information was held by the council.

Part 8

24. The complainant has requested confirmation of whether the proposed site for the incinerator has been 'appropriated' to the waste management company. The council has explained to the Commissioner that the council cannot 'appropriate' a site to a contractor in such a way, and that it has advised the complainant of this. There is no evidence to suggest otherwise to the Commissioner, who must therefore conclude that it is unlikely there was any relevant held information.

Part 9

25. The complainant has requested various information about the preparation of the proposed site, including costs and practical considerations, and has advised the Commissioner that she considers the council should hold this information as part of its responsibility to ensure the site is both suitable and safe.
26. The council has confirmed to the Commissioner that the only related information that it held in relation to subparts a, b, c, d, g, j, k, and l was a draft form of the financial model for the whole life costs of the contract that it has with the waste management company. The council has stated that this draft financial model does not contain information at the level of detail requested by the complainant. The council has further informed the Commissioner that this financial model still remains in a draft form, and that even once finalised, it may not contain the information requested by the complainant.
27. The council has confirmed that in relation to subparts e, f, h, and i, any relevant information would be held by the waste management company, and would not be held by the council until the execution of the contract variation. For subpart m, the council has further confirmed that based on the knowledge of a specialist officer involved in this matter, there was no relevant information held.
28. Having considered the relevant circumstances, there is therefore no clear evidence to indicate to the Commissioner that this information was likely to be held by the council.

Part 10

29. The complainant has requested confirmation of whether the council will participate in the collection of food waste.
30. The council has confirmed to the Commissioner that the collection of waste is the responsibility of district councils, who are the designated 'Waste Collection Authorities'. While the council is a designated 'Waste Disposal Authority', and as such has provided held background information to the complainant about the disposal of the collected food waste, the council does not have the duty that the complainant has

requested information about. The Commissioner has therefore concluded that the information was unlikely to be held.

Part 11

31. The complainant has asked for information about whether the council will accept the risk associated with the financial costs relating to incinerator ash.
32. The council has confirmed to the Commissioner that this information was not held, as the financial analysis that came to be reported in December 2013 was in progress and had not assessed this aspect. There is no conflicting evidence to suggest that this was not correct. The Commissioner has therefore concluded that the information was unlikely to be held.

Part 12

33. The complainant has requested information about the council's financial analysis of the proposed incinerator.
34. The council has confirmed to the Commissioner that this information was not held, as the relevant financial analysis was in progress and had not assessed this aspect. The council has confirmed that since the date of the request, this information has now come to be held as part of the 'Value for Money' report delivered in December 2013. There is no evidence to suggest to the Commissioner that this is incorrect, and he must therefore conclude that the information was unlikely to be at held at the time of the request.

Part 14

35. The complainant has requested a 'fully appraised transport plan' for the proposed site.
36. The complainant has contested that a 'fully appraised transport plan' was not supplied within the information that the council provided in response. The council has explained to the Commissioner that it considers that the only held information relevant to this part of the request is contained in the 'Traffic Assessment' section of the waste management company's planning application; to which the complainant has been provided the online URL.
37. Having considered the circumstances, there is no evidence to suggest to the Commissioner that further relevant information is likely to be held.

Part 15

38. The complainant has requested the finalised 'Risk Assessment and the Variation Business Case'.
39. The council has explained to the Commissioner that at the time of the request the finalised 'Variation Business Case' did not exist. The costs and 'Value for Money' assessment (which would then comprise part of any finalised Variation Business Case) were not held until the council's report in December 2013.
40. It is therefore reasonable for the Commissioner to conclude that the information was unlikely to be at the time of the request. It is noted that the complainant did ask for the information to be provided once finalised. However, the EIR does not provide a right to request information held in the future, and the council was therefore only under a duty to consider what information it held during the time for compliance.
41. The council has further explained that it incorrectly applied regulation 12(5)(e) to the requested 'Risk Assessment', and that the information was not held, due to information about any risks relating to construction, delivery and commissioning of the plant being held by the contractor. However, the Council has conceded that the request was ambiguous, and the complainant may have referred to the risks associated with the wider matter, which are recorded in various cabinet papers regarding the contract, and have been collated in the council's report of December 2013. The council has advised that it has received a further request on the 16 January 2014 by the complainant for the Variation Business Case and Risk Assessment, in which it expects to be able clarify what information is requested and provide the council's current position.

Conclusion

42. The Commissioner has considered the individual circumstances and arguments put forward by both the council and the complainant, and has concluded that no further information was held in relation to any part of the request. It is clear to the Commissioner that the matter remains 'live' and that at the time of the complainant's request, the council was still undertaking research in order to submit a final report to its cabinet in December 2013, in which it was likely that a proportion of the requested information would be contained. Additionally, the Commissioner has come to understand that the contract variation has not yet taken place, and that a proportion of the requested information may not be held by the council until that time.

Right to appeal

43. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

46. On 8 May 2013, the complainant requested the following information:

1. *The use of heat from the incinerator it is accepted is not an option now or in the future. The power generation was clearly set out in the submission by Mercia Waste prior to planning – the method, the distance to grid etc. You now state that this is not the intended method and that a different method was being investigated i.e. connecting to a transformer within Hartlebury trading estate. A transformer within the trading estate blew up in late 2012. Please explain:*
 - a. *Exactly how it is proposed to take the power generated to the transformer?*
 - b. *Have these negotiations been finalised?*
 - c. *How will any excess power be transported to National Grid?*
 - d. *If this method to utilise the power is not complete please inform me of the details as soon as they are complete?*
 - e. *Do the council expect excess power to the National Grid to be transported underground as described in the original statements?*
 - f. *Costs to date for all the services of ERM? Costs of 'Consultation'?*
7. *The EA tool WRATE states that "all options with one site are assumed to go to site A (Close to Worcester City on the M5 corridor), why was this changed to situate one site in a different unsuitable site?*
8. *The site is unsuitable for many reasons – including the extra cost to remediate the land and dangers of migrating gases. Plus the lack of revenue from use of the heat element. The land belongs to Worcestershire County Council i.e. the Taxpayer. Has this land already been 'Appropriated' to Mercia Waste?*
9. *Please explain:*
 - a. *The cost of two and a half years of wildlife removal from this site?*
 - b. *The cost of vegetation clearance?*

- c. The cost of felling Mature Oak Trees with protection orders?*
 - d. The cost of removing the reported 600,000 cubic metres of material to be excavated and regarded as 'waste' by the EA?*
 - e. The destination of this material?*
 - f. Please provide the Construction Environmental Management Plan? Please provide details of all ground investigations?*
 - g. How do the Council propose to remove the lead from the site and at what cost?*
 - h. There is no secondary water supply. Given the huge needs of an incinerator for water are these needs to be met from a mains connection?*
 - i. The EA state that the groundwater levels are high in the area and need to be adequately protected. How would these levels be protected?*
 - j. The cost of diverting the various considerable drainage issues on this site.*
 - k. The stream (Little Acton Brook) which runs through the centre of the site has yet to be diverted. Please supply costs for this diversion.*
 - l. Costs for diverting the sewage pipework which runs beneath the site.*
 - m. As the Council is the landowner who bears responsibility for health effects from working on this highly contaminated site please inform who takes responsibility for this and for the very real risk of explosion from gas migration from the various surrounding landfill sites.*
- 10. A high percentage of waste is food waste. Will the Council participate in collecting food waste for AD as recommended by WRAP?*
- 11. It is stated in the West Midlands Alliance Report that even without the proposed Worcestershire plant the West Midlands could have around 250,000 tonnes of ash to deal with and that only half the ash generated is recycled. The EA state that at least initially the ash from this facility would go straight to landfill. Huge amounts of IBA have been landfilled at Hartlebury. The report goes on to say that it may yet be classified as hazardous waste which could*

push the landfilling of IBA to £100 per tonne and that it is the Authorities which have contracted for the 'EfW' plants who will largely bear the new financial burden. Will the council accept this risk and are they happy to do so?

- 12. Coventry accepts waste from the East Midlands and Bedford to burn at a cheaper rate than a new incinerator could. Do the council accept that it would be cheaper to carry on with existing arrangements and then negotiate more beneficial contractual terms at contract end in 2023 to the benefit of the taxpayer?*
- 14. Please provide a fully appraised transport plan for:
 - a. All routes in and out for all deliveries for example lime and activated carbon, the ammonium hydroxide solution, caustic soda, hydrochloric acid, phosphate solution, the low sulphur gas oil, excess waste waters to be tankered off site etc?*
 - b. Routes for waste from each of the relevant sites?*
 - c. Routes and destination for the approx 25,000 tpa of ash?**
- 15. Please provide an updated Risk Assessment and the Variation Business Case, if these are not finalised please provide these as soon as they become available.*