

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 29 October 2021

**Public Authority:** Plymouth City Council  
**Address:** Civic Centre  
Plymouth  
PL1 2AA

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

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1. The complainant has requested information relating to emission data from 2015 to 2020 from Plymouth City Council (the council). The council initially applied Regulation 12(4)(b) to refuse the request (manifestly unreasonable requests). However, during the course of the Commissioner's investigation the council reconsidered its position and disclosed the information to the complainant. The complainant, however, believes that not all of the information has been disclosed to him.
2. The Commissioner's decision is that, on a balance of probabilities, no further information is held falling within the scope of the complainant's request for information. She has, however, decided that the council did not comply with the requirements of Regulation 5(2) in that it did not disclose the information which it did hold to the complainant within 20 working days of the receipt of his request.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 19 May 2020 the complainant wrote to the council and requested information in the following terms:

1. *"The Environment Agency Annual OMA reports for Emissions to Air from 2015 to 2020".*

2. *The quarterly / annual amount of extractive monitoring Hrs/year from 2015 to 2020 for:*

- a. Ammonia*
- b. Arsenic*
- c. Hydrogen Fluoride 2*
- d. Heavy metals*
- e. Mercury*
- f. Cadmium & Thallium*
- g. Chromium*
- h. Copper*
- i. Nickel*
- j. Dioxins & Furans*
- k. PAHS*
- l. PCBs*

3. *The quarterly / annual mass emissions data from 2015 to 2020 for:*

- a. Co2*
- b. Co*
- c. So2*
- d. Ammonia*
- e. Arsenic*
- f. Hydrogen Fluoride*
- g. Heavy metals total*
- h. Mercury*
- i. Cadmium & Thallium*
- j. Chromium*
- k. Copper*
- l. Nickel*
- m. Dioxins & Furans total*
- n. PAHS total*
- o. PCB's total"*

5. The council responded on 8 June 2020. It refused to provide the information on the basis that Regulation 12(4)(b) applied (manifestly unreasonable request).

6. Following an internal review, the council wrote to the complainant on 31 July 2020. It upheld its initial decision.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 6 November 2020 to complain about the way his request for information had been handled. He argued that Regulation 12(4)(b) was wrongly applied, and that the information should be provided to him.
8. During the course of the Commissioner's investigation the council agreed to disclose the information to the complainant in its entirety. It therefore disclosed the information on 14 September 2021. The complainant, however, wrote back to it on the same date saying that not all of the information had been disclosed. The council accepted that this was an error and it therefore disclosed further information to the complainant on 16 September 2021. It also responded to a number of points raised by the complainant. It disclosed further information to him on 4 October 2021.
9. It said that, following this disclosure, no further information was held falling within the scope of the request, and confirmed to the Commissioner that all parts of the request had now been responded to.
10. On the same date the complainant wrote to the Commissioner stating that not all of the information which he had requested had been disclosed to him. He itemised three points of information which he considered had still not been disclosed, or where there were other issues with the information which had been disclosed. These included:
  - i. Not all information had been disclosed.
  - ii. There are issues regarding the positioning of the equipment and the council's/MVV's ability to provide accurate serial numbers for the testing equipment used regarding the OMA reports which the council disclosed.
  - iii. The emission information was incorrect and did not match with his request. He argued that it does not refer or relate to the quarterly/annual amount of extractive monitoring hrs/year for the listed pollutants from 2015 to 2020.
  - iv. He also argued that emission data should be held for quarter 2 of 2015 which had not been disclosed to him.

11. The Commissioner notes that point ii is not a matter which falls within her powers to consider under the EIR. She has not therefore considered this point further.
12. The following analysis therefore concentrates on whether all of the requested information has been disclosed.

## **Reasons for decision**

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### **Regulation 12(4)(a)**

13. Regulation 5(1) of the EIR sets out the duty for public authorities to provide environmental information held on request. This is subject to any exclusions or exemptions that may apply.
14. Regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.
15. The council argues that it has disclosed all of the information which it holds falling within the scope of the complainant's request. The complainant argues that it has not.
16. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
17. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

### The complainant's position

18. The complainant argues that either MVV or the council is seeking to avoid responding to parts of his request and that it has not provided all of the information falling within the scope of his request.
19. He considers that there will be an OMA report from 2015 which has not been disclosed to him. He argues that *"In 2015 an OMA report would have been produced, it had to be completed in order for the plant to continue operation this is a condition of the environmental permit"*.

20. He also considers that the information which was disclosed to him relating to emission levels does not provide the information which he requested. He argues that: "*...the spreadsheet as stated in my previous response it does not refer or relate to the quarterly/annual amount of extractive monitoring Hrs/year for the listed pollutants from 2015 to 2020 the information has not been supplied*".
21. He further clarifies that "*the hrs listed refer to the operating hrs of plant not the quarterly/annual amount of extractive monitoring Hrs/year from 2015 to 2020*".
22. He also argues that the spreadsheet should contain information relating to quarter 2 of 2015. It only contains information in relation to quarters 3 and 4.

#### The council's position

23. The council argues that it has disclosed the information it holds falling within the scope of the request.
24. The Commissioner has reviewed the request as it is written and the council's response to it. Having done so, the Commissioner is satisfied that the council has responded to all parts of the request, and where it has not been able to disclose information, it has clarified why that is the case to the complainant – generally, that the information is not held because it is not recorded or required to be recorded.

#### The Commissioner's analysis

25. The Commissioner has considered the arguments of both parties with reference to the information which has been disclosed.
  - The council has provided copies of the OMA report for 2018. The OMA report specifically states that it is the First OMA report to be produced regarding the facility. The council also clarified to the complainant that this is the sole report that has been produced as the Environment Agency conducts these assessments on a four yearly basis. There is therefore no earlier OMA report which should have been disclosed.
  - The complainant argues that further information should have been provided within the OMA, including the serial numbers of the monitoring equipment. The Commissioner notes, however, that the requested information was a copy of the report in question, which does not contain the information which he considers it should. This is not, however, a matter for the Commissioner. The request was for the OMA report, and this information was disclosed.

- The council has provided copies of its monitoring statistics. Whilst the data does not exactly match that specified by the complainant in his request, it has disclosed the information which it actually holds. The council argued that in relation to the spreadsheet, the monitoring is carried out in accordance with the Environment Agency's processes. It argues that as the extractive monitoring is a snapshot in time, this information is then multiplied to produce the relevant data. It has therefore disclosed the information it holds that is within the scope of the request.
  - The complainant argues that the spreadsheets do not contain information in relation to quarter 2 for 2015, only information on quarters 3 and 4. The council has, however, previously stated to the complainant that in its initial stages the facility was in testing mode and emission data was not produced during this period. The council's website clarifies that "*The facility began accepting waste from the Partnership in April 2015 and reached full Service Commencement in September 2015*"<sup>1</sup>. The council has therefore confirmed to the Commissioner that no relevant information is held for quarter 2 of 2015.
26. The Commissioner recognises that the complainant wishes to fully understand the emissions which the EfW is producing. He considers that the information he has requested should be held by the council and MVV, however the council argues that its monitoring is in compliance with legal requirements and its environmental permits.
27. The council has confirmed to the Commissioner that there is no further information held falling within the scope of the request. There is no contradictory evidence available to the Commissioner that indicates the Council's position is wrong.
28. The Commissioner does not consider it necessary to ask the council to carry out searches for information. The council's response meets the terms of the request for information. It has provided the OMA report, and has also provided the data it holds on the emissions which were specified, and clarified that these are not held or recorded in the manner requested by the complainant. The council stipulates, however, that its records meet the legal and permit requirements under which it operates.

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<sup>1</sup> <https://www.plymouth.gov.uk/binsrecyclingandwaste/southwestdevonwastepartnership>

29. The Commissioner has not been made aware of any requirement on either the council, or MVV to record the information in the manner stipulated by the complainant within the licences and permits which are in place.
30. The Commissioner notes, for the benefit of the complainant, that the EIR only relates to information which is actually held by an authority in recorded form. A public authority is not required to create new information in order to respond to a request. The Commissioner has no powers to require the council to create or record information.
31. On this basis the Commissioner has concluded that, on the balance of probabilities, no further information is held falling within the scope of the complainant's request for information.

**Regulation 5(2) – time for compliance**

32. Regulation 5(2) of the EIR provides that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
33. The complainant made his request for information on 19 May 2020.
34. The council provided all of the information which it holds by 4 October 2021.
35. This falls outside of the 20 working days required by Regulation 5(2).
36. The Commissioner's decision is therefore that the council's response did not comply with the requirements of Regulation 5(2).

## Right of appeal

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

38. 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.
39. 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 .....**

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