

## **Environmental Information Regulations (EIR)**

### **Decision notice**

**Date:** 30 June 2014

**Public Authority:** Health and Safety Laboratory (an executive agency of the Health & Safety Executive)

**Address:** Harpur Hill, Buxton  
Derbyshire, SK17 9JN

### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the results of sample testing done at four wood recycling companies.
2. The Commissioner's decision is that Health and Safety Laboratory (HSL) has correctly applied regulation 12(5)(a) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### **Request and response**

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4. On 22 January 2013, the complainant wrote to HSL and requested information in the following terms:

*"Summary report, Occupational Hygiene, Implications of recycling wood, OH/2011/25*

*Project No PH00121*

*<http://www.hse.gov.uk/woodworking/recycling-report.pdf>*

*With reference to the linked document, and under FoIA 2000/EIR (I am not sure which of these this request will be covered by), would you please provide the following information:*

*Names of the 4 sites visited.*

*A copy of all sample analyses carried out by the Health and Safety Laboratory.*

*To whom were the 7 out of 15 breaches of WEL reported to?"*

5. HSL responded on 20 February 2013 and provided some information within the scope of the request. However, it refused to provide the remainder citing regulations 13 and 12(5)(b) of the EIR as its basis for doing so.
6. Following an internal review HSL wrote to the complainant on 15 January 2014. Due to the passage of time HSL reconsidered the public interest test. It concluded that at the time of the request it had correctly applied regulation 12(5)(b). However, during the internal review it considered regulation 12(5)(a) was more appropriate. It maintained its original position with regard to regulation 13.
7. The complainant made subsequent requests relating to this information, but these are not part of this complaint or dealt with in this decision notice.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 12 February 2014 to complain about the way her request for information had been handled.
9. The complainant has not appeared to challenge the application of regulation 13. Therefore the Commissioner considers the scope of this case to be to determine if HSL has correctly applied the regulation 12(5)(a) to the withheld information.

## **Reasons for decision**

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10. HSL advised the Commissioner that as part of the internal review procedure, it was established that the visits to the sites to carry out the study were voluntary. Duty holders were asked whether HSL could come onto their site to study their process and take pertinent measurements. They were not formal inspections, although a site inspector was free to accompany the research staff at any time.
11. Regulation 5(1) of the EIR provides that "a public authority that holds environmental information shall make it available on request". A public

authority may only refuse to disclose information where an exception applies.

12. If an exception applies, the information is still to be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”. This is assessed having regard to the overriding presumption in favour of disclosure. The result is that the threshold in justifying non-disclosure is a high one.

### **Regulation 12(5)(a)**

13. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
14. HSL confirmed its position that disclosure would adversely affect public safety.
15. In its response it stated that HSE recognizes that there is general public interest in openness, transparency and understanding of research projects, particularly in matters affecting the public.
16. The Commissioner notes that the threshold to engage the exceptions under regulation 12(5) of the EIR is a high one. It is necessary for the public authority to show that disclosure ‘would’ have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase ‘would’ the Commissioner has been influenced by the Tribunal’s comments in the case *Hogan v Oxford City Council & Information Commissioner* in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.
17. HSL stated that whilst there is low risk of public safety against the adverse effects of disclosing company details, weighting must also be given to the wider public interest in the ability of HSE/HSL to conduct research studies of this type. Companies that participate voluntarily in a research study would expect HSE/HSL to preserve their anonymity. If HSE/HSL are unable to protect anonymity HSE/HSL will be less likely to undertake valuable research work and this will adversely affect public safety.
18. It went on to explain that the programme to evaluate and improve the working conditions and environment in the wood industry was one that required volunteers that were able to co-operate and fully participate in the process.

19. As such HSE/HSL was and is dependent on the volunteered co-operation of a number of operators in the industry of which two withheld firms are constituent members. Their participation was based upon an affirmation of commercial confidentiality. Whilst they were aware that HSE could use their powers if a breach of health and safety was established following the outcome of the project, companies took part to show they are willing to look at ways of improving health and safety for their employees, and on this basis they each provided access to their sites. HSE/HSL are concerned that if activities and results from monitoring a particular site were disclosed it may be "fuel" for media campaigns, etc.
20. In particular, HSL stated that the volunteered information has the following characteristics which assist HSE in improving working conditions and the wider environment:
- Regular and frequent onsite monitoring which inspectors would not be able to perform themselves with such frequency or efficiency without the assistance of the site operators.
  - Willing participants whose involvement will improve their workers conditions and permit HSE to set goals and standards for the rest of the industry – enabling greater public safety all round;
  - The confidential nature of the participation is of paramount importance as participation which yields results that are not favourable, but which can be improved through advice and action, is vital to the ongoing success of such research projects which have a particular public benefit, in this case both for the immediate environment, although there will be situations where the wider environment could be improved by similar research projects too;
  - The close co-operation of the sites which could be improved and the knowledge and expertise gained from industry insiders who are participating on the basis of confidentiality and whose time and effort is freely given – all of these factors amount to a public knowledge resource within HSE, which is invaluable for improving the wood industry's safety, both locally and more widely, given the methods and materials that are used and taking into account new technologies and so forth;
  - The process is not a one-off event. HSE/HSL can and does revisit industries in order to maintain safety standards and in order to devise new standards as industry practices change. Thus the process of knowledge gathering and management is not isolated to one-off projects but works within a continuum in line with progress and altered practice and use of new substances and materials.

- It would be unfair to target volunteered information given in the process of improving industry standards, unfair to the participants and a retrograde step for HSE/HSL monitoring and safety functions. Relevant to the wider public safety question is the fact that there will be firms that will stand to benefit from the standards set by HSE/HSL as a result of the research, but, who do not have to declare their emissions. The news that firms are expected to participate on a named basis will have the net effect of putting off firms who have not previously participated in such research, as well as those who have participated in this project;
  - HSE has a continuing business need to conduct research and surveys to maintain the currency of its knowledge base, as well as informing guidance and enforcement expectations. Given the direction provided by *Good Health and Safety. Good for Everyone* (March 2011 – the Government's formal response to the review of health and safety law undertaken by Lord Young of Graffham at the request of the Prime Minister in 2010) it is essential that we keep such voluntary surveys workable and that we continue to rely on industry cooperation.
  - Research and survey visits to industry sites by our scientific staff may take place with or without HSE Specialist Inspector staff present, since some projects may require assessment of duty holder compliance with specific legal requirements related to the research. Whether or not this is the case, it is best practice to conduct research and surveys in line with the Government guidance for social research (*Ethical Assurance for Social Research in Government* – published by the Government Social Research Unit), of which key principles are the non-disclosure of identities of participants and the avoidance of personal and social harm for research participants. Consequently, unless disclosure of identity is required through inspection and/or enforcement action, we uphold the principle of retaining the anonymity of research and survey voluntary participants as far as possible. Our inability to do this would result in a general breach of ethical best practice and compromise our ability to conduct effective and worthwhile future research and surveys.
21. In particular it is the view of the HSE inspectors that to "name and shame" firms whose initial volunteered findings were not up to the standard that could be achieved would be counterproductive and detrimental to its knowledge gathering and advisory roles and as such would directly impact the public safety functions assigned to it.
22. Having considered the above arguments, the Commissioner considers the exception at 12(5)(a) is engaged. He has therefore gone on to consider the public interest test.

**Public interest arguments in favour of disclosing the requested information**

23. The Commissioner considers that there is a public interest in openness, transparency and accountability.
24. HSL acknowledged that there is a public interest in making research findings public in full, in that it would yield openness and fuller consideration of all the facts,
25. The complainant has argued that wood dust is a Group 1 carcinogen alongside asbestos, as classified by the International Agency for the Research on Cancer for the World Health Organisation in 1995 (2). Also Defra state that the majority of waste wood is known to be contaminated(3), containing brick dust, plastics, MDF, paints and preservatives and heavy metals, some of which are also carcinogenic (4) PAS 111.
26. The complainant considers that the decision by the HSL aims to protect the companies and employees with no consideration for the protection of residents living alongside this industry.
27. In addition, the complainant considers it is in the interest of the public for this information to be released contrary to the decision of the HSL. The complainant also stated that retrospectively, she had no interests in pursuing actions for elevated levels of exposure to workers above the WEL (workplace exposure levels), that is the job of the HSE. However she argues that exposure to contaminated or carcinogenic dust emissions is a contravention of our human rights under Article 8 of the HRA 1998 in respect of private and family life, health and wellbeing. It is also the human right of all citizens under International Law to the highest standard of health. She considers that the HSL decision to withhold information be overruled under the Aarhus Convention (5), which elevates the rights of the public to access environmental information. The HSL study further highlights the scarcity of data relating to this industry, and it will remain so if the authorities are allowed to withhold information in the interest of public safety.

**Public interest arguments in favour of maintaining the exception**

28. HSL stated that the detrimental effects of the disclosure on HSE/HSL research and public advisory and standard setting functions is likely to be acute with participation in such voluntary research projects likely to be hampered by the disclosure of such information. Further HSE/HSL makes substantial disclosures of its findings in such research projects and considers that these disclosures help to meet the public interest in disclosure. On balance, and taking into account the presumption for

disclosure under the Regulations, HSE does not consider that the public interest in disclosure is met in this case.

29. HSL also stated that if the withheld site information was released into the public domain, it would be highly likely to have an impact on HSE's/HSL's future research projects as duty holders would be less likely to volunteer to participate in such studies, in turn this would impact on HSE/HSL's role in providing for public health and safety.

### **Balance of the public interest arguments**

30. The Commissioner considers that there is a public interest in openness, transparency, accountability and informing the public about significant decisions which are made by public authorities.
31. However, he considers that information already disclosed in this case goes a considerable way to meeting these public interest arguments. The Commissioner has noted that the HSL has explained that it has held back information which would jeopardise voluntary participation in research.
32. The Commissioner considers that there is a very strong public interest in withholding information which identifies organisations that have taken part in this research as stated in paragraph 29. Lack of such volunteers would be likely to impact on HSL's role in providing for public health safety.
33. The Commissioner notes the seriousness of the complainant's concerns regarding the health of communities in the locale of the four sites that were tested. However, HSL has disclosed the results of the samples taken and the names of two of the companies, with their consent. The Commissioner is satisfied that the public interest is met by HSL's current disclosures and publications.
34. Therefore the Commissioner considers that, in all the circumstances of this particular case, the public interest arguments in favour of maintaining the exception outweigh the public interest arguments in disclosure.

## Right of appeal

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35. 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: 0116 249 4253

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)

36. 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.
37. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**