

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

Date: 27 November 2024

Public Authority: Health and Safety Executive
Address: Redgrave Court
Merton Road
Bootle
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested information about hazardous sites. The above public authority ("the public authority") relied on regulation 12(4)(b) of the EIR (manifestly unreasonable) to refuse the request.
2. The Commissioner's decision is that the request was manifestly unreasonable and that the public authority was not obliged to comply with it. The public authority did comply with its regulation 9 obligation to provide advice and assistance. However, it did not comply with regulation 14 of the EIR, because its refusal notice was inadequate.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 21 May 2024, the complainant wrote to the public authority and requested information in the following terms:

"Please disclose the date (year) when HSE last updated their Land Use Planning (LUP) Risk Assessment and associated Consultation Zones for (Upper Tier) COMAH sites in the UK?"

5. The public authority responded on 21 May 2024. It relied on regulation 12(4)(b) of the EIR to refuse the request. However it did provide the name of each site.
6. On 14 June 2024, the complainant contacted the public authority again to narrow his request in the following terms:

“I ask you limit your searches to the 151 sites in Northern England ONLY and reconsider my refined request for the Year in which HSE last undertook a Land Use Planning (LUP) Risk Assessment at each Upper Tier COMAH site (e.g the risk assessment used when you advise LPAs on planning applications).”
7. Following an internal review the public authority wrote to the complainant on 16 July 2024. It stated that the revised request was also manifestly unreasonable.

Scope of the case

8. At the outset of the investigation, the Commissioner wrote to the complainant to set out his initial view of the complaint. He noted that, even though the public authority’s estimate seemed fairly high, it seemed unlikely that it could be brought down sufficiently as to no longer render the request manifestly unreasonable. He suggested that the best way forward would be for the complainant to narrow his request further – and suggested how this might be achieved.
9. The complainant did not accept the Commissioner’s view and asked for a decision notice.

Reasons for decision

Is the requested information environmental?

10. The Control Of Major Accident Hazards (COMAH) Regulations aim to prevent and mitigate the effects of major accidents involving dangerous substances that could harm either the public, or the environment, or both. The Commissioner considers this to be an environmental measure.
11. As the requested information is information on how the public authority enforces the COMAH regulations, the Commissioner considers that it is information on a measure affecting the elements of the environment and is therefore environmental information. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(4)(b) – manifestly unreasonable

12. Regulation 12(4)(b) allows a public authority to refuse a request that is manifestly unreasonable.
13. A request can be manifestly unreasonable because it is vexatious, or (as is the case here) because it would impose a manifestly unreasonable burden.
14. Under FOIA, the public authority would be entitled to refuse a request if the cost of complying would exceed £450 (the equivalent of 18 hours of staff time). The EIR do not contain a cost limit, but the Commissioner considers that the FOIA limit is a useful starting point when deciding what a “reasonable” burden might be.
15. However, the Commissioner will also balance the burden of responding to the request against the size of a public authority (and hence its ability to spread the burden amongst its staff) and the public value of complying with the request.

The Public Authority’s position

16. In its internal review, the public authority informed the complainant that:

“While HSE have a Hazardous Substances Site database which may be able to provide some of the information on these 151 UT COMAH Sites. Not all 151 COMAH Sites within this request are contained on the database as they may never have amended their consent. This would mean HSE would need to locate and review the paper file which would require special input and for each site this would take around 4 hours (0.5 days) for each site. This means out of the 151 COMAH sites, it would only take 7 sites not to be on the database for this request to be manifestly unreasonable.

“If all 151 COMAH sites happened to be on the database and HSE did not have to review paper files this request would still be manifestly unreasonable as for each case it would take 11 minutes to locate, review and extract the data for each site which totals up to 27 hours of work.”

The complainant’s position

17. The complainant explained to the Commissioner that he did not accept:

“that [the public authority] do not know, with some relative ease of reference, without need to seek manual retrieval, when this work was last undertaken, and it is my view that HSE are deliberately seeking to

prevent the dates on Land Use Planning (LUP) Risk Assessments becoming publicly known, as this would cause they considerable public embarrassment and if it became known that HSE had not, for example, undertaken LUP Risk Assessments at most of the UKs most hazardous works for an excessively long period of time.”

18. The complainant offered no evidence in support of his assertion that the HSE was able to retrieve this information more easily. However, he did note that he had recently discovered that a COMAH site near his home had not had its risk assessment updated for 30 years.
19. The complainant argued that, irrespective of the burden, there was a public value to complying with the request because it would show how well the public authority was enforcing the COMAH regulations.

The Commissioner's view

20. In the Commissioner's view, the request was manifestly unreasonable.
21. It is not the Commissioner's role to determine what records the public authority ought to keep and in what manner. The public authority is entitled to base its estimate of the burden on the way its records are kept.
22. Whilst there may be force in the complainant's suggestion that this information **ought** to be more easily retrievable, no evidence has been put forward to suggest that the public authority **can** access the information more easily than it says it can.
23. Furthermore, the complainant's point about a local site not having had its risk assessment update for thirty years would indicate that there may well be a number of old records. The longer ago since a risk assessment was last updated, the less likely that record is to be digitised. The more sites that have not been reviewed for a considerable period of time and whose records have not been digitised, the longer the public authority will have to spend searching paper files for the information – increasing the burden of complying.
24. The public authority has argued that its estimate for the burden of compliance is a minimum of 27 hours – assuming each record is digitised. However, for each file that is not digitised, it will require a four hour search of paper records to extract the relevant information.
25. Whilst the Commissioner is sceptical that four hours is a reasonable estimation, even if that time could be cut to just half an hour (thus adding twenty minutes per file to the time the public authority says it would need to consider records held digitally), it would only require nine

paper files to be searched before the time required would reach 30 hours' work.

26. Given the size of the public authority, the Commissioner considers that 30 hours of staff time would require a considerable diversion of resources away from other core activities.
27. The Commissioner recognises that safety is and must be paramount at COMAH sites, particular those in the Upper Tier, which pose higher risks. There is a public value to information that would demonstrate to the public how the public authority is regulating these sites to ensure they remain as safe as possible.
28. The fact that the public authority cannot provide this information easily might, in itself, be significant – especially if, as the complainant seems to be suggesting, the records are so inaccessible because they are so out of date.
29. Taking everything into consideration, the Commissioner is satisfied that complying with the request would impose a manifestly unreasonable burden.

Public interest test

30. Even where a request is manifestly unreasonable, it must still be complied with unless the balance of the public interest favours maintaining the exception. A public authority must also apply a presumption in favour of disclosure.
31. The Commissioner accepts that the request has a value – although he considers that the public authority admitting it cannot easily access such information may, in itself, have a public value.
32. However, the Commissioner considers that there is a greater public interest in protecting public authorities from unreasonably burdensome requests. If the complainant's purpose in making the request is to demonstrate that the public authority's information is not as up to date as it could be, he has already demonstrated as much and can demonstrate it further by seeking a smaller sample of sites, thereby reducing the burden upon the public authority.
33. Whilst informed by the presumption in favour of disclosure, the Commissioner is satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exception.

Procedural matters

Advice and assistance

34. Where a public authority is relying on a claim that a request would impose a manifestly unreasonable burden, it should provide reasonable advice and assistance to help the requester narrow their request such that it no longer imposes a manifestly unreasonable burden – or should state that the request cannot be meaningfully refined.
35. The public authority's response of 14 June 2024 did not explicitly refer to advice and assistance. However, it did provide a list of COMAH sites and set out how much time it would require, per site, to identify the requested information.
36. The Commissioner considers that a reasonable requester would have been able to combine those two pieces of information to reformulate their request such that it would impose a lower burden. He also notes that the public authority provided more explicit advice and assistance as part of its internal review.
37. The requirement under regulation 9 is not intended to be onerous and the public authority is not expected to lavish ingenuity on coming up with every possible way in which a request might be reformulated. The Commissioner is therefore satisfied that, in the circumstances of this case, the public authority met its obligation under regulation 9.

Regulation 14 – refusal notice

38. Where a public authority wishes to rely on an EIR exception, regulation 14 requires it to issue a refusal notice which states that exception and explains why the exception applies.
39. The refusal notice must also contain details of the right (under regulation 11) to seek a reconsideration (internal review) of the response and inform the requester of their right of appeal to the Commissioner.
40. The complainant has argued that the public authority's response of 14 June 2024 did not meet either of the requirements set out in paragraph 39.
41. The Commissioner accepts that the refusal notice the public authority provided did not explicitly refer to regulation 11. Nor did it use the words "representations", "reconsideration" or "internal review."

42. However, the Commissioner also notes that the last paragraph of the letter stated that, if the complainant had "any queries about this letter" that he could contact the author. It also provided a contact email address for that purpose.
43. Whilst the statutory language has not been used (and the Commissioner would recommend that the public authority adjust its templates to prevent confusion), the Commissioner has looked purposively at the wording. A reasonable person would infer, from that wording, that they were entitled to "query" the public authority's response and they have been provided with a mechanism (an email address) for doing so.
44. The purpose of this part of the legislation is to make the requester aware that they do not have to simply accept the public authority's initial refusal and to set out the route by which they can challenge it. In the Commissioner's view, the public authority's refusal notice did set out a means by which the refusal could be challenged.
45. The Commissioner also notes that complainant appears to have had no difficulty in challenging the response and that the public authority carried out an internal review, in response to that correspondence, within the statutory timeframe. Therefore, even if the complaint was genuinely unaware of his rights, he has suffered no obvious disadvantage.
46. However, the Commissioner does accept that the initial refusal notice did not inform the complainant that he had the right to complain to the Commissioner.
47. Given that the public authority did inform the complainant of his right to complain to the Commissioner in its internal review response and given that the complainant was able to submit his complaint to the Commissioner in a timely manner, the Commissioner once again does not accept that the complainant has been inconvenienced by this admission. Nevertheless, it remains a breach of Regulation 14.

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Roger Cawthorne
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Wycliffe House
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