

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 February 2015

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the destination of fracking wastes for specific sites.
2. The Commissioner's decision is that the Environment Agency (EA) has correctly applied regulation 12(5)(a) of the EIR to all the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 4 February 2014, the complainant wrote to EA and requested information in the following terms:

"I would like to request information held by the EA on the destination of all such wastes, and in particular- For each site and type of waste whether Cuadrilla, the recipients or the EA tested the wastes at any time for NORM content, and for the results of the testing where held by the EA.

Although the NORM content is my main interest I would appreciate also the results of testing of received drilling waste materials for any other potential contaminants."

5. EA responded on 1 April 2014 and refused to provide the requested information. It cited regulations 13(1), 12(5)(e) and 12(5)(f) of the EIR as its basis for doing so. It further stated that details on waste types and sampling/testing of such waste from the Preese Hall site was not held by EA. The operator has a duty of care to ensure that wastes are transported and disposed of at appropriately permitted facilities and that all records are kept. EA can inspect these records if required but does not hold copies.

6. In further correspondence to the complainant dated 22 April 2014, EA stated:

"In response to the question whether we tested any of the drilling muds in Lancashire – the answer is no. As to whether we hold any information about the testing of drilling muds from Lancashire sites that answer is also no.

With respect to other companies, whether they did any testing from any Cuadrilla Lancashire site; Under the 'duty of care' for waste transfer, it is the duty of the producer to correctly describe their waste, as such in many cases the waste is tested. Cuadrilla are the producers of the waste and so may hold test information. An enquiry would need to be made to Cuadrilla to request this information.

As part of waste acceptance and duty of care at Waste recycling/disposal sites, testing can be carried out to confirm that the waste they are accepting is correctly described and is compliant with their Environmental Permit. The waste site would hold that information on testing."

7. Following an internal review EA wrote to the complainant on 3 June 2014 and revised its position. EA stated that regulation 12(5)(f) could not apply, however, it maintained its position with regard to the other exceptions applied.

8. After correspondence from the Commissioner EA provided a further response to the complainant on 19 September 2014. It considered that the redactions could be reduced and therefore provided some further information. However, it further stated that it was also now relying on regulation 12(5)(a) to withhold some of the information.

9. The complainant wrote to the Commissioner on 9 October 2014 and provided his reasons and arguments as to why he did not consider his request had been responded to appropriately.

10. The complainant also indicated that he was not concerned with the application of regulation 13 in relation to personal data.

Background

11. The request relates to hydraulic fracturing and the drilling of a borehole. The complainant stated in his request that this would have resulted in drilling waste, including borehole excavation/drilling muds/cuttings and drilling cores. Information had been circulated that indicated that cuttings and muds were disposed of at a local landfill site, and that drilling cores were sent for processing at another location.

Scope of the case

12. The complainant contacted the Commissioner on 20 June 2014 to complain about the way his request for information had been handled.
13. The Commissioner considers the scope of this case to be to determine if EA has correctly applied regulations 12(5)(a) and 12(5)(e) of the EIR to the withheld information. The withheld information comprises of the names of several companies involved, or potentially involved with the waste disposal.
14. In further correspondence with the Commissioner the complainant questioned why EA were able to apply a different exception to that originally cited. This issue is dealt with under 'Other matters' at the end of this decision notice.

Reasons for decision

Regulation 12(5)(a) – public safety

15. Regulation 12(5) of the EIR states that, for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – (a) international relations, defence, national security or public safety.
16. EA has stated that disclosure would adversely affect public safety.
17. The Commissioner's guidance on 12(5)(a)¹ states that:

¹ https://ico.org.uk/media/for-organisations/documents/1633/eir_international_relations_defence_national_security_public_safety.pdf

"49. The term public safety is not defined in the EIR. But in broad terms this limb of the exception will allow a public authority to withhold information when disclosure would result in hurt or injury to a member of the public. It can be used to protect the public as a whole, a specific group, or one individual who would be exposed to some danger as a result of the disclosure.

50. The hurt or injury could be to the physical or mental health of those affected. However, the Commissioner does not accept that worry or stress equates to an adverse effect on mental health."

Adverse effect under regulation 12(5)(a)

18. To successfully apply Regulation 12(5)(a) public authority must show that disclosure "would" have an adverse effect - not that it could or might have such an effect.
19. EA explained that operations of hydraulic fracturing have attracted great public and media interest and considerable public opposition. In the main this has taken the form of lawful peaceful protest. However, EA further stated that it was aware that some protests had been unlawful and potentially dangerous. EA provided copies of media articles, and further evidence the EA has received from other public authorities, with its response to the complainant and to the Commissioner in support of this.
20. EA also stated that it had previous experience through an incident in 2013 where there was significant protest involving either Cuadrilla as an operator (Balcombe where they were carrying out conventional drilling operation) or other operators at shale gas sites, e.g. at Barton Moss near Manchester. During July and August 2013 at Balcombe and over winter 2013/2014 at Barton Moss protests resulting in intimidation of staff took place at the sites and there were incidents of tailgating contractors.
21. EA stated it had considered the matter further and consulted with Cuadrilla and police forces. EA concluded that it should also have relied on regulation 12(5)(a) in relation to the identity and location of waste disposal contractors, as disclosure of this information would adversely affect public safety.
22. In addition EA indicated it had taken further advice from relevant security organisations that had experience of other supporting companies and subcontractors to the hydraulic fracking industry being targeted and they were concerned about EA releasing the identity of the actual and potential waste disposal contractors to the public.

23. Furthermore, EA stated that there was a concern that disclosing this information would lead directly to criminal activity at sites. There is also evidence that haulage firms used in relation to shale gas exploration that do have their details open to the public have been threatened and intimidated.
24. Cuadrilla has also reported incidents of trespass on its premises and in relation to its supply chain. One such incident in 2011 led to a successful prosecution and conviction. There has also been a petrol bomb attack on the home of an employee of a contractor to the shale gas industry.
25. EA has provided additional information which is not appropriate to detail in this decision notice.

The complainant's position

26. The complainant provided detailed arguments to rebut the media articles that EA had provided in support of its application of regulation 12(5)(a). He also noted that some of these incidents had occurred after his request had been refused and therefore considered they were not relevant at the time.
27. The complainant went on to counter the arguments EA had presented with regard to the police advice it had received. The Commissioner has taken these into consideration but has not felt it necessary to detail them all in this decision notice.
28. The complainant considered that the examples he provided were sufficient for him to believe that the EA's application of regulation 12(5)(a) should be rejected.
29. The Commissioner acknowledges the detailed arguments presented by the complainant, and the strength of feeling that these types of issues raise.
30. He has also reviewed the small amount of withheld information.
31. The Commissioner notes that EA stated disclosure would *probably* lead to direct action and criminality and provided articles related to previous incidents. He therefore has to consider if EA has shown that disclosure "would" have an adverse effect - not that it could or might have such an effect. The Commissioner consequently sought further clarification from EA.
32. EA explained that although further incidents had occurred after its response to the complainant it did not consider them to be irrelevant, rather that it was further evidence to support the application of the exception.

33. Having considered all the arguments presented the Commissioner considers that EA has shown that disclosure "would" have an adverse effect. The exception is therefore engaged. The Commissioner has reached this finding following the approach set out in his guidance, referenced above. He is satisfied that the risk to the public e.g. the contractors, was significant enough to be classed as a risk to public safety. The evidence supplied clearly illustrates that the risk is beyond public nuisance or inconvenience caused by protest. The Commissioner has also been mindful not to assume that criminal breaches of the law automatically lead to a public safety risk. The Commissioner has considered the complainant's arguments that some of the evidence submitted post-dated the request but he is satisfied that this risk still existed at the time of the request.
34. Though the exception applies, the information is still to be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner has therefore gone on to consider the public interest test.

Public interest test

Arguments in favour of disclosing the withheld information

35. The Commissioner considers that there is a public interest in openness, transparency and accountability.
36. There is clearly a current and high level of public interest and participation in the debate over the use of shale gas and hydraulic fracturing processes in the UK. The Commissioner acknowledges that the process of fracking is still being assessed in terms of some aspects of its safety and viability, though significant expert evidence is now emerging.
37. The complainant argued that earlier this year in Pennsylvania, USA drilling "sludges" were rejected at a disposal site because they contained radioactivity higher than the landfill site's limit.
38. He further stated that in the UK there was no such limit. The complainant therefore considered it is very much in the public interest to know what testing if any is done by any waste receiving site. This cannot be done without knowing where those sites are.
39. The complainant further stated that by refusing to divulge information on method, location of waste disposal, including drilling wastes, the public is denied proper consultation.

40. If a local tip is used for waste dumping to landfill (as from the Annas Road drillings) then the public there has the right to know about the possibility of waste build-up. When disposal sites are not known, wherever they may be, the public near those sites is deprived of the right to ask questions or express concern.
41. The fact that the waste from fracking has to be regulated by the EA indicates that there is some level of risk to the public that needs to be managed. The Commissioner recognises that there is a specific public interest in the public understanding who is handling such wastes.

Arguments in favour of maintaining the exception

42. EA stated that it would only withhold information if it was sure that disclosure would cause substantial harm. It considered that disclosing this information would probably lead to direct action and criminal activity leading to a real threat of physical harm to a section of the public (waste company employees) and in addition a consequent endangerment to their mental health.
43. There is a very strong public interest inherent in the exception in ensuring the safety of the public is not affected by the disclosure of this information and in particular where it is the safety of employees carrying out their lawful activities of work whose safety is being threatened. In relation to the limited amount of information that has been redacted for reasons of public safety in this situation, this factor alone carries significant weight.
44. EA and the Department of Energy and Climate Change (DECC) has made a significant amount of information public, and information was released as part of this request. Information is available on the website GOV.UK: <https://www.gov.uk/government/publications/about-shale-gas-and-hydraulic-fracturing-fracking>. This page contains links to other documents and guides covering different issues linked with hydraulic fracturing.
45. In relation to individual sites, when applications for permits are submitted there is a period of consultation following advertisement when a large number of documents are made available to the public through its consultation portal at <https://consult-environment-agency.gov.uk/portal>.
46. Hydraulic fracturing also requires planning permission to be in place from the local council and in this case that is Lancashire County Council, whose planning register is here: <https://www.lancashire.gov.uk/planningregister>. The register makes available to the public the application for planning permission along with

supporting documents which include an Environmental Statement that details the findings of the required Environmental Impact Assessment of the site.

Balance of the public interest

47. The Commissioner will invariably place significant weight on protecting individuals from the risk to their public safety. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision. In this case the Commissioner has no doubt that the complainant has a valid reason for seeking the information and has provided strong arguments supporting disclosure. However, when placed against the risk that disclosure potentially poses, the Commissioner considers that the arguments in favour of maintaining the exemption outweigh those in favour of disclosure.
48. In reaching this decision the Commissioner recognises that there is a general public interest in the disclosure of environmental information because it supports the right of everyone to live in an adequate environment and ultimately contributes to a better environment. The factors in favour of disclosure listed above command considerable weight but the Commissioner does not find them to be compelling enough. Although the wastes clearly pose some risk to the public, and are regulated by the EA, the Commissioner is not persuaded that there is enough evidence to suggest that the risk from the wastes are so significant as to make the case for disclosure compelling. As a non-expert regulator in this area the Commissioner considers that it is reasonable for him to rely on generally authoritative sources such as the Royal Society² to reach this conclusion.
49. The Commissioner acknowledges the complainant's arguments that the public has a right to know information related to wastes from fracking. However, he has to balance this against the rights of the individuals employed to be able to go about their lawful work without threat or intimidation.
50. The Commissioner also acknowledges that the majority of protestors do so peacefully and lawfully. However, there are clearly some individuals who choose to protest unlawfully.

² Royal Society and Royal Academy of Engineering. Shale gas extraction in the UK: a review of hydraulic fracturing, June 2012. <http://royalsociety.org/policy/projects/shale-gas-extraction/report/>

51. Finally, the Commissioner considers that disclosing the companies involved and therefore location of the waste sites, would not inform the public of what testing is being carried out on the waste it receives which is one of the complainant's main concerns . This is because the EA has explained to the Commissioner's satisfaction that it did not hold testing information at the time of the request or that the contractors hold it on the EA's behalf.
52. Having considered the arguments presented the Commissioner finds that EA has correctly applied regulation 12(5)(a) of the EIR to all the withheld information.
53. As all the withheld information is exempt under regulation 12(5)(a) the Commissioner has not gone on to consider the application of the exception at regulation 12(5)(e).

Other matters

Late reliance on regulation 12(5)(a)

54. The Commissioner acknowledges the complainant's concern that EA only introduced regulation 12(5)(a) after the Commissioner has advised that he had received the complaint.
55. A public authority is able to raise a new exemption or exception either before the Commissioner or the First Tier Tribunal and both must consider any such new claims.
56. In the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010), the Upper Tribunal was asked to consider whether a public authority could cite a new exemption or exception either before the Commissioner or First Tier Tribunal and whether or not those bodies had any discretion to refuse to consider such a late claim. Judge Jacobs commented "...I analyse the nature of the duties imposed on the Information Commissioner and the First-tier Tribunal as requiring them to consider any new exemptions identified by the public authority" (paragraph 18).
57. The Upper Tribunal based its decision on an accumulation of arguments, to include:-
 - i. The Upper Tribunal said that "...no administration is perfect. Documents can be misplaced, overlooked or difficult to find. Officials may fail to identify the potential application of exemptions. They may also make accidental mistakes, for

example, by wrongly overwriting an earlier notice or incorrectly completing a template when drafting a section 17 notice" (paragraph 35). It went on to say that "...the processing of a request for information is an administrative matter, not a formal decision-making one. There is nothing in the nature of that process that involves a commitment and the interests of good administration require that the public authority should at least have the ability to correct accidental mistakes" (paragraph 42).

- ii. It was also suggested that the wording on section 17 supports this approach – "...I note that under section 17(1) the public authority must identify the exemption on which it is 'relying'. That suggests a current position. If the authority were committing itself for the future, I would have expected 'relies'" (paragraph 34).
 - iii. The Upper Tribunal was also concerned that if late claims were not allowed, the interests of third parties that were identified at the point of the authority raising a new and late exemption may not be protected. It asked "...why should the protection of the interests of third parties be a matter of discretion?" (paragraph 28) and it went on to say "in summary, a public authority is allowed to change its position to disclose information. If it is not allowed to change its position to rely on another exemption, this may hamper a full consideration of the public interest and prevent the interests of third parties being taken into account" (paragraph 29).
58. As a judgment of the Upper Tribunal is binding, the Commissioner is therefore bound by its decision that a public authority can, as of right, make a late claim of an exemption or exception and that both he and the First Tier Tribunal must consider any such late claim.

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

Steve Wood
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