

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

Date: 13 June 2022

Public Authority: Environment Agency
Address: Horizon House
Deanery Road
Bristol
BS1 5AH

Decision (including any steps ordered)

1. The complainant has requested information about a Small Waste Incinerator Plant. The Environment Agency (EA) has disclosed some information, some of which it had originally withheld under regulation 12(5)(e) of the EIR. The EA has advised it does not hold information within scope of two parts of the request.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the EA does not hold the information requested in parts 1 and 4 of the request and regulation 12(4)(a) of the EIR is engaged in respect of those parts.
3. The Commissioner does not require the EA to take any remedial steps.

Background

4. The EA has provided the following background. It says it permits Calderdale Valley Skip Hire Ltd to keep and treat waste at its site in Sowerby Bridge, West Yorkshire.

5. Calder Valley Skip Hire has installed a Small Waste Incineration Plant (SWIP) at its site. The installation and operation of this SWIP is permitted and regulated by Calderdale Metropolitan Borough Council. The Environment Agency does not regulate incineration operations of this type. The complainant is opposed to the operation of the SWIP.

Request and response

6. From material the complainant sent to the Commissioner, it appeared that on 10 February 2021 they had written to the EA and requested information in the following terms:

[1] R1 Status

... Please provide the correspondence concerning R1 status. Or confirm there is no such correspondence between the EA and these parties with advice or guidance since my question has not been addressed.

[2] Single regulator

..I would appreciate the documents including emails and the full letter from the agent of 13 February and the EA reply and any other correspondence as soon as possible.

[3] Application to vary waste permit EAWML 65545 (Application reference EPR/SP3196ZQ/V002)

I requested all documents drawings and details and correspondence ("copies of the emails/application forms".) I have been sent a link to documents. There is no correspondence included or internal documents and would appreciate that all other correspondence and documents are sent to me.

[4] public consultation

In response to my query about consultation the EA said "The scale and scope of this proposal is such that it does not require public consultation". I would like to see the documented basis the decision is made on by the EA and what factors were considered."

7. The EA had responded on 22 April 2021. It advised that it had not received an application for R1 status for the site. It directed the complainant to published information relevant to part 2 and provided detail of its correspondence with a consultant working on behalf of the operator. The EA directed the complainant to published information relevant to part 4 and advised that the permit requested in part 3 of the request had the status of 'under determination'.

8. The EA provided an internal review on 25 May 2021. With regard to part 1 the EA confirmed it does not hold any correspondence. The EA withheld information within scope of part 2 (the correspondence) under regulation 12(5)(e) of the EIR. With regard to part 3, the EA said that the requested permit had been issued in the interim and it provided this to the complainant. The EA provided links to published information relevant to part 4.
9. The EA's submission to the Commissioner shows that correspondence between the complainant and the EA in fact continued and on 25 October 2021 the EA provided the complainant with a further internal review. In this response the EA was able to disclose the information it had previously withheld under regulation 12(5)(e); its position regarding the remaining parts of the request remained the same.

Scope of the case

10. The complainant contacted the Commissioner on 6 August 2021 to complain about the way elements of their request for information had been handled.
11. Given the EA's subsequent withdrawal of its reliance on regulation 12(5)(e) regarding part 2, the Commissioner's investigation has focussed on whether, on the balance of probabilities, the EA holds any information within scope of parts 1 and 4 of the request.

Reasons for decision

Regulation 12(4)(a) – information not held

12. Under regulation 12(4)(a) of the EIR, a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
13. Although regulation 12(4)(a) is a qualified exception, the Commissioner's position is that it is not necessary to consider the public interest. To do so would be illogical because the public interest cannot favour disclosure of information which is not held.
14. The complainant considers that the EA holds information within scope of parts 1 and 4 of their request. Part 1 of the request is for communications about 'R1' and the site in question. (The Commissioner understands that 'R1' is a performance indicator for the level of energy recovered from waste.) The complainant says that a letter dated 13/2/2020 from the solicitor acting for the permit holder requesting a single regulator was quoted as an extract in an email to the complainant

from the EA on 22 March 2021. This therefore suggested to the complainant that the EA does hold relevant communications. The Commissioner put this point to the EA.

15. In its submission to the Commissioner, the EA has explained that after an operator has made an application for R1 status, there is an assessment of whether their incineration facilities are achieving this.
16. Where the EA undertakes an R1 assessment, its National Permitting Service (NPS) will store information on the assessments in a spreadsheet and a database that shows all applications received. NPS logs and tracks R1 assessment information, including when applications were received, applicant and facility details and when the EA responded.
17. The EA says it has checked these electronic records, and there are no records of Calder Valley Skip Hire applying for an R1 assessment for its SWIP. R1 data is also published on the data.gov.uk web site, a link to which the EA had shared with the complainant.
18. As Calder Valley Skip Hire's SWIP is regulated by the local authority it would be the authority who would assess whether the SWIP is achieving recovery status and undertake the R1 assessment. The EA would therefore not expect to hold any information about R1 for this site.
19. The EA has also confirmed that it has no records of any discussion between the Environment Agency and the operator or local authority regarding R1 assessment at this site. It has checked this with its Yorkshire Area regulatory team and with its Local Authority Unit.
20. The Commissioner has considered the EA's submission and the complainant's argument. He accepts that the EA has not undertaken an R1 assessment of the site in question as Calder Valley Skip Hire did not apply for one. And the EA says it has checked with the relevant teams whether it holds any records of any discussion between it and the operator. It has not identified any. The Commissioner has decided that, on the balance of probabilities, the EA does not hold information within scope of part 1 of the complainant's request and regulation 12(4)(a) is engaged.
21. Part 4 of the request is for information that evidences how the EA made its decision not to conduct a public consultation on the permit variation relating to the SWIP. The complainant says that a link the EA provided does not answer the points they made, for example that two local MPs oppose the permit. The Commissioner put this point to the EA.
22. In its submission the EA has explained that it had no statutory obligation to consult on this application.

23. The EA says its public participation scope is set out in the Environmental Permitting Regulations 2016, Schedule 5, Part 1. Paragraph 5(2) states that:

Paragraph 6 [the requirement to consult] applies to every application for the variation of an environmental permit if—

- (a) it would entail a substantial change [to an installation], or
- (b) the regulator determines that the paragraph should apply.

24. This is transposed into the EA's public participation statement on how and when to consult, which would involve matters that have 'significant negative effects on humans or the environment'.

25. In the handover form sent by the EA's National Permitting Service to its Yorkshire Waste Team, the EA stated that the variation was not expected to increase the risk on site. This showed that it was not regarded as a substantial change and would therefore not require consultation. The EA sent the complainant a copy of this handover form following its internal review.

26. The EA has noted that the complainant has stated that two MPs opposed the permit. With significant interest from MPs the EA says it may well designate an application as high public interest, which would entail additional consultation. However, in this case it had no evidence to support that designation.

27. The EA's Yorkshire Customers and Engagement team has confirmed that it holds no correspondence from the local MP in relation to this site. The team has gone back to 2019 in its records.

28. The EA concludes its submission by confirming it therefore did not consult on this application or discuss consulting on this application. As such it does not hold any information relevant to part 4.

29. The Commissioner has again considered the EA's submission and the complainant's argument. He is not persuaded that, in the circumstances the EA has described, it would hold information relevant to part 4 and so finds that, on the balance of probabilities, EA does not hold that information.

Right of appeal

30. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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