

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

Decision notice

Date: 8 November 2018

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

Decision (including any steps ordered)

1. The complainant has requested the Environment Agency (EA) to disclose three documents relating to the Redcliffe Bay Petroleum Storage Depot (RBPSD). The EA initially responded, refusing the entire request under regulation 12(4)(a) of the EIR. However, during the Commissioner's investigation the EA also sought to rely on regulation 12(4)(b) of the EIR for one of those documents.
2. The Commissioner's decision is that the EA is entitled to rely on regulation 12(4)(a) of the EIR for the first two documents named in the request. For the third document, the Commissioner has decided that the EA incorrectly applied regulation 12(4)(a) of the EIR but, alternatively, it was entitled to rely on regulation 12(4)(b) of the EIR.
3. The Commissioner does not require any steps to be taken as a result of this notice.

Request and response

4. On 18 January 2018, the complainant wrote to the EA and requested information in the following terms:

"1. Redcliffe Bay PSD Environmental Risk Assessment Addendum Ref UK 14-22544

2. Redcliff Bay Environmental Risk Assessment Review Ref FO61 ER001 Rev 5 3 Feb 2017
3. RBPSD ERA Environmental Cost Benefit Analysis Ref UK 14-23847 Feb 2017"

"...please may I ask the EA to release now all 3 reports under the 2004 EIRegs?"

5. The EA responded on 14 February 2018. In relation to document one, the EA advised the complainant that this was subject to an earlier request he made in November 2017 and the Commissioner's investigation under case reference FER0718339. Regarding document two, it advised that it has never held this document and therefore wished to rely on regulation 12(4)(a) of the EIR. In respect of document three, the EA confirmed that it did hold this document for a short period of time. However, it is no longer held and so again it wished to rely on regulation 12(4)(a) of the EIR.
6. The complainant requested an internal review on 19 February 2018. He limited his request for an internal review to documents two and three and expressed dissatisfaction that the EA does not or no longer holds this information.
7. The EA carried out an internal review on 6 April 2018 and notified the complainant of its findings. It confirmed again that it does not hold documents two and three of the request and therefore it was satisfied that it has applied regulation 12(4)(a) of the EIR appropriately.

Scope of the case

8. The complainant contacted the Commissioner on 9 April 2018 to complain about the way his request for information had been handled. He stated that he believes these reports are currently held by the operators of RBPSD (Compania Logistica de Hidrocarburos (CLH)) and the EA as regulator on a combined basis. He commented that if the EA has studied at least two of the reports and has had full access to all three for over 12 months, then by all intents and purposes, it holds the requested information for the purposes of the EIR.
9. The Commissioner will first consider the application of regulation 12(4)(a) of the EIR to documents one and two. In relation to document three, she will first consider the application of regulation 12(4)(a) of the EIR but if she finds that this does not apply to this document the Commissioner will then go on to consider the application of regulation 12(4)(b).

Reasons for decision

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

10. Regulation 12(4)(a) states 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.
11. The exception is subject to the public interest test. Although in reality the Commissioner cannot envisage what public interest considerations there would be to consider if she is satisfied that the public authority does not hold the requested information.

Document one

12. The complainant requested a copy of this document in an earlier request made in November 2017. This was subject to a separate investigation under case reference FER0718339 and a decision notice was served on 7 March 2018. It can be accessed via the following link:

<https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2258366/fer0718339.pdf>

13. As the notice explained, the Commissioner upheld the application of 12(4)(a) of the EIR, as the EA did not hold the requested information at the time of the request. The notice explained why the information was not held at this time and why this would continue to be the case until at least August 2018, when it does expect to receive the requested information as part of the COMAH Safety Report five year review.
14. The Commissioner understands that the circumstances have not changed between this request and the request the subject of this notice. Her decision as outlined in the above notice therefore still stands and the EA is entitled to again rely on regulation 12(4)(a) of the EIR.

Document two

15. The EA has explained that it has never held this document. During a site inspection at RSPSD on 29 March 2017 the existence of an Environment Risk Assessment Review document was mentioned to one of its staff but the document was not available to them to see. The staff member did not at that time need to see the document for the purposes of regulating the site so they did not ask for it to be provided to them. The staff member has at no time seen or received the document so they cannot carry out any specific searches of their records for information they or the EA more widely has never held.

16. The EA confirmed that it has also checked with all officers who are involved with regulating the site and other CLH COMAH sites and none of them have ever held or seen the document. It confirmed that it does anticipate that a version of this document will be provided to the EA at the time of the review of the current Safety Report for the RBPSD later in 2018.
17. The Commissioner is satisfied that the EA is entitled to rely on regulation 12(4)(a) of the EIR for this element of the request. It has confirmed with confidence that it has not ever held or seen this document for the purposes of regulating the site. It has confirmed that it has checked with all staff members involved in the regulating of this site and others, not just the staff member that inspected the site in March 2017, and the information is not and has never been held.
18. Similar to the previous case investigation under case reference FER0718339, the EA has confirmed when it is likely to receive a version of this document. This will assist the complainant in making a fresh request for the information at the relevant time.

Document three

19. The EA has confirmed that the document was held for a short period of time but it no longer holds it. It explained that a paper copy was provided to the member of staff who carried out a site visit on 29 March 2017. That member of staff took the document back to his office and scanned it so that he could circulate it to colleagues for consideration. This was done by saving the document as a pdf onto a secure network drive with limited access. The member of staff then emailed three other staff members to advise them of the folder into which the document had been saved so that they could together assess whether the EA should comment at that time on the method of analysing cost benefit being proposed by CLH in that document. The EA has stated that no other members of staff within the organisation were informed of the existence of the document in this network folder. However, one member of staff consulted an officer at the Scottish Environmental Protection Agency (SEPA) about the proposed methodology. This EA staff member has no specific memory of sharing the document with SEPA but it would be normal practice to do so via email, attaching the document from the shared network file in the format in which it was stored as they would have done many times in the past in consulting with colleagues at SEPA. In this case, the member of staff has confirmed that would be a pdf. After considering the document over some weeks and providing comments back to CLH in June 2017, both the paper copy of the document and the electronic version of the document stored on the network drive were destroyed. The EA commented further that the member of staff who deleted the document cannot specifically recall

whether he used a Deslock shredder but he may have done, as that is a practice they adopt for all sensitive documents. It therefore stated that it no longer holds this document but it does expect to receive the latest version later in 2018 when the review of the current safety report for the RSPSD is due.

20. The Commissioner considers the process of deleting paper records is straightforward; files can be shredded or incinerated and the information permanently destroyed. It is not as easy with electronic information where deletion is usually a three stage process. Information is moved to a recycle bin. It is then deleted from the recycle bin, the space it occupies is then designated as free which means it can then be overwritten. Only once it has actually been overwritten is the information completely erased and therefore not held.
21. Whether information is held by a public authority is determined as an issue of fact. In the Information Tribunal hearing of *Catherine Whitehead v the Information Commissioner (EA/2013/0262; 29 April 2014)* the tribunal said:

“if requested information is in (or on) back-up tapes which are themselves held by the public authority or is in some way still stored on the public authority’s server, we consider that it is clearly “held” by the public authority.”
22. However, for information covered by FOIA, regard must be had to the wider implications of section 1(4) (for routine amendments and deletions made between the date of receipt of the request and the statutory time for compliance). It is the Commissioner’s view that if a public authority is not obliged to communicate information deleted in the period between receipt of request and disclosure it would not be reasonable to require a public authority to communicate information that has been deleted before the request has been received. So under FOIA if a public authority can demonstrate that the requested information is not held in “live” records because it was deleted before the request was received it will not be obliged to establish and advise the applicant whether, as a matter of fact, this deleted information has been overwritten or provide the applicant with any deleted information that hasn’t been overwritten.
23. Under the EIR, however, there is no equivalent of section 1(4). The Commissioner’s view is that if environmental information is held by the public authority at the time of the request, it must be provided unless an exception applies. If information requested under the EIR is held in circumstances where the deletion has been undertaken in accordance with the retention schedule of the authority’s records management policy, public authorities can consider refusing the request under

regulation 12(4)(b) of the EIR. However, if a public authority was to decide that the request was not manifestly unreasonable then it would need to establish whether the deleted information was, as a matter of fact, held.

24. In light of the above, the Commissioner asked the EA some further questions about what searches had been undertaken to try and locate and retrieve both the paper and electronic version.
25. The EA stated that all relevant members of staff have checked their computer files and confirmed that there is no saved version of the document stored there. It explained that it has a records retention policy that sets out what files and information should be recorded and kept. In relation to COMAH sites records that need to be kept are retained for 7 years after a site ceases to be regulated under COMAH and then they are reviewed for destruction. This would include the latest agreed version of the site's safety report and associated documents. There is however no requirement or business need to keep an early draft of a document that has been submitted for comment and which will be submitted formally in final format as part of a process for approval of a revised safety report. Therefore once the document had been considered it was deleted from the network drive and the paper version securely destroyed and none of the officers saved the document elsewhere on any other computer or paper files.
26. The EA explained further that the relevant members of staff have all reviewed their emails on Outlook and do not hold a copy here as, in line with its systems, all emails for these officers auto delete after 6 months. One officer does have an extension on their auto delete. They hold an email advising them where the document had been stored prior to deletion but do not have a copy of the document itself.
27. It stated that none of the officers had any business need to retain the document. It was only held for comment and once this had been given it was destroyed in accordance with its records management procedures.
28. The EA made enquiries at SEPA too (having received the document in its own capacity as a separate public authority but also potentially holding it on behalf of the EA, if indeed it is still held). SEPA confirmed that all relevant searches have been carried out for this document and it is not held. The officer who received the document from the EA checked his electronic email files and they no longer hold it. Emails at SEPA are either deliberately deleted or remain in email files. There is a back up made of emails daily but if an email is deleted on the day it is received it may never be backed up. If it is backed up this is on a rolling 3 month basis so after 3 months emails and other electronic files cannot be recovered by their IT team. SEPA's electronic network file for the site

has been searched and there is no email from the EA providing this document to SEPA and no version of the document as provided by the EA. It has stated that there are emails dated 30 May to 1 June between SEPA and the EA commenting on the document but there is no longer any record of the document itself. SEPA has however said that it may hold an earlier version of the document which was provided to it by CLH but it does not hold any later version that the EA provided.

29. In terms of contacting IT with regards to the possibility of retrieving and restoring the deleted document, the EA confirmed that it wishes to rely on regulation 12(4)(b).
30. The EA stated that it adopts a records management policy and requires officers to follow that. It would impose an unreasonable burden on it as a public authority were it to request that email accounts of officers or individual network drives are restored from back ups each time a request for information is received in order to consider whether it continues to hold in back ups any information that relates to a request. For the year end of March 2018 the EA received 36,379 requests for information. It stated that if it was expected to search back ups for all requests for information this would have a significant impact on its ability to comply with requests in accordance with the statutory timeframes outlined in the legislation and place an enormous burden on it as an organisation in terms of time and resources.
31. The EA confirmed that it does not know when the document was forwarded to SEPA by email or when this email was deleted from the officer's sent items and then their deleted items. The officer routinely deletes sent items and deleted items every 4 to 6 weeks. Sometimes if there is a shortage in space in this particular individual's email account or staff are asked by the EA to delete items because there is a shortage on space across the authority as a whole items are deleted sooner. It is even possible that it was deleted the same day if the staff member was routinely carrying out this exercise that same day. It is also possible that the member of staff did not delete the email as they would usually do so and it was therefore held in their sent items until it was auto deleted at 6 months.
32. The EA confirmed that it can ask its IT support to restore an account with a particular email address on a particular date and time. But because it does not know when the email was sent and how long it remained in the account until it was deleted it would just have to offer a date when it thinks it is most likely that the email was in the sent box or a variety of dates. IT would have to restore the email account, more realistically, for various proposed dates to make the exercise more successful and then a member of staff would have to check each restored sent box to see whether the email can be found. This would

take several hours of work and would effectively be a trial and error exercise. The task of restoring an email account has to be carried out over a weekend as well due to the burden on the system of recreating the account.

33. A similar approach would have to be taken for the document saved to the network drive. Initially and more quickly, IT can send through a list of the files in a folder at the relevant date they are given so that can be checked to see whether the relevant file is listed and then a request to restore the content of the relevant folder can be made only if the file is there. But the EA would have to select a particular date for the recreation. It also stated that it is the officer's usual practice to destroy the pdf document in the secure folder after comments are given using the Deslock shredding tool. This would be effective to make a document, even if recovered, illegible on the day it is deleted. That being said back up copies of the document made and stored before the date of deletion would still have been available and legible in back up storage until overwritten at the date of the request.
34. The Commissioner does not consider regulation 12(4)(a) of the EIR applied at the time of the request. For this to apply, the EA was required to determine as a matter of fact that the document was not held. The EA has not said this. It has said that the document was no longer held in its "live" records and had been deleted in accordance with its records retention policy at the time of the request. It has also said when questioned further that it is possible that the deleted record was still held in back ups and snapshot back ups that would have been taken at the time of the request.
35. However, the Commissioner is satisfied that regulation 12(4)(b) of the EIR applies to this element of the request and she will now explain why.

Regulation 12(4)(b) – manifestly unreasonable

36. Regulation 12(4)(b) of the EIR provides grounds for refusing manifestly unreasonable requests. If information requested under the EIR is held in circumstances where the deletion has been undertaken in accordance with the retention schedule of the authority's records management policies, a public authority can consider refusing the request under regulation 12(4)(b). For example, the public authority can say that the request is manifestly unreasonable because, having adopted good records management policies and procedures such as the regular deletion of 'low level' records, it would be an unreasonable burden to be required to search for such deleted records.
37. The EA has confirmed that there was no business need to retain a copy of this document once it had provided the necessary comments. As

there was no business need the document was deleted and therefore destroyed in accordance with its records retention policy. The Commissioner considers it is good practice to regularly delete low level records or records that are no longer required for the business needs of an organisation. The EA has explained in this case what tasks would be potentially involved in trying to locate and restore the deleted information and how time consuming and burdensome this would be. She is therefore satisfied that regulation 12(4)(b) is engaged.

38. In terms of the public interest test, the Commissioner considers the public interest arguments in favour of adopting good records management policies and avoiding the burden of searching through deleted records needs to be weighed against the value of the deleted information.
39. The EA has said that the complainant has on occasion requested certain documents, all being early versions of documents that relate to assessing risks following improvements being made that were agreed between the EA and the Health and Safety Executive (HSE) as Joint Competent Authority and the operator CLH for RBPSD. It acknowledges that the complainant lives close to the site and has made several requests for information about it to the Oil and Pipelines Agency (the previous operator), the Ministry of Defence, the HSE and to the EA; some of which have been considered by the Commissioner previously and the First-tier Tribunal. It also acknowledges that there is a high level of public interest in informing local people of the presence of such sites near them, actions to take if there is an incident, if they hear an alarm and how they will be made aware of incidents. It stated that it is understandable that they will have a significant and clear interest in understanding the safety measures that are in place at the site and in the risks to and safety of the local people and environment.
40. However, it is of the opinion that it has made a huge amount of information available to the complainant over the course of the past few years and engaged with him to assist with his concerns. The EA disagrees with the complainant that it is a document that it should have received and held as record on the site file. It was shared with it for comment in advance of the next safety report review. Once the EA had commented on it, it was no longer needed for business purposes and was therefore deleted in accordance with its records retention policy. It has informed the complainant several times when it is likely to receive the requested information; this being later in 2018 when it will receive the revised safety report. It has said that when it does receive the revised safety report and accompanying documents it will be creating redacted versions (redacted for national security) which will then be made available to the public on request.

41. The EA argued that there is little public interest and value in the requested information in draft form. It was simply provided to it for comment as part of the process the operator was going through in order to prepare their update of the safety report. It considers there are stronger public interest arguments in favour of maintaining the exception in this case. It argued that there is a strong public interest in not imposing an excessive administrative burden on a public authority in responding to information requests. Although it may have been possible to have retrieved and restored the deleted information at the time of the request at a relatively low financial cost (cost to EA to be paid to its IT provider), it would still have taken officers several hours of time and resource checking recovered email account folders and network folders at different dates to try and find the document. It stated that it was difficult to say how many different dates would have had to have been restored and therefore how many hours spent, but in total and including searches that were already made of officers of their "live" records, the EA estimated that in excess of 18 hours could easily be spent by officers. If you then add the time of the IT specialist staff the estimate is even greater.
42. It stated that there is a significant public interest in public authorities having a records management procedure that ensures that information is stored in "live" files when needed for the business purposes of the organisation and to comply with the relevant laws. There is significant public interest in ensuring that unnecessary information is deleted whether actively or by auto-deletion, so that public authorities are not holding and storing information (with all of the financial and information risk implications of that in terms of information security) for longer than is necessary.
43. The Commissioner has considered the public interest arguments on both sides. She acknowledges the general public interest in transparency and accountability and the benefit to the public of providing access to recorded information at an early stage. For the complainant and the local community she also understands that there are ongoing concerns about the safety of the site and in ensuring that it is being appropriately managed and regulated by the appropriate authorities.
44. However, in this case, she agrees with the EA that there are stronger public interest arguments in favour of maintaining the exception in this case. She notes that the requested information was a draft document submitted to the EA by the operator in advance of the up and coming revised safety report. It was simply provided to the EA for comment to then inform the operator and its preparations. The final revised safety report and accompanying documents are not due for submission until later this year (although by the time of writing, this may have already occurred) and the EA has already given assurances that it will make a

redacted version of these documents available to the complainant and the public on request.

45. The Commissioner considers there is little value and public interest in requiring the EA to try and locate and restore the deleted draft document at considerable time and expense, considering that it was only a draft and not the final version and the final version is likely to now have been submitted or will be very shortly. It has explained what would be involved in doing this and the Commissioner is satisfied that if it was expected to try and recover and restore the deleted information in this case it would place an unreasonable burden on the EA. The Commissioner agrees with the EA there is a strong public interest in not imposing an excessive administrative burden on a public authority in responding to information requests.
46. The Commissioner also agrees that there are strong public interest arguments in favour of public authorities having good records management policies and in actively and auto deleting information that is no longer required for business purposes.
47. For the above reasons, the Commissioner has concluded that the EA is entitled to rely on regulation 12(4)(b) of the EIR for this element of the request and that the public interest is best served by maintaining this exception.

Right of appeal

48. 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

49. 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.
50. 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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