

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 October 2021

Public Authority: Plymouth City Council
Address: Civic Centre
Plymouth
PL1 2AA

Decision (including any steps ordered)

1. The complainant requested information relating to Davenport Energy from Waste Facility in Plymouth. Plymouth City Council (the council) initially declared the request vexatious. However, on review it provided some information and said that other information is not held. The complainant believes that more information is held, that some of the information which was disclosed is inaccurate, and that the council has not responded to all of his requests and questions.
2. The Commissioner's decision is that the council has not complied with the requirements of Regulation 5(1) in that it has not responded to some sections of the complainant's request for information. She has also decided that the council did not comply with Regulation 5(2) in that it did not provide this information within 20 working days after the date of receipt of the request. However, she also finds that the council was correct to apply Regulation 6(1) to refuse to provide information in response to some of the requests in the format requested. She has also decided that no further information is held in response to some parts of the request for the purposes of Regulation 12(4)(a).
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.

- To respond to the complainant's requests, outlined in annex B, as required by the EIR.
4. The council must take these steps 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. Following a number of earlier requests for information, on 20 August 2020 the complainant wrote to the council and highlighted details of requests which he believed the council had not responded to previously. He also sought to highlight some previous requests where he believed that the information which was provided in response was inaccurate. The requests are set out in Annex A to this decision notice.
6. The council responded on 27 August 2020 and refused the request, applying section 14 of the FOI Act (vexatious).
7. The complainant asked the council to review its decision, and the council provided its internal review on 24 November 2020. It responded to some of the requests and provided further information to the complainant.

Scope of the case

8. The complainant contacted the Commissioner on 27 November 2020 to complain about the way his request for information had been handled.
9. He argues that the council should hold further information and argued that not all of the information which he requested has been disclosed to him.
10. The complainant's further grounds for complaint revolve around a failure to disclose information to him, inaccurate data being provided, and a failure to respond to some parts of his request.
11. The Commissioner has no powers to consider whether the data disclosed is accurate or not. This is not therefore considered further within this decision notice.

12. The Commissioner is aware that the complainant believes that MVV is subject to the EIR in its own right. This is not a point which is considered further in this decision notice, however. The Commissioner's analysis in this decision notice relates specifically to the request to the council of 20 August 2020 and the council's response to that request.

Reasons for decision

13. The Commissioner notes that the requested information relates to the emissions, the measurement of emissions, and the equipment involved in the running of an EfW Facility. The information therefore falls within the definition of environmental information set out in Regulation 2(b) and 2(c) of the EIR.
14. The EIR provides a right to request recorded information from a public authority. They do not provide a direct right to ask for explanations of data, or to ask direct questions of public authorities. Regulation 5(1)(5) does however provide that:

"(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used."

15. In essence, therefore, for some information, further details regarding the collection and measurement of data falling within the scope of Regulation 2(b) can be requested by a requestor.
16. Additionally, the First-tier Tribunal has previously decided that where information is held which would answer a question that has been asked by a requestor, that information should be considered for disclosure in response to the question.

Have all of the complainant's questions been responded to?

17. Regulation 5(1) of the EIR provides that, subject to the exemptions within the Regulations, a public authority that holds environmental information shall make it available on request.

18. In its response to the Commissioner the council recognised that it had not responded to all of the requests made by the complainant which were highlighted to it by the Commissioner from the request of 20 August 2002. It therefore recognised that it needs to disclose further information to the complainant in order to meet its obligations under the EIR.
19. The Commissioner therefore requires the council to respond to the requests outlined in Annex B to the complainant, as required by Regulation 5(1).

Regulation 12(4)(a)- Information not held

20. The council clarified that it does not hold the following information and explained the reasons why it does not hold the information.
21. In response to question 2 it clarified that no information is held relating to the commissioning period as this was a testing phase where it was ensuring that the equipment was running properly.
22. In response to request 6(c) the council confirmed that the initial information was provided by the council, and that MVV, the company who manages the facility, do not hold this information. It said therefore that no further information is held in regard to this part of the request beyond that already disclosed to the complainant in response to his request.
23. In regard to question 6(d), it confirmed that MVV created the information which was provided to the complainant.
24. In response to question 7, which relates to reports where the emissions exceed permits, the council clarified that there are a number of different levels of exceedance. Whilst the emission levels were exceeded, it said that these did not breach the threshold for exceedances, which is a different, higher threshold. Therefore, as they did not exceed the reporting threshold, they were not required to be reported to the Environment Agency. Therefore, no information is held falling within the scope of this part of the complainant's request.
25. In response to question 8 the council said that it has already explained to the complainant that the regulator requires only that MVV publish the information from service commencement which was 10 September 2015. The half hourly CEMS Monitored readings are not included on the MVV website as they are not required to publish this level of detail. It clarified however that the data has been updated only to add a missing two-week period at the beginning of service commencement and

considered that this this is the "alteration" that the complainant references in his complaint.

26. Additional information was however provided to the Commissioner and the council is therefore required to respond again to the complainant as part of the step required of the council within this notice.
27. In response to question 9 the council clarified that MVV do not hold the requested data, and that the information which *it did* disclose to the complainant was provided from its own records.

The Commissioner's analysis

28. The complainant argues that further information should be held by the council. The relevant exception within the EIR for information which is not held at the time that a request is received is Regulation 12(4)(a).
29. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
30. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
31. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.
32. During the course of her investigation, the Commissioner will usually ask the council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how it established whether it held further information within the scope of the request.
33. The Commissioner is required to establish, on a balance of probabilities, whether any further information *is* held which falls within the scope of the complainant's request for information.

34. If the council has carried out appropriate searches of the areas within its records, then, unless there is evidence to the contrary, she will accept the council's position that no further information is held on the basis of the searches it has carried out. Similarly, if the council can provide substantive reasons why it would not hold the information requested then, in the absence of evidence to the contrary, the Commissioner will accept that, on a balance of probabilities, no information is held.
35. Under the circumstances of this case, the council has sought to clarify why it has responded in the way that it has rather than to specify the actual searches which it, or MVV, carried out in order to determine whether relevant information is held. It has provided the complainant, and the Commissioner with full explanations why the information requested is not held.
36. Whereas the complainant may believe that it is a legal requirement that the information he has requested is held, where the council is adhering to the requirements it considers it must operate under, such as the Environment Agency permits and licences, then the council and MVV may not hold the level of detail which the complainant would like them to.
37. The Commissioner has considered both the arguments of the council, and of the complainant in this instance. Taking into account the additional information which she is requiring to be disclosed within this decision notice, she is satisfied that the council has provided appropriate and thorough explanations as to why the information is not held.
38. There is no contradictory evidence available to the Commissioner that indicates the Council's position is wrong.

The Commissioner's conclusions

39. Taking into account the information already identified and identified for further disclosure by the council, highlighted above, the Commissioner is therefore satisfied that, on a balance of probabilities, no further information is held falling within the scope of the complainant's requests for information.

Regulation 6 – form and format

40. Regulation 6(1) provides that:

"Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format."

41. Regulation 6(2) provides that:

"If the information is not made available in the form or format requested, the public authority shall –

(a) explain the reason for its decision as soon as possible and not later than 20 working days after the date of receipt of the request for the information;

(b) provide the explanation in writing if the applicant requests; and

(c) inform the applicant of the provisions of regulation 11 and the enforcement and appeal provisions of the Act applied by regulation 18."

42. The council explained that for some sections of parts 6 and 8 of the request it provided the information to the complainant in electronic form but declined to provide him with hard copies of the information.

43. It explained that at the time of the request it confirmed to the complainant that due to the COVID-19 Pandemic the UK Government had issued guidance advising that all individuals who can work from home should do so. It said that the council takes its duty of care in relation to the health and wellbeing of its staff extremely seriously, and all staff who could work from home were therefore doing so at the time that the requests were received. They were instructed to only enter their workplace to provide an essential service. It considered that the provision of a hard copy of information which had already been provided to the complainant electronically in response to his EIR request was not an essential service. Therefore, it refused to provide a hard copy of the information to the complainant in this format and stated that Regulation 6(1)(a) was being applied.

44. The Commissioner has considered the council's arguments. She is satisfied that under the circumstances described it was reasonable for the council to refuse to re-provide the information to the complainant in hard copy form given the circumstances at the time of the request.

45. The Commissioner's decision is therefore that the council was correct to apply Regulation 6 to refuse to provide the information in hard copy format.

Regulation 5(2)

46. Regulation 5(2) provides that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
47. In this case, the council only noted that it had missed responding to some parts of the complainant's request in responding to the Commissioner's questions.
48. It has not applied exceptions to withhold the information, it simply missed responding to these parts of the request due to the voluminous correspondence, and the detailed nature of the requests received from the complainant.
49. The Commissioner is therefore satisfied that the council has failed to comply with the requirements of Regulation 5(2) as regards this information.

Right of appeal

50. 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

51. 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.
52. 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

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A – information requests

Request of 20 August 2020

"1.The actual Start date of the commissioning period when chimney emissions were monitored.(as the date provided doesn't relate to the CEMS Equipment testing period).

2.The Equipment Testing Period for each CEMS Monitoring System from start to end date for :

- i)Durag - D-R800. Serial Number: 01242271 (Duty)*
- ii)Durag - D-R800. Serial Number: 01242272 (Standby)*
- iii) MCA 10 HWIR. Serial Number 039 (Duty)*
- iv) MCA 10 HWIR. Serial Number 40 (Standby)*
- v)Thermo-Fid TOC Serial Number ? (Duty)*
- vi)Thermo-Fid TOC Serial Number ? (Standby)*

3.The serial no's of all the listed CEMS equipment are incorrect, please provide the actual serial numbers.

4.Ashttp://4.As requested previously but not supplied :

'Please list the contractors and provide the scheduled maintenance and calibration plans for all of the installed CEMS Equipment.'

We have two maintenance and calibration periods per year under our permit. We schedule these typically around May and October each year. The contractors are:

- CEMS Solutions UK Ltd (hardware and equipment)*
- Element Material Technology Ltd and/or Socotec UK Ltd (emissions testing)*

please supply

a) The Annual scheduled maintenance and calibration plan test results for all of the installed CEMS Equipment.(from Feb 2015 to the present day)

b)The actual positioning and range settings of each piece of Installed CEMS Equipment including sensors and control units for

- i)Durag - D-R800. Serial Number: 01242271 (Duty)*
- ii)Durag - D-R800. Serial Number: 01242272 (Standby)*
- iii) MCA 10 HWIR. Serial Number 039 (Duty)*
- iv) MCA 10 HWIR. Serial Number 40 (Standby)*
- v)Thermo-Fid TOC Serial Number ? (Duty)*
- vi)Thermo-Fid TOC Serial Number ? (Standby)*

As the reply received contains untrue information

'The CEMS equipment is located in the CEMS equipment cubicle in the Boiler House on the MVV site at North Yard, Devonport, Plymouth.

The serial numbers for the Thermo -Fid TOC Analysers are as follows:

Duty - TOC (VOC) - 039 01242271, Standby TOC (VOC) - 040 01242272'

This is another untrue statement

CH4 Methane, as a flammable gas, is not a by-product of incineration and is not present in the flue gas that CEMS monitors, therefore it is not required to be measured under the Waste Incineration Directive.

The MCA 10 HWIR gas filter correlation measuring method can 3 monitor CH4 Methane.

The usage of activated carbon produces ozone in the flue gas

5.The actual Start Date of Incineration In 2015.

a)The 1/2 hourly CEMS Monitored readings have been created for the purpose of my information requests.

b)The Daily ELV readings that have been provided are incomplete, the readings are not colour coded and they do not include Max, Min readings.

They have been created for the purpose of my request.

c)The Moor Lane table of readings supplied have been created for the purpose of my request as monitors do not just record in whole numbers For PM2.5 and PM 10.

Please confirm the creator of these tables ie.MVV Environment ,SWDWP or PCC.

With reference to the replies received concerning :

1.The Annual Pollution Inventory returns have consistently exceeded the reporting thresholds for:

Carbon Dioxide

Nitrous Oxide

Nitrogen Oxides as NO2

HCl

Mercury and other Heavy Metals

a) Please explain why these facts have not been recorded in the Annual Performance reports as annual exceeded emissions, these breaches and the PI reporting thresholds are not listed.

Please fully answer and explain in detail your reply why the Annual performance reports do not contain this information as this statement is ridiculous :

Whilst these items did exceed the reporting threshold, and were therefore reported, they did not breach the threshold for exceedances which is a different, higher threshold.

2. Please explain why there is no public record of weekly Chimney Emission data throughout the commissioning period up until 05/10/15 (this information is not contained on the website). Please provide this information.

Please fully answer and explain in detail your reply ,why would the Environment Agency authorise exceedances not to be publicly documented when these pollution levels are known to significantly damage human health and the environment ,as these information statements are implausible :

The report covers the service period from 10 September 2015 to 31 March 2016.

What report are you referring to during the commissioning period that covers this time period ?

Prior to this the plant was in commissioning. The Environment Agency does not require plants to provide this data for the commissioning period which is a testing phase to demonstrate the plant is capable of being signed off to go into full service.

Please supply the daily 1/2 hourly CEMS readings including the full daily ELV's from the 01/08/2015 to the 10/09/2015.

During commissioning activities, it is expected that permitted ELVs may be exceeded due to the need to optimise different parts of the plant. Trigger points are, therefore, agreed with the Environment Agency. If these values are reached the commissioning manager must take action (e.g., de-load the plant or shutdown).

So please confirm and provide the dates and times when that action was taken by the commissioning manager.

Also please confirm that the levels During the commissioning period exceeded the permitted levels of operation.

3. Please supply the specific yearly tonnage details for 2015, 2016, 2017, 2018, 2019 from:

- b) Street bin to incineration*
- c) Household recycling centres to incineration*
- d) Commercial & Industrial Waste to incineration*

Recycling bins were only installed in the city centre in June 2020 and so no information exists for the requested periods.

As this reply information is inaccurate for street bins, general waste and recycling have existed for many years throughout Plymouth, usually both are placed into the same vehicle and taken to the incinerator.

This statement is untrue

'Only the total amount of general waste sent for incineration is weighed.'

Please supply the overall contracted annual tonnage the SWDWP are obligated to supply MVV Environment for Incineration

4. The actual address and storage capacity details of the IBA storage Facility at Victoria wharf. Please include the different Methods of transportation and locations used listing the distance for each part of the journey starting from the MVV's site to the final destination.

This information is untrue

Victoria Wharf, Cattedown, Plymouth, PL4 0RF. Information on the storage capacity at the site is not held by MVV or Plymouth City Council. IBA was road hauled to Victoria Wharf and then transported by ship to Rock Solid in the Netherlands, Keesomstraat, 10G, Alkmaar, 1821BS, The Netherlands. We do not hold data on the distances involved.

The HSE field operations directorate served an improvement notice 307781155 against the company on 26/01/2017.

The company were instructed to install in the U-IBA storage bunker hydrogen gas monitors and a hydrogen warning system at Victoria Wharf.

Please supply this information

MVV Environment 's revised risk assessment and safety procedures for U-IBA storage and movement from site to site.

Please confirm that MVV Environment are still the only EFW company in the U.K. that use long distance transportation for unground, Unprocessed incinerator Bottom Ash.

Please confirm that MVV Environment have not fulfilled one of its planning Obligations concerning the treatment of underground, Unprocessed Incinerator Bottom Ash.

Please explain why:

The information contained in the annual pollution inventory returns and the Annual Performance Reports concerning IBA is incorrectly recorded. U-IBA is hazardous waste, and both the Annual reports and pollution inventory returns should reflect that.

It is also a planning and Environmental Permit Obligation to process unground U -IBA before transportation to lower the score marking for risk assessment.

5. Please provide a copy of the Legal independent review that was requested by PCC regarding health and environmental impacts from EFW plants on local communities in built up areas.

With reference to the information, I requested regarding the smoke related enquires/complaints

As with a lot of the other information supplied this data is also untrue."

Annex B – Requests which need to be responded to:

The Commissioner requires the council to respond to the following requests to the complainant:

- *What report are you referring to during the commissioning period that covers this time period ?*
- *Please supply the daily 1/2 hourly CEMS readings including the full daily ELV's from the 01/08/2015 to the 10/09/2015*
- *Please supply the specific yearly tonnage details for 2015, 2016, 2017, 2018, 2019 from:*
 - a) Street bin to incineration*
 - b) Household recycling centres to incineration*
 - c) Commercial & Industrial Waste to incineration*
- *The 1/2 hourly CEMS Monitored readings.*
- *(With reference to question 9 of the initial request). So please confirm and provide the dates and times when that action was taken by the commissioning manager.*
- *a) The Annual scheduled maintenance and calibration plan test results for all of the installed CEMS Equipment.(from Feb 2015 to the present day).*