

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

Date: 18 May 2022

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

Decision (including any steps ordered)

1. The complainant has requested from the Environment Agency (EA) information relating to Kingmoor Energy Recovery Facility and the correspondence and communications between the EA and the permit applicant and/or agent, Fortum Carlisle Ltd (FCL) since the submission of a referenced permit application.
2. The EA provided some information in response to the request, withholding other information under regulation 12(5)(e) EIR - commercial or industrial information and regulation 12(5)(f) EIR - interests of the information provider. The EA also withheld some personal information.
3. The Commissioner's decision is that the EA has correctly cited regulation 12(5)(e) and that the public interest favoured maintaining the exception at the time the request was made. However, by failing to provide all the relevant information within the required timescales, the EA has breached regulation 5(2) EIR.
4. The Commissioner does not require the public authority to take any further steps.

Request and response

5. On 10 September 2020, the complainant wrote to the EA and requested information in the following terms:

"I write to make a request under the Freedom of Information Act and/or Environmental Information Regulations (EIR) concerning Kingmoor ERF. The address is:
Land North of Kings Drive
Kingmoor Park Industrial Estate
Carlisle CA6 4SE

Please provide all correspondence (including emails and letters) and the notes/minutes of any telephone conversations and the notes/minutes of any meetings (including virtual meetings) between the Environment Agency and the EPR/SP3609BX/A001 permit applicant (Fortum Carlisle Limited) and/or their agent(s) since the submission of the permit application."

6. The request was formally acknowledged by the EA on 14 and 15 September 2020.
7. The EA responded on 5 October 2020 to the request. Some information was provided and some redacted. The EA cited regulation 12(5)(e), regulation 12(5)(f) and regulation 13 – personal information regarding the redacted information.
8. On 15 October 2020 the complainant asked for the following:
- "Please supply the missing air quality modelling files."
9. This was acknowledged by the EA on 16 October 2020 and passed on to the relevant team.
10. This information requested on 15 October 2020 was provided by the EA on 27 October 2020.
11. On 2 February 2021 the complainant made an internal review request regarding the 10 September 2020 request, as follows:

"With regard to the redacted information contained in the communications between the EA and the applicant, I request (under EIR 2004) that the EA reconsider its redactions and release all its communications with the EPR/SP3609BX/A001 applicant (except the names of individuals)."

12. The EA provided its internal review response on 19 March 2021. In its review it considered the exceptions it had cited in its refusal notice and maintained its position.

Scope of the case

13. The complainant contacted the Commissioner on 22 March 2021 to complain about the way their request for information had been handled.
14. In its response to the Commissioner on 9 March 2022, the EA stated that there was some additional information that should have been disclosed to the complainant. This additional information disclosed the existence of a Land Option Agreement (LOA) as the EA said it believed the fact of its existence is registered with the Land Registry and was therefore in the public domain. Additionally it was disclosing to the complainant some of the information that had been previously withheld as personal data which it had subsequently decided was not.
15. The EA also explained that whilst searching for the unredacted versions of information it had found one email chain and one single email that were within the scope of the request but had not been included in its response. This was an error and redacted versions had now been provided to the complainant. It did not accept that any of the remaining withheld information should be released.
16. The EA added that there were four emails missing from the non-redacted highlighted version of document 'Kingmoor email1'. There is one email missing from the non-redacted highlighted version of document 'Kingmoor email 2'. Although it has searched for unredacted versions of these emails, the EA believes they have been deleted since the original information was sent out.
17. The complainant excluded names from their review request on 2 February 2021. As the withheld information under regulation 13 solely consists of names and contact details of individuals, the Commissioner does not intend to include this within the scope of the case. The Commissioner therefore considers the scope of this case to be EA's citing of regulations 12(5)(f) and 12(5)(e).

Reasons for decision

Is the information environmental information for the purposes of the EIR?

18. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:

“(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)’

19. The request is for information relating to refuse/waste. The Commissioner is satisfied that the requested information concerns an environmental measure, a factor (waste) and the state of human health and safety (regulations 2(1)(c) and (d) and (f)) affecting or likely to affect the elements listed in regulation 2(1)(a).

Regulation 12(5)(e) – commercial or industrial information

20. Regulation 12(5)(e) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

21. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality.
22. The Commissioner's guidance¹ sets out that the exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:
 - The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.

The guidance explains that this test was adopted by the Tribunal in [Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012, 24 May 2010\)](#).

23. Regulation 12(2) states that the public authority should apply a presumption in favour of disclosure. This means that a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
24. In order for information to be commercial in nature, it needs to relate to a commercial activity, in this case that of the EA or FCL. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit. Amongst the examples provided in the Commissioner's guidance is:
 - Planning: information about development plans for land.
25. The exception protects confidentiality owed to a public authority by a third party, as well as confidentiality the public authority owes a third party. The Commissioner's guidance states that this was explicitly confirmed by the Tribunal in [South Gloucestershire Council v Information Commissioner and Bovis Homes \(EA/2009/0032, 20 October 2009\)](#).

The complainant's view

¹ [Commercial or industrial information \(regulation 12\(5\)\(e\)\) | ICO](#)

26. The complainant believes that all the environmental information should be released and that, in this instance, it should all be released except for the names of individuals.

EA's view

27. The EA has stated that the withheld information is not part of its consideration of the application. It was provided for EA administration purposes and, because the application has been allocated, the EA says that it is no longer relevant or required.
28. The EA set out its arguments under the four headings outlined in paragraph 22 of this decision notice.
29. The EA states that it believes the information to be commercial in nature. The withheld information relates to a commercial matter between two parties and is not in the public domain. The Commissioner has been provided with the withheld information but is unable to be more specific about its content as this would be likely to disclose the nature of the information.
30. The EA then moves on to how it considers that confidentiality is provided by law. It contends that the information satisfies the common law of confidentiality. The EA explains that the common law of confidence requires information to have been passed from one party to another in circumstances importing a duty on the receiving party to keep the information confidential. The withheld information was provided to the EA in confidence as part of discussions relating to the allocation of FCL's permit application (submitted to the EA) for allocation to a permitting officer. The information concerns private parties and the EA is not party to it. The withheld information constitutes information passed from FCL to the EA in confidence where there was no statutory obligation to do so. It was provided on a discretionary basis as background information to assist a permitting officer in facilitating the allocation of the application. By way of explanation, the EA said that its National Permitting Service operates with significant work queues. Had this not been the case, the dialogue would not exist and it would not have held the information.
31. For these reasons, the EA considers that the information attracts protection under the common law of confidentiality as the redacted information is not an application document and is not information which falls within the scope of the determination of the application. The information was provided before the application was made and solely related to EA administration/allocation of work in the National Permitting Service because of the work queue.

32. The EA states that the withheld information is not trivial and is commercially sensitive as disclosure would adversely affect FCL's commercial interests for reasons that cannot be described here but were outlined by FCL and the EA.
33. It confirmed that the information had not been disclosed to third parties and had remained internal (within the EA). Therefore, the EA considers the withheld information to have the necessary quality of confidence to meet the common law confidentiality principles.
34. The EA also considers that the duty of confidence identified arises in order to protect FCL's economic interests. It agrees with FCL (who has provided its arguments for non-disclosure) that the withheld information is commercially sensitive and confidential. The information is not in the public domain or known by those operating in the same industry. If this information was to be disclosed it would have a significant adverse effect. The EA puts forward the view that disclosure would more likely than not be liable to cause real and significant harm to FCL as it would be advantageous to any rivals because it is of commercial value. How a competitor would use this information is detailed in the EA's arguments but cannot be set out here, as explained earlier.
35. The EA considers that the requested information is confidential and to release it into the public domain would inevitably harm the confidential nature of information that was never intended for disclosure.

The Commissioner's view

36. Firstly, the Commissioner has seen the withheld information and accepts that it is commercial in nature and is not trivial. He also agrees that the information has the necessary quality of confidence as it was shared in circumstances that created an implied obligation of confidence. FCL was not obliged to provide the information as it was not part of the application document or part of the determination.
37. FCL has legitimate economic interests that have been identified by the EA. Examples of a legitimate economic interest are set out below. One or more of the bullet points apply in this instance:
 - retaining or improving market position;
 - ensuring competitors do not gain access to commercially valuable information;
 - protecting a commercial bargaining position in the context of existing or future negotiations;
 - avoiding commercially significant reputation damage; and

- avoiding disclosures which would otherwise result in a loss of revenue or income.
38. The EA has argued that the withheld information was provided by FCL to the EA under the common law of confidence. The Commissioner notes that it is the interests of the confider (in this case, FCL) that are relevant.
39. Finally, the Commissioner accepts that confidentiality would be adversely affected by disclosure because the first three elements of the four stage test as set out in paragraph 22, are met. The Commissioner considers that it is inevitable that when the first three elements have been met, the fourth element will be satisfied. In his guidance he says that disclosure of truly confidential information into the public domain would inevitably harm the legitimate economic interests that have been identified. The exception is engaged.

Public interest test

40. Whether the withheld information should be disclosed or not therefore rests on the public interest which the Commissioner will determine below.

Public interest factors in favour of disclosing the requested information

The complainant's view

41. The complainant's public interest arguments are set out in their internal review request. They argue that there are strong public interest reasons to disclose the redacted information. The complainant refers to disclosed information which they contend shows that the applicant's agent considered that the EA had requested some of the redacted information. The email from the EA to which the applicant referred (29 April 2020) stated,

"Importantly, we also need to really understand the critical path for the applicant's business, construction etc so that we can navigate the consultation process with equal regard for both the community representation and your client."

42. The complainant says that this suggests that there may be a conflict between "the critical path for the applicant's business, construction etc" and the "community representation". Their view is that there is a clear public interest reason for the disclosure of information which the EA considered was (or could have been) so significant that it may impact or conflict with/be balanced with "community representation". The

complainant considers that the public interest is heightened because the adequacy of the consultation process is disputed.

43. The complainant also argues that the information in the emails that has been disclosed indicate repeated requests from the applicant for priority consideration of the permit application. They said that the applicant's statement was not refuted by the EA in their response. However, there appeared to be some disagreement with this position, namely a response from the EA to an enquiry by an MP (22 December 2020) that "customers are treated on a first come first served basis" and "All applications go into our national work queue as they are received". The complainant states that the email of 4 June 2020 shows that the EA is willing to consider expediting the permit application on the basis of information from the applicant. Their view is that there is a public interest in disclosure because it might be considered sufficient to compromise the fairness of the system of "first come first served".
44. The public interest is best served by disclosure of the redacted information because it is not in the public interest to request information the EA does not need. If the information supplied did not have a bearing on the application (including the public consultation) that is also a legitimate interest for disclosure.
45. The complainant argues that it is not clear what criteria the EA uses for its decisions, such as those that might impact community representation and the possible expediting of all, or some aspects of its permit application considerations. It is in the public interest to know what information the EA considers to be relevant and what information influenced or did not influence the EA's decision.
46. The complainant states that an applicant is made aware that the EA may need to release information that it considered confidential, that this was communicated pre-application, and that the permitting process also makes this clear. If FCL provided this information then they presumably considered it relevant, whether the EA does or not. Therefore it should be released and made publicly available in order that the regulatory process can be seen to be transparent and fair. If FCL has provided the information for some other reason than to obtain a permit then it is in the public interest to disclose it because it indicates the possibility of a conflict of interests. There is a clear public interest in disclosing this information so that the regulatory process can be seen to be carried out without influence.
47. The complainant does not accept that the risk of an adverse effect meets the criteria stated by the EA for the withholding of information. Finally they put forward the argument that the timescale has altered and

any commercial consequences may no longer exist, may have sufficiently diminished, or may now be outweighed by public interest reasons, even if they did not before.

EA's view

48. The EA takes account of the presumption in favour of environmental information being disclosed. EA also recognises the importance of openness and transparency around how public authorities determine permit applications as it allows the public to hold those authorities to account regarding the decisions they make.
49. The EA has also considered whether the information is in the public domain and concluded that it is not. It has also assessed the importance or significance of the release of the information to the public in general.

Public interest factors in favour of maintaining the exception

The EA's view

50. The EA's view is that there is a general public interest in protecting the commercial interests of private companies when they are exercising private commercial activities and upholding the common law of confidentiality in respect of information provided in confidence and which a public authority could not have requested under its statutory powers.
51. Although the EA recognises that the public has a right to know how public authorities reach their decisions, the withheld information is not part of the EPR permit application and it has no bearing on the determination of the application. The EA cannot see the wider public benefit in disclosing information concerning private parties which is commercially confidential and was provided on a confidential basis. On the contrary, the EA's arguments are that there is a substantial benefit to the wider public in preserving the principle of commercial confidentiality and common law confidentiality. Its view is that disclosure and the harm to FCL's economic interests are weighty factors in favour of withholding the requested information.
52. The EA contends that it would only withhold information if it was more likely than not that there would be an adverse effect if disclosure occurred. It describes the central public interest as the protection of the legitimate economic interests of FCL. It is not in the public interest to disrupt a fair and balanced marketplace by releasing into a competitive marketplace information relating to its commercial activities.

53. It goes on to argue that there is a strong public interest in ensuring fair commercial competition in a mixed economy. Disclosing confidential third party information to the world at large would not be fair as it could put them at a disadvantage. The EA provided an example which cannot be repeated here without disclosing the nature of the withheld information.
54. The EA states that the common law duty of confidence arises between FCL and the EA. Releasing this confidential information into the public domain would potentially breach the common law duty of confidence and risk legal action. The EA could potentially incur significant costs defending its disclosure position which is not in the public interest.
55. As a public sector body the EA must consider how disclosure would prejudice its interests. It states that FCL provided the information, in confidence, as background information relating to a permit application and was under no legal obligation to provide it. The EA's interests would be harmed significantly by private business becoming reluctant to provide information voluntarily and discuss matters in an open and frank manner.
56. Finally, the EA states that it has provided the complainant with a considerable amount of information in response to their request. The disclosed information relates to the determination of FCL's application details and the EA's decision-making process as the EA considers that there is high public interest in favour of the disclosure of information relating to the determination. The EA has withheld limited information which it considers to be commercially sensitive and was provided voluntarily on a confidential basis. The withheld information relates to one matter and it considers that disclosing it would not provide additional context to the EA's determination of the permit application as it does not form part of that determination.

The balance of the public interest

57. The EA has argued that the public interest lies in upholding the common law principle of confidentiality and not disadvantaging third parties in a market economy by interrupting that market and disadvantaging certain players.
58. Having looked at the withheld information, the Commissioner agrees that it is very limited. The EA has provided most of the information, whilst withholding a small amount of commercially sensitive information. He does not accept that it is in the public interest to release this information because it is not in the interests of FCL or the public interest generally. Leaving aside any consideration of whether the withheld

information influenced the determination of the application or the expediting of the application, the Commissioner needs to consider where the balance of public interest lay at the time of the request. At the time the information was requested, the disclosure of this information would have placed FCL at a commercial disadvantage set against which is the public interest in being provided with environmental information relating to the application for an environmental permit to develop a waste facility, the majority of which has been provided. The Commissioner has decided that the likely adverse effect to FCL overrides full transparency in this instance. Therefore the Commissioner accepts that the withheld information should not be disclosed.

59. As the Commissioner has decided that it is not in the public interest to disclose the withheld information at this time and that regulation 12(5)(e) has been correctly cited, she has not gone on to consider the citing of regulation 12(5)(f).

Regulation 5(2) – Duty to make environmental information available on request

60. Regulation 5(1) of the EIR states that: “a public authority that holds environmental information shall make it available on request.”
61. Regulation 5(2) of the EIR says that the public authority must make the requested information available as soon as possible and no later than 20 working days after the date of receipt of the request.
62. The EA explained to the Commissioner that it was releasing to the complainant the fact that there was an LOA, disclosing some information that it had previously cited as personal information which it had found was not, and disclosing a chain of emails and one single email that had been missed in its previous response to the complainant. The complainant submitted their request for information on 10 September 2020 but the EA only provided those items listed in the previous sentence after the Commissioner had sent his investigation letter (9 September 2021). It is unclear when the EA provided this information to the complainant but it was well over a year after the original response had been made. Therefore the EA has breached regulation 5(2) of the EIR.

Right of appeal

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

64. 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.

65. 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

Janine Gregory
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