

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

**Decision notice**

**Date:** 7 March 2018

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

**Decision (including any steps ordered)**

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1. The complainant has requested the Environment Agency (EA) to disclose a copy of the Environment Risk Assessment (ERA) for the Redcliffe Bay Petroleum Storage Depot (RBPSD). The EA responded advising the complainant that it does not hold the requested information and cited regulation 12(4)(a) of the EIR.
2. The Commissioner's decision is that, on the balance of probabilities, the EA does not hold the requested information and is therefore entitled to rely on regulation 12(4)(a) of the EIR in this case.
3. The Commissioner does not require any further action to be taken.

**Request and response**

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4. On 3 November 2017, the complainant wrote to the EA and requested it to disclose the ERA for the RBPSD.
5. The EA responded on 9 November 2017. It stated that it does not hold the requested information and was therefore refusing the request in accordance with regulation 12(4)(a) of the EIR.
6. The complainant requested an internal review on 16 November 2017.

7. The EA carried out an internal review and notified the complainant of its findings on 19 December 2017. It stated that it remained of the opinion that it does not hold the requested information and was therefore correct to cite regulation 12(4)(a) of the EIR.

## Scope of the case

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8. The complainant contacted the Commissioner on 3 January 2018 to complain about the way his request for information had been handled. He stated that he finds it difficult to accept that the EA does not hold this information when it is responsible for regulating the RBPSD. He commented that he cannot understand how the EA can regulate the RBPSD without having this document to hand and if it is regulating the RBPSD without this information it may be doing so to prevent him and other members of the public from knowing and understanding the risks. The complainant also suggested that the ICO should compel the EA to obtain this information from its source in order to disclose the information to him.
9. Firstly, the Commissioner wishes to point out that she has no powers under the EIR or the FOIA to compel a public authority to *obtain* information from another organisation or public authority in order to comply with a request. A public authority is only obliged to disclose recorded information it holds at the time of the request subject to any exceptions outlined in Part 3 of the EIR or exemptions outlined in Part II of the FOIA.
10. The Commissioner's investigation has therefore focussed on whether the EA is entitled to rely on regulation 12(4)(a) of the EIR in this case. She has considered whether on the balance of probabilities the EA holds the requested information or not.

## Reasons for decision

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11. Section 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold the information when an applicant's request is received.
12. The EA stated that the complainant's request concerns the ERA for the site. It considers the request to be for the updated assessment – amendments made since an assessment (Environmental Risk Assessment for COMAH, RBPSD, Reference UK13-20341) was provided to the EA with the site Safety Report on 2014.

13. It confirmed that the operator, Compania Logistica de Hidrocarburos (CLH), has produced an Addendum to the ERA (RBPSD ERA Addendum Reference UK14-22544) but this is only held by CLH at this time; not the EA. It stated that it will not be sent a copy of the ERA Addendum until it is submitted to it and the Health Safety Executive (HSE), as the joint Competent Authority, and as part of the COMAH Safety Report five year review by CLH. As a result of that review the EA expects to receive a revised Safety Report and an update to the ERA (which is likely to be a final version of the above identified ERA Addendum) but not until around August 2018. It commented that it does not know if the HSE holds a copy of the document or whether the complainant has requested a copy from them; only that it does not hold the requested information at this time.
14. The EA explained that the information requested is a document being prepared as part of the five year review of the site Safety Report that will provide certain information to the EA as part of the COMAH Competent Authority for the site in August 2018. There is no requirement for the information within the Addendum to be provided to the EA before then or in some way be available for its inspection. It stated that its site officer was given access to the document during a site inspection on 29 March 2017 so that he could consider how the review of the environmental risk at the site was progressing. The site officer produced a COMAH Competent Authority Inspection Report following the site visit, dated 12 April 2017. This discussed what the site officer saw within the Addendum and at the site on that day and provided the site officer's own assessment of ongoing matters. The report also made a recommendation to CLH about ongoing work and the need for additional information when the five year Safety Report review is completed.
15. The EA advised that the Inspection Report dated 12 April 2017 has already been disclosed to the complainant on two separate occasions, redacted to remove information which would adversely affect public safety. The EA explained that this report was not released to the complainant in response to any formal request for information under the EIR but during the normal course of business. It explained further that it has been in contact with the complainant for some time about this site and has an ongoing agreement with the site officer that he is kept informed of ongoing developments and is provided with any relevant information as it emerges.
16. The EA confirmed that the site inspector did not take a copy of the ERA Addendum away with him after the site visit and therefore only had sight of it for a few hours on 29 March 2017. The site inspector then produced the Inspection Report referred to above, which details his

assessment and summary of the visit and the information he saw on that day.

17. It stated that it is normal practice for COMAH site inspectors to read documentation at a site during inspections and extract from it the information that they need as regulator, or if information is provided to them at their own offices, to extract the information they need and keep a record of that, but for documents to then be returned to the operator or securely destroyed. Some documents can be held for a short period of time by the regulator, but can then be destroyed or returned. This reduces the need to manage and keep secure sensitive documents that are not needed by the regulator to carry out their functions at that time and reduces the risks associated with the storage of sensitive information.
18. It argued that the Safety Report for the site and its associated documents will be held by the EA, but there is no business and regulatory need for other additional documents to be held. On this particular occasion the site officer reviewed the Addendum on site and felt that it was not necessary for a copy to be taken or to be retained by the EA at this time. He used information that he saw in this Addendum and other information collated on that day to produce his assessment of the site inspection.
19. The EA advised the Commissioner that it has checked with other officers to ensure that they do not hold a copy of the requested information and they do not. It holds the Inspection Report produced by the site officer after the site inspection, which refers to and discusses the Addendum but it does not hold the Addendum itself. The site inspection and report produced is sufficient for the EA's duties as COMAH Competent Authority and so there was no business or regulatory need to hold any further information or more specifically the requested information at the time of the request.
20. To be clear, the EA stated that it consulted the COMAH team regulating the site, the site officer, his manager who is also the Installations Team Manager for West Midlands, a senior adviser on COMAH issues and the Lead Unit Manager for CLH sites. It confirmed that the Lead Unit Manager has attended the site in the past but that was prior to 2017. Also two retired officers attended the site before 2013 and another officer in 2014 for an emergency exercise. None of these individuals have had access to a document produced after 2016. They have all confirmed that they do not hold a copy of the ERA Addendum. The EA explained that there are no other officers that would have reason to be in contact with CLH about this site and the site does not have other environmental permits that would mean other EA officers would be involved with it either. It is therefore confident that it has searched

thoroughly and contacted all possible members of staff within the EA about this specific request.

21. In terms of any business or regulatory need to hold this information, the EA explained further that the CLH are required to provide a Safety Report for the site to the Competent Authority (COMAH Regulations 2015 Regulation 8 and 9) and this is held by the EA, the HSE or both on some occasions. The current Safety Report is dated 2014 and was received by the EA on 28 February 2014. As a COMAH Upper Tier operation, CLH are required to review the Safety Report after five years and either then confirm to the Competent Authority that there has been no significant change and the Safety Report remains valid unchanged, or they are required, if there have been changes, to provide an update to the Safety Report (COMAH Regulations 2015 Regulation 10). The EA has therefore stated that it expects to receive the review before 28 February 2019.
22. It went on to say that CLH are rewriting their Safety Reports for all eight of their Upper Tier sites in England with a rolling programme of submissions due between November 2017 and June 2019. Following discussions with the EA, it has been mutually accepted that the current date for the submission for this site is August 2018. This is earlier than needed but that is when the EA expects to receive the revised Safety Report. There is a requirement on operators that they assess the potential impact of operations on the environment. Most operators, rather than including this in their Safety Reports, provide a separate ERA and this is the approach taken by CLH. It stated that CLH provided an ERA for the 2014 Safety Report and it is expected that they will do the same for the report due by 2019.
23. It concluded by saying again that it does not hold the requested information and there is no requirement for CLH to submit the documents before the current Safety Report expires in 2019.
24. The Commissioner is satisfied in this case that on the balance of probabilities the EA does not hold the requested information and is therefore entitled to rely on regulation 12(4)(a) of the EIR. She will now explain why.
25. The EA has explained that there is no requirement for it to hold or for this information to be submitted to it until the current Safety Report is due to expire in 2019. The EA has informed the complainant and the Commissioner when it is likely to receive this information (August 2018) and that the complainant should make a new request of information then.

26. It has explained that its site officer inspected the site in March 2017 and during his visit he had access to the current draft of the requested information. However, the site officer did not retain or take a copy for EA records and left the requested information at the site with the operator, as there was no business or regulatory need at this time to do so. The site officer produced an Inspection Report shortly after the site visit and it is noted that this refers and discusses the requested information. However, the Commissioner considers this is not the same as the requested information. The report produced discusses some of its contents and provides the site officer's own assessment of this information and other information collated during his visit. It does not contain specific extracts or quotes from the Addendum. It is also worthy to note that the complainant received a copy of this report soon after it was produced in accordance with an ongoing agreement outside of the EIR with the site officer to be kept informed and to receive information as it becomes known through the normal course of business.
27. The EA has contacted all officers that could possibly hold the requested information, if indeed it was held, and they have all confirmed that they do not hold the requested information and have not have sight of any document relating to the site since 2016.
28. The Commissioner is satisfied from the EA's explanations that it will not hold this information until later this year and that it has carried out sufficient and adequate searches to ensure that this is indeed the case. Therefore, on the balance of probabilities, the Commissioner is satisfied that regulation 12(4)(a) of the EIR applies to this request.
29. The EIR does say that this exception is subject to the public interest test. However, in reality, the Commissioner does not consider it is possible to carry out a public interest test assessment for information the EA does not hold.

## Right of appeal

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30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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 .....**

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**