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

Decision notice

Date: 1 April 2019

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

Decision (including any steps ordered)

1. The complainant has requested information associated with an energy-from-waste plant at Runcorn. The Environment Agency (EA) has relied on regulation 12(4)(a) of the EIR; its position being that it does not hold information in recorded form that addresses the complainant's requests and questions.

2. The Commissioner's decision is as follows:

   - EA breached regulation 5(2) with regard to part 5 of the request.
   - EA cannot rely on regulation 12(4)(a) with regard to part 1 and part 3b) of the request.
   - EA was entitled to rely on regulation 12(4)(a) with regard to parts 2, 3a), 4, 6 and 8 of the request.

3. The Commissioner requires the EA to take the following step to ensure compliance with the legislation:

- In line with its duty under regulation 6 of the EIR (advice and assistance) the EA must clarify part 5 of the request with the complainant and then provide a response to the clarified request that complies with the EIR.

4. The EA 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

5. On 28 August 2018 the complainant wrote to EA and requested information in the following terms:

"I have received the FoI information requested regarding the visits to the Runcorn EfW [energy-from-waste] *plant by the EA; however this information leads me to request some supplementary information.*

Firstly I have attached a chart taken from the CAR dated 8th August relating to exceedances of permit levels, for guidance I have added the maximum permitted ;levels for the three substances.

Contained within the permit is the following condition at Schedule 5 a form to be completed under the following circumstances

(b) notifications of the breach of a permit level

To be notified with a period of 24 hrs --------- (with the appropriate data to be supplied regarding the exceedance).

1 Could the Agency please advise me if the plant notified the Agency of any of these exceedances, if so please provide me with a copy of that notification.

2 If no notification was received what action have the Agency taken as there would appear to be then a number of permit breaches (i) emission exceedances (ii) non compliance with the requirement to report any of these exceedances.

With regards to the full environmental report for 2017 I have the following comments

There are a number of other exceedances of permit levels particularly the following

CO exceedances of 531, 463 and 712. (limit 100)

SO2 exceedances of 2615. (limit 200)

TOC exceedances 282. (limit 20)

3 Could the Agency please advise what action has taken with regards to these exceedances, additionally did the plant advise the Agency of these exceedances.

4 Additionally could the Agency please advise me why it has taken until now to pursue this matter considering that the first quarterly report would have been receive in April 2017 and the visit was not made until August 2018, some 16 months later Additionally why did the discussion not extent to quarters 2,3 &4, when there were further exceedances noted.

A number of the visits related to potential increases in the tonnages received by the plant including an agreement to increase the tonnage in 2017 and extend that into 2018 (pending an application to vary the permit).

5 Could the Agency provide me with a link to where the Authority has the permission to do this on a local level.

6 Additionally the tonnage restriction was also the subject of planning permission by Halton Borough Council a) where HBC consulted b) does the Agency have the authority to override this planning permission. If so please provide me with the source of these authorities.

7 Within the application documents it is noted that the level of Carbon being emitted would be controlled by the volume of fuel being burned so why then when the permit level for CO is 100 and the two high readings of 1,692 and 6193 have been noted in 2017 and when the TOC level is 20 units with the highest reading of 282 has been recorded does the agency then see it acceptable to give even temporary authority for the tonnage to be increased.

8 Noting the detail contained within the CAR of the precise time and levels of exceedances it is obvious that the Agency has the information available (probably in the form of a chart of graph) accordingly under the EIR could you provide me with a copy of this information.

I have copied the Council in on this email for two reasons one is due to the Agency authorising an increase in tonnage which is restricted under the planning consent. Could the Council please provide me with a response to the question does the EA have the authority to authorise a limit set in a planning consent.

Additionally as the following is recorded in the ES " Halton Borough Council identified the following areas that should be considered as part of the planning application:

air quality: to include details of the standards and modelling used and an assessment of potential pollutants likely to be emitted. This information can be found in Chapter 10 of this ES."

Additionally as the Council have a responsibility for air quality in the Borough and they specifically noted that it be part of the planning application what are the Councils intentions regarding the permit exceedances.

The EIR regulations give a 20 maximum deadline for requests and I would expect some answers to non EIR questions accordingly a date of 25th September is the date by which I would expect answers to all of the questions noted within this email."

6. EA responded on 4 September 2018. It said that the information the complainant has requested is excepted from release under regulation 12(4)(a) of the EIR as it does not hold this information.

7. EA provided an internal review on 7 September 2018. It provided narrative answers to some of the complainant's questions and explained that the EIR does not require an authority to provide opinions. With regard to question 8, EA said it did not have anything further to add than the information that was contained in a particular CAR (Compliance Assessment Report) form.

Scope of the case

8. The complainant contacted the Commissioner on 18 September 2018 to complain about the way his request for information had been handled.

9. The Commissioner's investigation has focussed on whether EA holds, in recorded form, information that falls within the complainant's request.

Reasons for decision

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

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

10. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request.

11. Regulation 12(4)(a) says that 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.

12. The complainant has told the Commissioner that, in his view, EA's response to request 8 is a clear indication that the information is readily available. He also says that EA has the remit to ensure that the Runcorn EfW plant's emissions limits are within the parameters set by the Industrial Emissions Directive; to meet these requirements the complainant considers that EA is required to have access to the information he has requested.

13. EA has also provided the Commissioner with a submission. With regard to part 1 of the request, the complainant asked EA to advise him if the Runcorn plant notified it about any exceedances and, if the plant did, asked that EA provide him with a copy of that notification. At review EA advised the complainant that all unusual Continuous Emission Monitoring System (CEMS) ratings are notified to the EA by telephone and a schedule 5 notice would only be raised for those substantiated as real or non-trivial. The Commissioner understands that a 'schedule 5 notice' is a notice for a request for more information that EA can issue under the Environmental Permitting (England & Wales) Regulations 2010.

14. In its submission the EA has told the Commissioner that the exceedances in question are "*also in the annual/quarterly reports*" and that the complainant received a copy of this report(s) in May 2018, in response to a previous request. The Commissioner does not consider that this point addresses the complainant's request, which is for a copy of any notification that EA received from the Runcorn plant about an incidence of an unusual CEMS rating.

15. The EA's submission also did not make it clear what 'annual/quarterly' reports it was referring to and the Commissioner clarified this with EA. It explained that these were four quarterly Environmental Monitoring Reports for the Runcorn EfW plant for 2017.

16. In its original response to the complainant dated 4 September 2018 EA said the information requested in part 1 (and all the information the complainant had requested) was exempt information under regulation 12(4)(a) because it was not information that EA held. EA advised the Commissioner that it does not hold this information as it is notified of any unusual CEMS ratings by telephone.

17. From its submission with regard to part 8 of the complainant's request (discussed below) the Commissioner understands that EA took a telephone notification relating to the Runcorn plant and inputted the information from this call into a CAR form. EA *does* therefore hold information falling within the scope of part 1 – she considers that the CAR form in question is a record of the notification EA received. With regard to part 1 of the request, the Commissioner finds that regulation 12(4)(a) cannot therefore be applied to this information, because EA holds this information. However, the Commissioner understands from part 8 of the complainant's request that the complainant has already been provided with a copy of this information in response to a separate request – the CAR form.

18. To summarise part 2 of the complainant's request, the complainant has asked what action in respect of particular breaches and emission exceedances, which he says have occurred, did the EA take if it did not receive a notification about the plant. At internal review the EA again advised that notification was received by telephone. In its submission to the Commissioner, the EA has again said that the notification was received via telephone and was explained further in the annual report (ie the quarterly monitoring report) that was provided to the complainant.

19. Part 2 of the request concerns what action EA took if it did not receive a notification. That EA *did* receive a notification (by telephone) voids the second element of the request and EA was not obliged to consider whether it holds any recorded information about resulting actions it may have taken. In retrospect the EA might have more clearly confirmed that it does not hold any recorded information relevant to this part of the request, and why. However, on balance, the Commissioner considers that EA addressed this part adequately and could rely on regulation 12(4)(a).

20. In part 3 of the request, the complainant has asked EA a) what action it took with regards to the Runcorn EfW plant exceedances and b) whether the plant advised EA of these exceedances. At internal review the EA provided the same response as it had given to part 1 of the request.

21. In order to comply with the EIR the EA needed to confirm whether it holds in recorded form any information that falls within the scope of

either element of part 3; that is recorded information on any action it took with regard to the notification and recorded information on whether the plant advised EA of the exceedances. This latter element appears to be a repeat of part 1 and since this has been dealt with above, the Commissioner does not intend to discuss it again here.

22. With regard to part 3a), in its submission EA advised the Commissioner simply that it had nothing to add [to its internal review response]. This suggested to the Commissioner that EA's position was that, since a schedule 5 notice would only be raised for those notifications substantiated as real or non-trivial, EA did not take any actions on this occasion as the notification had not been substantiated as real or non-trivial. It would therefore follow that EA would not hold any recorded information about actions it took.

23. The Commissioner asked EA to clarify its position. It confirmed that it does not hold any information falling within the scope of part 3a) as the notification was not substantiated as real or non-trivial. The Commissioner is therefore satisfied that EA can rely on regulation 12(4)(a) with regard to part 3a) of the request.

24. In part 4 of the request the complainant asked EA why it had not pursued the matter (of exceedances) before August 2018, since it would have received the plant's first quarterly report in April 2017. The complainant also asked why any discussion EA had with the plant did not include quarters 2, 3 and 4, when he says further exceedances had been noted.

25. On the face of it, this does not appear to be a request for recorded information, but is a request for an explanation. The EIR concerns information an authority holds in recorded form; as EA advised the complainant, the EIR does not oblige an authority to give an explanation or opinion – that would be a general customer service matter.

26. At internal review EA advised that the operator notifies the EA and discusses the situation as and when anything happens. In its submission, EA has said it has nothing further to add. Although the request does appear to be seeking an explanation, the Commissioner approached EA to confirm with it that, despite this, EA was certain that it holds no recorded information that would address it.

27. EA advised that the operator (the Runcorn plant in this case) notifies the EA by telephone as and when anything happens and this information is added to quarterly monitoring reports. It confirmed that all the related information it holds – the Runcorn EfW plant's quarterly monitoring reports – had already been provided to the complainant. The

Commissioner is satisfied that EA can rely on regulation 12(4)(a) with regard to the specifics of part 4 of the request.

28. In part 5 of his request the complainant has asked EA to provide him with a link to evidence that '*the Authority*' has the permission to increase the tonnages [of waste] received by the plant on a local level. At internal review EA advised that it derives its powers from the Environment Act 1995 and in its submission to the Commissioner EA has advised that it has nothing further to add.

29. Having reviewed the request, the Commissioner notes that it appears to be a request for a link to evidence that the relevant *local authority* has the permission to increase the tonnage, rather than for evidence that the EA itself has the permission. The Commissioner is not satisfied that the EA's response – which is, in any case, somewhat broad and vague – is a correct interpretation of the request. She is therefore not satisfied that EA's response to part 5 has complied with regulation 5(1) of the EIR because it appears to her that the information that the EA has provided – a reference to the Environment Act 1995 – addresses a request that the complainant had not submitted.

30. Regulation 5(2) of the EIR requires a public authority to make environmental information that it holds, and which is not exempt information, available on request as soon as possible and no later than 20 working days after the date of receipt of the request. With regard to part 5 of the request, the Commissioner finds that the EA has breached regulation 5(2) as it has not complied with regulation 5(1) within the required timescale.

31. In part 6 of the request the complainant has asked EA whether Halton Borough Council was consulted about the tonnage restriction as part of a related planning permission process, and whether EA has the authority to override this planning permission. At internal review EA advised the complainant to take up planning matters with the relevant local authority and advised that it does not have authority over any planning permissions. In its submission to the Commissioner, EA advised that the planning application in question was approved on 5 February 2019.

32. This request also appears to be a general enquiry rather than a request for recorded information. EA addressed the query at review – in order to provide a level of customer service - but did not clearly confirm that it holds no relevant recorded information, and did not in its submission to the Commissioner. Again, the Commissioner sought clarification from EA that, despite the request appearing to be a general query, EA was certain that it holds no recorded information that would address it. EA confirmed that it holds no recorded information that addresses part 6. Given its responses to the other parts of the request and the wider

circumstances, the Commissioner accepts, on balance, that this is the case and that regulation 12(4)(a) is engaged.

33. In part 7 of the request the complainant has asked EA for its opinion on whether, in light of particular circumstances, it considers it acceptable to give temporary authority for the tonnage at the plant to be increased. At internal review the EA advised that the EIR do not require it to provide an opinion and has advised the Commissioner that it has nothing further to add. The Commissioner agrees that this particular request is clearly a request for an opinion and is not a request for recorded environmental information. She considers that EA was not obliged to provide a response to this question under the EIR.

34. In the final part of his request, part 8, the complainant referred to the detail contained in the CAR form and said it appeared to be obvious to him that EA has relevant information available, and to provide him with a copy of this information. At internal review, EA advised that it holds no information other than what is in the CAR form. In its submission to the Commissioner, EA has said that the information listed in the CAR form was telephoned into EA and inputted into the form. This information is further explained in the quarterly reports, copies of which were previously provided to the complainant. EA confirmed that it holds no further recorded information with regard to this data.

35. From his request, the Commissioner understands that the complainant has a copy of the CAR form in question. Having considered all the circumstances, she is satisfied that EA can also rely on regulation 12(4)(a) with regard to part 8 of the request because it does not hold any relevant information.

Right of appeal

36. 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

37. 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.

38. 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

Pamela Clements
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