Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 24 June 2010

Public Authority: Environment Agency
Address: Rio House
Waterside Drive
Aztec West
Almondsbury
Bristol
BS32 4UD

Summary

The complainant requested reports held by the Environment Agency concerning the testing of incinerator bottom ash. The Environment Agency identified a draft version of one report provided to it by a stakeholder but refused to disclose this information on the basis of the exceptions contained at regulations 12(4)(d) and 12(5)(f). The complainant asked the Commissioner to consider the application of these exceptions and also to establish whether the Environment Agency held any further information falling within the scope of his request. The Commissioner has concluded that the Environment Agency does not hold any further information falling within the scope of this request and that the information that has been located is exempt from disclosure on the basis of regulation 12(4)(d).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement

provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

Incinerators and Incinerator Bottom Ash (IBA) and the role of the Environment Agency ('the EA')

3. In its role as a regulator the EA is responsible for granting permits for the development of new incinerators and therefore it has to be aware of the sensitivities surrounding such developments; local interest groups often oppose the development whilst their proponents are keen to ensure that such developments become operational. Incinerator Bottom Ash (IBA) and whether it is a hazardous waste is one element that can be subject to debate. Where IBA is hazardous waste it may be much more difficult or expensive to dispose of and it may present a potentially greater risk of pollution of the environment or harm to human health.

4. Wastes are classified in legislation as:

- Always hazardous (based solely on where the waste was produced and its description);
- Always non-hazardous (again, based solely on where the waste was produced and its description); or
- Potentially hazardous or non-hazardous depending on composition and properties.

5. This means that if an individual batch of IBA from individual incinerator has significant concentrations of dangerous chemicals then it is classified as a hazardous waste; if a batch does not have significant concentrations of dangerous substances it is classified as a non-hazardous waste. Both in law and in practice it is not possible to say that all IBA will always be either hazardous or non-hazardous as it is dependent on the particular composition of each batch, even where the IBA is from the same incinerator.

6. An incinerator operator is therefore obliged to assess their IBA in order to determine whether or not it is hazardous waste. The EA provides technical guidance to assist waste producers in undertaking this process. There are fourteen hazardous properties, H1 to H14, that are considered when assessing waste. Where the waste has one or more of these hazardous properties then it is classified as a hazardous waste. H14 Ecotoxic is a particular concern with IBA.

7. Prior to July 2005, IBA had been classified and disposed of as non-hazardous wastes under the Special Waste Regulations 1996. H14 Ecotoxic was not considered in determining whether IBA was hazardous under these regulations. However in 2005:

- The Hazardous Waste Regulations and the List of Waste Regulations replaced the Special Waste Regulations, applying H14 Ecotoxic to IBA; and
- There was a change to the classification of one of the substances that may be present in IBA. A revision to the Approved Supply List reclassified zinc oxide as an ecotoxic substance.

8. The EA has explained to the Commissioner that companies or trade associations frequently approach it for undertaking assessment of IBA. This includes providing their data and assessment to ensure that they have understood the requirements correctly; questions on a specific technical issue to clarify their understanding; or interpretation issues once the data has been obtained.

Background to this request

9. The Environmental Services Association (ESA) represents the UK's waste management and secondary resources industry. The ESA approached the EA in assistance with developing procedures to ensure that their members' hazardous waste management assessment of IBA was conducted appropriately. As part of this process ESA commissioned consultants, Wrc, to undertake research. Wrc subsequently produced a report entitled 'H14 Assessment of MSW IBA'.

Public consultation

10. The EA conducted a consultation exercise between 10 September 2007 and 6 November 2007 into proposals to revise its Hazardous Waste Technical Guidance WM2. The ESA, among others, provided the EA with submissions in response to this consultation.

11. The revised guidance was published in May 2008 and the EA has explained that as a result this revision has changed the way in which it assesses waste for H14 Ecotoxic.

The Request

12. The complainant submitted the following request to the EA on 23 February 2008:

> 'Please provide me with the following information:
>
> Reports about the deployment and/development (including trials) relating to the H14 eco-toxicity test for incinerator bottom ash.
>
> This is a request for environmental information and must be dealt with under the Environmental Information Regulations 2004.
>
> Please provide the information by email. If you are not able to provide the information in this format then please explain why when you provide the information in another format'.

13. The EA responded on 30 May 2008 and confirmed that it held information falling with the scope of this request, namely information provided to it by the ESA. However, the EA explained that it considered this information to be exempt from disclosure on the basis of the exception contained at regulation 12(4)(d) because it related to incomplete data.

14. The complainant contacted the EA on 2 June 2008 and asked for an internal review to be undertaken. In asking for this review the complainant queried whether the information he sought was in fact incomplete, and thus whether it actually fell within the scope of the exception. The complainant also argued that the public interest test had not been properly considered.

15. The EA informed the complainant of the outcome of the review on 11 June 2008. In this correspondence the EA confirmed that it believed that the requested information was exempt from disclosure on the basis of regulation 12(4)(d) and expanded on its reasoning for reaching this conclusion. The EA also informed the complainant that it was also of the opinion that the requested information was exempt from disclosure on the basis of the exceptions contained at regulations 12(5)(c) and 12(5)(f) and that the public interest favoured maintaining all three exceptions.

16. The complainant contacted the EA on 22 June 2008 and argued that the EA had not given sufficient weight to the public interest in

disclosing this information and asked for this decision to be reviewed once more.

17. The EA contacted the complainant again on 1 July 2008 and confirmed that it remained of the view that the conclusions set out in its letter of 11 June 2008 were correct.

The Investigation

Scope of the case

18. The complainant contacted the Commissioner on 11 August 2008 in order to complain about the EA's decision to withhold the information that he had requested.

19. On 20 April 2009 the complainant contacted the Commissioner and confirmed that he now understood that the title of the document to which we was seeking access to was 'H14 Assessment of MSW IBA' by consultants Wrc. The complainant confirmed that it was his understanding that Wrc had been commissioned by ESA to complete this report and the ESA had provided the EA with a copy.

20. The complainant subsequently contacted the Commissioner on a number of occasions in order to provide arguments, both in respect of the engagement of the exceptions and the public interest, in support of his position that the report identified in the previous paragraph should be disclosed. The Commissioner has replicated these arguments in the Analysis section below.

21. In correspondence sent to the Commissioner in 2010 the complainant also asked the Commissioner to confirm, as part of his investigation, whether the EA held any further information falling with the scope of his request. The complainant identified a number of reasons why he believed that the report he had indentified in his correspondence of April 2009 may not have been the only information to fall within the scope of his request. Again, these arguments are replicated in the relevant part of the Analysis below.

Chronology

22. Regrettably, due to a backlog of complaints about public authorities' compliance with the Act and the EIR, there was a delay before the Commissioner was able to contact the public authority in order to begin his consideration of this complaint. Therefore it was not until 10

November 2009 that the Commissioner contacted the EA. In doing so the Commissioner asked to be provided with a copy of the withheld information falling within the scope of the request along with detailed arguments to support the application of the three exceptions cited by the EA.

23. The EA provided the Commissioner with a response on 11 December 2009. This response confirmed that the EA was no longer relying on the exception contained at regulation 12(5)(c) to withhold the information, but maintained its application of the exceptions contained at regulations 12(4)(d) and 12(5)(f). The Commissioner was provided with the draft copy of the report entitled 'H14 Assessment of MSW IBA'.

24. The Commissioner wrote to the EA again on 18 May 2010, in light of the issues highlighted by the complainant, in order to clarify whether he had been provided with all of the information falling within the scope of the complainant's request.

25. The Commissioner received a response from the EA on 28 May 2010 in which it confirmed that he had been provided with all of the information that it considered to fall within the scope of this request.

Analysis

Substantive Procedural Matters

Regulation 12(4)(a) – information held by a public authority

26. The Commissioner notes that the complainant's request did not seek any specific reports or named documents concerning the subject matter of H14 testing of IBA. Rather the request was more generic in description and simply sought:

> 'reports about the deployment and/development (including trials) relating to the H14 eco-toxicity test for incinerator bottom ash.'

27. As noted above, on 20 April 2009 the complainant informed the Commissioner that he now understood that the title of the document to which he was seeking access to was 'H14 Assessment of MSW IBA' and consisted of a report sent to the EA by the ESA.

28. However, in May 2010 the complainant noted that two submissions made to the EA in relation to its public consultation exercise described

in the Background section above, made reference to information apparently provided to the EA on separate occasions concerning H14 Ecotoxicity. The complainant explained that he was not clear whether this additional information was the same as the document entitled 'H14 Assessment of MSW IBA' or different to it. He therefore asked the Commissioner to consider this point and establish whether the EA held any further information referenced in these submissions in relation to the public consultation, and if so establish whether this information fell within the scope of his request.

29. The first submission the complainant identified was one provided by the ESA with the relevant paragraphs being those numbered 7 and 8. These read:

> '7. ESA's Members have recently undertaken extensive sampling consisting of numerous direct tests of incinerator bottom ash, using daphnia and algae, in order to provide additional comfort that these wastes are not ecotoxic (H14) hazardous wastes. The independently produced completed report concludes that UK IBA could be classed as non hazardous with a considerable margin of safety.
>
> 8. This study was carried out with the full involvement and approval of the Environment Agency. ESA would therefore welcome clarification that the revised WM2 guidance will not impact of on the conclusions of the IBA Ecotoxcity report'.

30. The second submission was from a company called Veolia Environmental Services ('Veolia') and the relevant passage read:

> 'As the Environment Agency is aware, Veolia has undertaken numerous direct ecotoxic tests using daphnia and algae on its APC residues, and physico-chemical treatment products from the treatment of APC residues, in order to support its assertion that these waste are not ecotoxic (H14) hazardous wastes'.

31. With regards to the ESA submission, the EA has confirmed to the Commissioner its understanding is that the report referred to in the above quote is that entitled 'H14 Assessment of MSW IBA'. Furthermore the EA has confirmed to the Commissioner that it does not hold any further reports provided to it by ESA that could fall within the scope of his request.

32. In providing this clarification the EA confirmed that the version of the report provided to it by the ESA in September 2007 was only a draft version. The EA explained to the Commissioner why in its further

discussions with the ESA in late 2007 and early 2008 about this draft report, it was not provided with any further updated versions of this document. (In essence the ESA was reluctant to provide the EA with further updated copies of the report in question once it was aware that the initial draft has been the subject of an information request.)

33. On the basis of these explanations the Commissioner is satisfied that that the EA does not hold any further information provided to it by the ESA which could fall within the scope of the request.

34. With regards to the Veolia submission, the EA noted that although the producers are required to assess their waste in order to determine whether it is hazardous, they are not required to provide this information to the EA. Therefore, although the EA was 'aware' that many producers undertake assessment of their waste and hold relevant records it does not follow that they automatically provide the EA with copies of these records.

35. The Commissioner considers this to be a rational explanation as to why the EA would not hold any information provided to it by Veolia which would fall within the scope of this request despite the comments in Veolia's submissions. Furthermore, the Commissioner notes that the some of the data in the draft report provided to the EA by the ESA makes reference to data taken from Veolia plants. In the Commissioner's opinion this fact adds weight to the conclusion that it is reasonable to conclude that although Veolia did not separately provide the EA with any reports which may fall within the scope of this request, the EA was nevertheless aware of the testing Veolia had undertaken in respect of H14.

36. In cases such as this where there is some dispute as to whether a public authority has identified (or disclosed) all of the information falling within the scope of a request, the relevant exception is that contained at regulation 12(4)(a). This states that a public authority can refuse to disclose information to the extent that it does not hold that information when an applicant's requested is received.

37. In reaching a determination as to whether a public authority has in fact identified all relevant information, the Commissioner has been guided in his approach by a number of Information Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held. In deciding where this balance lies the Commissioner will take into account a variety of factors depending on the nature of the case including the scope, quality, thoroughness and results of the searches carried out by the public authority and any

other reasons offered by the public authority to explain why the information is not held.

38. In the circumstances of this case in the Commissioner's opinion the EA's explanation as to why it does not hold any further information is more relevant that than any searches which it may have conducted. Having considered these explanations and for the reasons set out above, the Commissioner is satisfied that the on the balance of probabilities the only information which falls within the scope of this request is the draft version of the report entitled 'H14 Assessment of MSW IBA' which was provided to the EA by ESA in September 2007.

39. The Commissioner notes that regulation 12(4)(a) is a qualified exemption and thus subject to the public interest test at regulation 12(1)(b). However, given that regulation 12(4)(a) applies in scenarios where information is simply not held by a public authority, as opposed to situations where information is held but is exempt from disclosure or the principle of confirm or deny applies, the Commissioner does not consider it possible to apply the public interest test in this situation. This is because there is no rational consideration of the public interest that could be carried out as there would be no practical consequence of the Commissioner concluding that the public interest favoured disclosing the information given that the information is not held and thus it could not be disclosed and moreover the EIR does not place any duty on public authorities to create information which has been requested.

Exemptions

40. At the time this decision notice is being issued, the EA is relying on the exceptions contained at regulations 12(4)(d) and 12(5)(c) to withhold the report in question. The Commissioner has considered the applicability of regulation 12(4)(d) first.

Regulation 12(4)(d) – material still in the course of completion, unfinished documents or incomplete data

41. The exception contained at regulation 12(4)(d) is a class based exception which provides that a public authority may refuse to disclose information to the extent that:

> 'the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data'

42. The complainant has suggested that the withheld information would not fall within the scope of the exception for two reasons. Firstly, if the

withheld information was relevant to the public consultation undertaken by the EA, as this consultation process was completed by the time he submitted his request the information could not be said to relate to an unfinished process. Secondly, and more specifically, the complainant highlighted the fact that in the aforementioned submissions to the public consultation in October 2007 the ESA made reference to the 'independently produced report **completed** [emphasis added] report'. The complainant therefore argued that it was illogical for the EA to refuse his request submitted some months later in 2008 on the basis that the report was incomplete.

43. The EA has argued that the withheld information does fall within the scope of the exception because the version of the ESA report it holds is a draft one which was subsequently supplemented with revised data and calculations.

44. The Commissioner is satisfied that the version of the report held by the EA is clearly a draft version and therefore an earlier version of the 'completed report' referred to the ESA submissions to the EA on the public consultation. Consequently the Commissioner accepts that the requested information falling within the scope of this request is incomplete in nature and can be correctly described as a draft and thus falls within the scope of regulation 12(4)(d). The Commissioner does not believe that the fact that the consultation process was complete at the time of the complainant's request affects the application of regulation 12(4)(d). This is because the report in question remained a draft version despite the completion of either the final version of the report or indeed the completion of the consultation process identified by the complainant.

45. However, regulation 12(4)(d) is a qualified exception and therefore the subject to the public interest test at regulation 12(1)(b).

Public interest arguments in favour of maintaining the exemption

46. The EA has argued that disclosure of the withheld information would be misleading and give an inaccurate representation of issues relating to testing of IBA if released. In the circumstances of this case this could not be mitigated by the EA setting the information into context because it does not hold the revised data and calculations which were made to this draft and thus it argued that it was not in a position to make any technical caveats. The EA argued that such an outcome would not be in the public interest because confusion would arise in what is already a difficult area of regulation and moreover would be inconsistent with its current guidance on H14 testing of IBA. Furthermore, such a consequence could result in the EA's staff having to spend time dealing

with enquires about this potential confusion which would not be an effective use of public resource and moreover distract from the real debate about the revised guidance on ecotoxcity testing.

47. The EA has also argued that disclosure of the information would not be in the public interest because it could harm the provision of information to the EA on a voluntary basis. (The EA has provided evidence to the Commissioner which demonstrates how the ESA's willingness to voluntarily supply it with information was negatively affected following receipt of this request.) The EA has explained that such a consequence would not be in the public interest because it would undermine its effectiveness as regulatory public body for the following reason: The EA highlighted the fact that constructive and open discussions with companies or trade associations, which involve the voluntary provision of information to it, form a central part of its role in ensuring that hazardous waste is appropriately managed. The EA argued that it was clearly in the public interest for a public authority to have a degree of public space in which to discuss issues and reach agreements with third parties and for those third parties to have access to public authorities to discuss areas of particular and legitimate concern to them without facing public scrutiny.

Public interest arguments in favour of disclosing the requested information

48. In his correspondence with the EA the complainant highlighted the following public interest arguments in favour of disclosing the withheld information:

49. Under the European Landfill directive, which is incorporated into national law, there is a requirement for hazardous and non-hazardous waste to be separated. Clearly, it is in the public interest to comply with our treaty and legal obligations. Disclosure of the requested information would demonstrate compliance with these obligations.

50. Where contaminated ash (hazardous material) is disposed of into inadequately licensed landfill then it may have detrimental effects on public health. Non-hazardous landfill is engineered to a lower level of containment than that for hazardous waste. Communities living near non-hazardous landfill may be put at unexpected risk by disposal of hazardous waste into it, when or if containment fails. Protection of public health is in the public interest.

51. The cost of remediation measures for landfill sites which are ineffective in containing their licensed material may be substantial. Further, in some cases, remediation may not be possible. Local authorities and

public monies may be called upon in the event of containment failing and its contents being released into the environment. Therefore, it is in the public interest to ensure that material destined for non-hazardous landfill is actually, non-hazardous.

52. Staff at incinerators may be put at unexpected and unacceptable risk if the material with which they are working is not properly classified and handled. It is in the public interest to see that there is proper provision for safe working. Ensuring that there is proper provision of information to the public in this regard is in the public interest.

Balance of the public interest arguments

53. In theory, the Commissioner does not disagree with rationale behind the arguments identified by the complainant: it is clearly in the public interest to ensure that legislative requirements concerning hazardous waste are complied with; that both the public living near incinerators and staff involved in their operation are provided with sufficient protection from hazardous waste; and that public money is effectively spent with regards to the management of such waste.

54. However, for the purposes of assessing the actual weight that should be attributed to public interest arguments both in favour of disclosing the information and those in favour of maintaining the exception, the Commissioner has to focus on the content of the information in question. That is to say, to what extent would disclosure of the withheld information actually serve the interests in disclosure and to what extent would disclosure result in the consequences identified by the public authority?

55. The Commissioner understands that by the time of the complainant's request in 2008 the EA's and ESA's discussions on H14 and IBA had moved on from the approach set out in withheld information, not least because of the separate work undertaken by the EA as a result of the public consultation exercise. In effect, by the time of the request the draft report which comprises the withheld information could be described as an abandoned piece of incomplete research. Therefore although there is no doubt an indisputable and compelling public interest in achieving the aims set out by the complainant, given the status of withheld information, i.e. incomplete and effectively abandoned, it is difficult to see how its content would further these particular aims. Furthermore the requested information, although detailed in nature, simply represents one submission to the EA from one its stakeholders about proposed approaches by incinerator operators to assessing IBA. The withheld information does not represent a discussion of legislative requirements concerning testing of

IBA or even guidance on this topic issued the EA. Therefore the Commissioner believes that the nature of the information itself means that likelihood of its disclosure serving the aims identified by the complainant is also limited.

56. However, this is not say that there is no public interest in disclosure of the information at all. Although the approach set out in the withheld information may have been abandoned, the Commissioner believes that there is still an inherent and weighty public interest in disclosure of information in order to ensure that public authorities are open and transparent. Disclosure would at least provide the public with details of the approach the ESA made to the EA in September 2007 concerning the testing of IBA and thus provide some insight to the way in which the EA interacts with its stakeholders. Moreover, even if this insight would be limited in nature, given the subject matter in question and the potential impact on the environment and public health of IBA, the Commissioner accepts that this argument should not be dismissed lightly.

57. With regard to the public interest arguments in favour of maintaining the exception, in general the Commissioner is usually sceptical about arguments which suggest that disclosure of information could mislead or cause confusion. In the Commissioner's opinion in many cases any information disclosed under the EIR (or under the Act) can be set into some sort of context in order to alleviate these effects.

58. However in the circumstances of this case, and for the reasons set out by the EA above, the Commissioner accepts that it would very difficult for this information to be placed into context and as a consequence for the EA to be able to counteract any confusion. The Commissioner believes that it would be strongly against the public interest for confusion to arise in such a contentious and difficult area of regulation, especially given the potential consequences of IBA being incorrectly classified. Furthermore, the Commissioner believes that it would be strongly against the public interest for the EA to be disrupted from its normal activities by having to deal with queries emanating from such confusion.

59. As a counter argument to this point, in his submissions to the Commissioner, the complainant highlighted the fact that the EA's own guidance explains that IBA has to be considered on a case by case basis in order to establish the hazardous properties of each batch. Therefore, any disclosure of information by the EA that IBA may not be hazardous cannot be considered as misleading.

60. In the Commissioner's opinion the established and accepted need to assess batches of IBA on a case by case basis does not remove the fact that disclosure of the withheld information may be misleading. In the Commissioner's opinion the technical and detailed nature of the withheld information may in itself influence the manner in which the case by case assessment of IBA is conducted.

61. The Commissioner also believes that in the circumstances of this case, the argument concerning the voluntary provision of drafts to the EA needs to be given significant weight. It would clearly by strongly against the public interest if the EA was not provided with the opportunity to comment on and review draft material produced by stakeholders because it would lose the opportunity to test the robustness of emerging views through free and frank discussion, thus compromising its efficiency as a regulator. In attributing such weight to this argument the Commissioner believes that it is vital to note that the EA does not have the statutory powers to ensure that such information is provided to it. The Commissioner also notes that the evidence supplied to him by the EA demonstrates that disclosure of this information would be very likely to result in a change in the ESA willingness to provide it information. Moreover the Commissioner believes that it is reasonable to conclude that disclosure of the withheld information may also affect the EA's relations with other stakeholders and more specifically their willingness to provide the EA with information on a voluntary basis.

62. As a counter argument to this point, the complainant suggested that there was another explanation as to why the ESA may become less willing to share information with the EA. The complainant drew the Commissioner's attention to a memorandum dating from March 2008 which in his opinion demonstrated that the ESA's dissatisfaction with the EA's decision not to adopt its preferred approach to H14 Ecotoxicity assessment but rather to adopt the approach set out in the EA consultation documentation. The complainant also highlighted the fact that it was important to remember the fact that the ESA is a trade association lobbying the EA on behalf of incinerator companies. The interests of the incinerator companies are not necessarily in line with the public interest because stricter environmental regulation which increases environmental protection may also increase operating costs and reduce profits.

63. Again, although the Commissioner recognises the logic of the complainant's arguments – the public interest may not always be served or best protected by the actions of the private sector – in the circumstances of this case he does not believe that the specific points identified by the complainant materially affect the balance of the public

interest test. In the Commissioner's opinion if a trade association disagrees with the actions of a regulator it is more rational to assume that instead of refusing to engage with that regulator in the future, it will lobby that regulator more frequently and/or more vehemently in order to ensure that actions of the regulator are changed to the benefit of its members.

64. In conclusion, whilst the Commissioner recognises that disclosure of the withheld information would contribute to the general public interest in openness and accountability, in addition to providing some insight into how stakeholders interact with the EA, the content of the withheld information would not particularly further a public debate or reassure the public that IBA waste is being properly assessed. Instead it is the more recent EA guidelines and work on the testing of H14 that would achieve the latter aims. In contrast the Commissioner believes that the two arguments in favour of disclosure need to given particular weight for the reasons set out above. The Commissioner therefore believes that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

65. In light of his conclusion in relation to regulation 12(4)(d), the Commissioner has not considered the EA's reliance on regulation 12(5)(f).

Procedural Requirements

66. Regulation 14(1) requires public authorities to provide an applicant with a refusal notice which sets out in writing which exceptions it is relying on to refuse to provide requested information. Regulation 14(2) requires that his refusal is provided within 20 working days following the date of receipt of the request.

67. In the case the complainant submitted his request on 23 February 2008 and the EA did not issue its refusal notice until 30 May 2008. The EA therefore breached regulation 14(2) of the EIR.

The Decision

68. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- The only information held by the EA which falls within the scope of this request is the draft version of the report entitled 'H14

Assessment of MSW IBA' provided by the ESA to the EA in September 2007.

- This information is exempt from disclosure on the basis of regulation 12(4)(d) and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the information.

69. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The EA breached regulation 14(2) by failing to provide the complainant with a refusal notice within 20 working days following the date of receipt of the request.

Steps Required

70. The Commissioner requires no steps to be taken.

Right of Appeal

71. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 24th day of June 2010

Signed ……

Steve Wood
Head of Policy Delivery

Information Commissioner's Office
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Water Lane
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SK9 5AF

Legal Annex

Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

"the Act" means the Freedom of Information Act 2000(c);

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate record authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other 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 elements of the environment referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;
"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

(a) a body referred to in section 80(2) of the Act; and

(b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

"transferred public record" has the same meaning as in section 15(4)of the Act; and
"working day" has the same meaning as in section 10(6) of the Act.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) 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.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

Regulation 12(5) 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;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.