

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 January 2016

Public Authority: The Environment Agency
Address: Quadrant 2
99 Parkway Avenue
Sheffield
S9 4WF

Decision (including any steps ordered)

1. The complainant has requested from the Environment Agency (the EA) the amount of evidence (measured in tonnes) of Waste Electrical and Electronic Equipment (WEEE) met through the use of the Compliance Fee broken down by category and the identity of the Producer Compliance Schemes (PCSs) that made use of the Compliance Fee to meet their obligations.
2. The Environment Agency has withheld the requested information under Regulation 12(5)(e) of the EIR on the basis that disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
3. The Commissioner's decision is that the Environment Agency has successfully applied Regulation 12(5)(e) of the EIR.

Request and response

4. On 3 March 2015 the complainant wrote to the Environment Agency (EA) and requested information in the following terms:

'I would be grateful if you could provide the following information in relation to the WEEE¹ Compliance Fee:

The amount of evidence (in tonnes) met through the use of the Compliance Fee broken down by category. Which PCS²s made use of the Compliance Fee to meet their obligations'.

5. The EA responded on 1 April 2015. It stated that the information was 'environmental' within the meaning of the EIR and it was withholding it under Regulation 12(5)(e) – confidentiality of commercial or industrial information.
6. On 1 April 2015 the complainant requested an internal review.
7. Following an internal review the EA wrote to the complainant on 6 May 2015. It stated that it was upholding its original decision to apply Regulation 12(5)(e) of the EIR.
8. The Commissioner is aware that the complainant has made a similar request to the Scottish Environment Protection Agency (SEPA).

Scope of the case

9. The complainant contacted the Commissioner 11 May 2015 to complain about the way his request for information had been handled. In particular, the EA's decision to withhold the requested information in its entirety under the EIR.
10. The scope of the Commissioner's investigation is to consider the EA's application of Regulation 12(5)(e) of the EIR to withhold the requested information.

Background information

The Waste Electrical and Electronic Equipment (WEEE) Regulations and the compliance fee)

11. Producers of electrical goods have an obligation to finance the collection and treatment of a proportion of (WEEE) that arises in the
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¹ Waste Electrical and Electronic Equipment

² Producer Compliance Scheme

UK each year. Producers discharge this obligation by joining a Producer Compliance Scheme (PCS).

12. WEEE is divided into six main categories; large household appliances, small mixed WEEE, display equipment, cooling appliances containing refrigerants, lamps and photovoltaics.
13. The latest WEEE regulations³ came into force on 1 January 2014. These new rules introduced changes to the previous regulations to allow PCSs to pay a 'compliance fee' if they fail to meet their members' recycling obligations through collecting sufficient WEEE. By providing an alternative means of compliance, the fee is intended to discourage PCSs from collecting volumes of WEEE significantly above their collection targets and then seeking to sell the surplus evidence at excessive costs to PCSs that have been unable to collect sufficient evidence to meet their obligations.
14. Each PCS that wishes to pay the compliance fee must declare to an independent administrator the tonnage they have failed to collect, and the total obligation in each category that they would like to pay the fee for. The administrator then calculates a fee per category, on an escalating scale, based on the percentage of obligation that they have failed to collect, those with a higher outstanding percentage will pay a higher fee. This approach is intended to ensure that that collecting WEEE is incentivised above simply opting to pay the compliance fee. By creating uncertainty, the process also aims to avoid PCSs with excess WEEE collections from increasing costs for access to the material up until slightly below a known fixed price. The WEEE regulations require the methodology for setting and administering the compliance fee to be reviewed each year in order to increase uncertainty in the market and reduce price fixing.
15. The latest regulations are the UK's implementation of the 2012 EU WEEE Directive⁴ and come under the responsibility of the Department of Business Innovation and Skills (BIS).
16. According to the EA, there are currently 29 WEEE PCSs operating in the UK. Some of these PCSs have access to more WEEE than they

³ The Waste Electrical and Electronic Equipment Regulations 2013
<http://www.legislation.gov.uk/ukxi/2013/3113/contents/made>

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0019>

need to meet their own obligations whilst others need to reach agreements with the over-collecting PCSs or pay the compliance fee to comply.

17. In September 2015 the Department for Business Innovation & Skills (BIS) announced that £375,000 had been raised by the compliance fee in 2014, minus administration costs⁵. BIS declined to give a breakdown of which categories of WEEE the majority of payments into the fund related to.

Reasons for decision

The Environmental Information Regulations 2004 (the EIR)

18. The EA has dealt with the complainant's request under the EIR on the basis that the information is 'environmental' within the meaning of Regulation 2(1) of the EIR.
19. The Commissioner has seen the requested information which the EA has withheld in its entirety under Regulation 12(5)(e) and is satisfied that it is 'environmental' under Regulations 2(1)(c) and 2(1)(d) of the EIR.
20. The requested information comprises of two tables: One showing the total tonnage of WEEE satisfied by the compliance fee broken down into the six categories of waste described above. The other one showing the identity of the PCSs that made use of the compliance fee to satisfy their WEEE obligations.

Regulation 12(5)(e) of the EIR – confidentiality of commercial or industrial information

21. The EA has applied Regulation 12(5)(e) to the entirety of the requested information. The purpose of this exception is to protect any legitimate economic interests underlying commercial confidentiality.

⁵ <http://www.letsrecycle.com/news/latest-news/bis-announces-775k-weee-fund-for-councils/>
<https://www.gov.uk/government/news/775000-boost-for-re-use-and-recycling-of-old-electricals>

22. The Commissioner's guidance⁶ states that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosure which would otherwise result in a loss of revenue or income.
23. The construction of the exception effectively imposes a four-stage test, each part of which must be satisfied for the exception to be engaged:
- (i) The information is commercial or industrial in nature.
 - (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
 - (iii) The confidentiality is protecting a legitimate economic interest. If the arguments refer to the economic interests of a third party we will require evidence that the third party has expressed concerns about disclosure.
 - (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary element of the exception, the Commissioner considers that this test will inevitably be satisfied if the first three conditions are established.
24. If all of the above tests are met, a public authority must go on to consider the balance of the public interest.
25. Taking into account the purpose of the exception, the EA has responded to tests (i)–(iv) in turn. The Commissioner has tested its submissions against the legislation and his analysis follows.

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https://ico.org.uk/media/fororganisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

(i) Is the information commercial or industrial in nature?

26. The EA has pointed out to the Commissioner that the information requested concerns the use of the compliance fee. It has argued that this information is price sensitive, the disclosure of which could lead to a distortion of the market by influencing market behaviour and pricing. This in turn would create economic advantage or disadvantage. Accordingly, the EA believes that the information is commercial in nature.
27. The Commissioner is satisfied that the withheld information is commercial in nature.

(ii) Confidentiality is provided by law.

28. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party.
29. The EA has argued that the requested information is subject to confidentiality under both statute and common law.
30. The EA has said it considers that disclosure of the requested information could result in a breach of competition law and lead to enforcement action by either the European Commissioner or the Competition and Markets Authority. Both of these organisations apply a positive interpretation of competition legislation. The EA believes that the flow of information that would take place if it disclosed the requested information is the type of activity that competition legislation is designed to prevent as it would allow PCSs to work out commercially sensitive information about competitors which could make them modify their commercial behaviour and so skew the market by making it artificially transparent. It pointed out that competition law prevents the direct and indirect release of such confidential information.
31. The EA has also argued that disclosure of the requested information would be a breach of the common law of confidence as there is inherent confidentiality in arrangements surrounding how information is collected and managed for the purposes of WEEE regulation. The EA has pointed out that it compiled the requested information from information that was supplied to it (as regulator) by the different PCSs and by the independent administrator of the compliance fee scheme. This information was provided under a statutory obligation in a confidential environment and which allows

the setting of an appropriate compliance fee which in turn allows the market to operate effectively.

32. The common law of confidence will apply where information has the necessary quality of confidence and is shared in circumstances creating an obligation of confidence. For information to have the necessary quality of confidence it must not be trivial nor can it already be in the public domain.
33. The Commissioner has seen the requested information and is satisfied that it is not trivial nor is it in the public domain. He is also satisfied with the EA's explanation that the raw data from which the information was created was supplied under a common law duty of confidence.
34. As the Commissioner is satisfied that the requested information is covered by the common law duty of confidence he has not gone on to consider whether it is covered by a statutory bar.

(iii) The confidentiality is protecting a legitimate economic interest

35. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
36. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

Whose interests?

37. The EA has said that the economic interests to be protected are those of the PCSs.
38. The Commissioner considers that if it is a third party's interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.
39. In this case, the EA confirmed to the Commissioner that it contacted all of the PCSs, of which there were 29 operating in the UK at the

time of the request. A total of 11 responded, 7 of which opposed disclosure. This opposition was on the basis that the disclosure of such confidential information would be in breach of competition law and damaging to the PCSs by providing an insight into their commercially confidential business arrangements.

40. The Commissioner accepts the evidence provided by the EA that the economic interests to be protected are those of some of the PCSs.

(iv) The confidentiality would be adversely affected by disclosure.

41. The Commissioner's guidance⁷ on Regulation 12(5)(e) provides the following clarification with regard to this test at paragraphs 33 and 34:

'Public authorities will therefore need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interest at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.

It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – i.e. more probable than not) that disclosure **would** cause some harm'.

42. In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

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https://ico.org.uk/media/fororganisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

43. The EA has stated that if the requested information is disclosed under the EIR to the world at large, including other PCSs who may be competitors, it could result in them modifying their business strategies and the potential use of the compliance fee in order to gain a market advantage. The EA takes the view that the WEEE market is an industry sector where transparency can lead to anti-competitive behaviour, which is a situation the WEEE regime was intended to rectify.
44. The EA has stated that disclosing the requested information would cause significant harm to some of the PCSs by putting them at a considerable disadvantage against their competitors. For example, by releasing details of those PCSs that have used the compliance fee may adversely affect their reputation and subsequently weaken competition.

Public interest arguments in favour of disclosure

45. Under Regulation 12(2) of the EIR there is a requirement that a public authority will apply a presumption in favour of disclosure.
46. The Commissioner recognises that there is a public interest in the EA being transparent in relation to the collection, treatment, recycling and disposal of Waste Electrical and Electronic Equipment (WEEE).
47. The EA believes that this public interest is largely satisfied by the information which is already in the public domain regarding the operation of the WEEE regulations⁸, the amount of WEEE collected and the release of WEEE evidence at the completion of the WEEE year⁹. However, the Commissioner notes that not all of this information was publicly available when the request was made and reviewed.
48. The Commissioner also recognises that there is a public interest in the EA being transparent in relation to the effectiveness of the new WEEE regulations which came into force on 1 January 2014. In particular, the operation and effectiveness of the 'compliance fee'

⁸ <https://www.gov.uk/government/publications/weee-regulations-2013-government-guidance-notes>

⁹ <https://www.gov.uk/government/publications/weee-evidence-and-national-protocols-guidance/waste-electrical-and-electronic-equipment-weee-evidence-and-national-protocols-guidance>

which was introduced by the new regulations to discourage PCSs from collecting volumes of WEEE significantly in excess of their collection targets and then selling the surplus volumes at excessive costs to other PCSs that have failed to reach their targets.

49. The EA believes that the public interest in transparency is counteracted by damage that could be caused to the WEEE market, producers and ultimately consumers.

Public interest arguments against disclosure

50. The EA has pointed out that disclosing the requested information would reveal the identity of the PCSs that failed to meet their collection targets (and in which categories) and therefore those that had to pay the compliance fee. The EA considers that this might affect the reputation of such PCSs by wrongly portraying them as less compliant or high risk. The EA believes that this would weaken competition and mean that the PCSs would be less likely to use the compliance fee. This in turn might result in a greater demand for evidence, meaning that prices would escalate. Any increase in charges would be transferred to producers and ultimately UK consumers. The EA does not believe this would be in the public interest.
51. The EA has pointed out that the latest WEEE regulations create a competitive market for scheme membership and for the provision of evidence that WEEE has been treated, recovered and recycled in a market based system. The EA therefore believes that there is a high level of public interest in ensuring that the competitive market place put into existence to allow the WEEE regime is not distorted by the release of confidential information (such as that requested) which would adversely impact on the ability of companies to operate within the marketplace.
52. The EA also believes that any increases in costs caused by disclosure of the requested information would be against the WEEE Directive¹⁰, where producers should only finance the costs of the treatment of WEEE.
53. The EA considers that disclosure of the requested information could be against competition law which bars the release of confidential

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0019>

information which makes a market artificially transparent. The EA believes that the disclosure of any information that might be used by a PCS to work out something commercially sensitive about another PCS and which would cause it to modify its commercial behaviour, might result in the PCS breaching competition rules.

54. The EA has also argued that there is a significant public interest in protecting the commercial interests of the private sector which plays an important role in the general health of the UK's economy.

Balance of the public interest

55. The Commissioner is mindful that under Regulation 12(2) of the EIR there is an express presumption in favour environmental information being disclosed and recognises that access to such information can assist the public in understanding how public authorities operate and make decisions.
56. However, the Commissioner also recognises that it would not in the public interest for any information being disclosed which would weaken competition in the WEEE private sector, especially where this would result in increased prices, less use of the compliance fee and potential breaches of competition law.
57. The complainant on the other hand believes that there is a public interest in businesses to having access to the requested information to enable them to decide which PCS to use. He also believes that there is a public interest in understanding how the compliance fee works and whether it has been successful in reducing costs.
58. The Commissioner has taken into account the arguments for and against disclosure and has concluded that those presented by the EA as indicated above are sufficiently strong to balance the public interest in favour of the exception under Regulation 12(5)(e) of the EIR being maintained.

Right of appeal

59. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

60. 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.
61. 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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