ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FS50615142

Dated: 11th. August, 2016

Appeal No. EA/2016/0218

Appellant: **Gerald Evans**

Respondent: The Information Commissioner (**"**the ICO**"**)

Before

David Farrer Q.C.

Judge

and

Henry Fitzhugh

and

John Randall

Tribunal Members

Date of Decision: 30th. January, 2017

The appellant appeared in person

The ICO did not attend but made written submissions

Subject matter:

FOIA s.1(1)(b)

Whether the public authority (The Water Services Regulation Authority ("OFWAT")) held the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that OFWAT did not hold the requested information at or near the date of the request.

The appeal is therefore dismissed.

Dated this 30th. day of January, 2017

David Farrer Q.C.
Judge [Signed on original]

Relevant Statutory Provisions

Environmental Information Regulations, 2004 ("The EIR") reg. 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;

- - - - -

REASONS FOR DECISION

The Background

1. Mr. Evans has been for many years a zealous and highly knowledgeable critic of the water industry and its service to domestic consumers. He has been in correspondence, often disputatious in tone, with OFWAT, the British Standards Institute ("the BSI") and the water supply and disposal companies ("the water companies") since the early 1990s.

2. Two important issues have been in the forefront of his concerns. The first is the notorious loss of water through leakage sustained in every region of the United Kingdom, which has serious financial and environmental consequences. The second is the persistent failure to improve the accuracy and working life of domestic meters through adherence to relatively coarse 500 micron mesh in their filters. He explained at the hearing the link between the two, as he perceives the position.

3. He considers that the different parties in the water industry referred to above have failed, indeed refused, to answer his objections to the policies that they have

maintained on both issues. He has repeatedly asserted, both to them and to the ICO and the Tribunal in the course of these proceedings, that their deliberate inaction in the matter of meter filters amounts to the commission of fraud on the public. He included in the agreed bundle a short memorandum on the law of fraud to support his contention.

The request

4. On 9th. December, 2015, Mr. Evans made the following request to OFWAT –

"Could you please let me know the average total production cost of getting a cubic metre of water to a customer? The total figure should cover all relevant costs such as holding it in reservoirs, treating it to make it drinkable, including energy, distribution, filtration, administration, all the ancillary and capital costs".

5. OFWAT 's initial response was the provision of the sale price of a cubic metre of water. When Mr. Evans pointed out that this was not what he requested, it stated, on 1st. February, 2016, that it did not hold the requested information but offered a means of calculating the approximate figure from the water companies' annual accounts and demonstrated such a calculation.

6. Following Mr. Evans' request for an internal review, OFWAT maintained its denial and explained that its statutory functions did not require it to hold or obtain the gross production price requested. Mr. Evans was satisfied that such information was necessary to its functions and therefore must be held. He complained to the ICO as soon as he received OFWAT's denial and pursued it following the internal review. From the outset he drew attention to the water meter issue and alleged fraud in the water industry linked to the refusal to provide information.

The Decision Notice ("the DN")

7. In support of his complaint Mr. Evans provided extensive evidence to the ICO of the deficiencies of domestic water meters and the problems of water leakage, both of which failings he attributed to a plot to defraud consumers.

8. In its responsive letter to the ICO dated 27th. June, 2016, OFWAT stated that it did not hold the requested information because it did not need to hold it. It controlled prices, monitored the water companies' performance and ensured their financial health. It held the total operating costs but this did not include "ancillary or capital costs". The water companies all provided wastewater services and did not distinguish between the capital costs attributable to those services and the costs of water supply. Nor were their corporation tax payments broken down as between supply and waste disposal.

9. In the DN the ICO proceeded on the basis that the requested information was environmental information as defined in EIR reg. 2(1). Applying the civil standard of proof, she found that OFWAT did not hold the requested information. Mr. Evans appealed.

The Appeal

10. Mr. Evans made three points in his grounds of appeal -

    (i) It is incredible that OFWAT should not hold or be readily able to calculate the production costs of a product that it regulates.

    (ii) Its failures to require an improved design for water meters or to act to reduce losses from leakage or to disclose such losses prove that it im-

properly protects the water companies to the prejudice of consumers, whose interests it is supposed to promote.

(iii) This wrongful collusion with the water companies explains OFWAT's refusal to provide the requested information which it holds or could easily obtain.

To his grounds of appeal was attached a voluminous bundle of documents largely devoted to water meters but alleging other forms of fraud on the consumer by the water companies. In a report to his M.P. entitled "The Water Industry Fraud and Cover – Up", he described the continuing use of inadequate filters for domestic water meters as a fraud involving the meter manufacturers, the water companies, BSI, OFWAT and successive governments. The water companies made dishonest profits from the provision of replacement meters and from compensation obtained for the under – recording of water flow which resulted from particulate blockage of the filters and the other parties identified above colluded in this activity.

11. In addition to this material, he submitted correspondence and DVDs which made the same points repeatedly.

12. His oral submissions at the hearing covered the same ground. In answer to the Tribunal, he accepted that all this evidence was tendered by way of analogy, to persuade the Tribunal that OFWAT had, over many years, repeatedly concealed information, shamelessly collaborated with the water companies to cheat the consumer and lied to him, so that we should infer that it was doing the same thing again in response to his request, deliberately hiding information which it held or could, without real effort, obtain.

13. The ICO, in response, stated that she accepted OFWAT's claim that it had no need for the requested information and had no reason to suppose that it was being withheld.

The Tribunal's findings

14. The sole issue for determination by the Tribunal is whether OFWAT held the requested information as to total production costs.

15. We consider that this is "environmental information" within EIR reg. 2(1). We are aware that the decision of Judge Wikeley in the Upper Tribunal in *Department of Energy and Climate Change v IC and Henney [2015] UKUT 761 (AAC)* dealing with the boundary between information within this provision and information falling under FOIA s.1(1) is to be considered by the Court of Appeal. However, it is immaterial which regime applies here. The result will be the same. If we are wrong, the outcome of this appeal will be unaffected. The presumption in favour of disclosure provided for in EIR reg. 12(2) can have no application where the issue is whether there is information within the scope of the request.

16. The question for us is not whether OFWAT could readily obtain the requested information (though that is very doubtful anyway, given the very wide range of costs to be taken into account) but whether it holds it.

17. Mr. Evans ' case is, regrettably, quite hopeless. It fails at every stage of his argument and the links between those stages are quite unconvincing in any event.

18. First, and most importantly, there is no reason for OFWAT to hold the information. Mr. Evans referred us to the Water Industry Act, 1991, which created OFWAT and

the current structure of the water supply and disposal industry. OFWAT's duties are set out in s.2. They do not involve an investigation into the water companies' production costs. Its function is to ensure that the companies are financially stable, that proper water supply and sewerage disposal are maintained and that consumer interests are promoted, where appropriate, by effective competition in the provision of those services. It is also relevant to observe that the companies' capital costs of (i) producing clean and (ii) disposing of waste water are not distinguished in their own accounts.

19. How the water companies would profit from deliberately using inadequately filtered domestic meters is inexplicable. They bear the cost of providing and replacing such meters and maintaining and repairing them, where, as is most common, meters are installed at their behest (see Water Industry Act, 1991 s.148(1)). The obstruction of filters by particulates causes under – recording of water flow, hence undercharging. Mr. Evans exhibited a report by engineers of one water company to its directors expressing dismay at the losses that were sustained by the company due to poor filtering.

20. Mr. Evans asserts that such losses are more than recouped by overcharging customers in comparatively small amounts spread over a very large number of consumers. He produces no evidence to support this accusation. Why a supposedly dishonest supplier should decide to sustain a loss in order to extort a fraudulent profit from the customer is far from clear. Why not avoid the loss and overcharge anyway?

21. The antecedent fraud, upon which Mr. Evans' case rests, however flimsy the reasoning that leads from it to OFWAT's supposedly untruthful denial of his request, is wholly implausible anyway. He makes a good case for criticizing the

water companies for failing to adopt adequate meter filters years ago but that is quite another matter.

22. Why, if it held the information as to production costs, should OFWAT decide to conceal it, even if it had been party to the wholly unrelated conspiracy envisaged by Mr. Evans? When invited to explain what concern might induce OFWAT falsely to deny that it held the requested figure, accepting for this purpose his interpretation of its conduct, he was quite unable to suggest a motive. Indeed, even on his hypothesis, it is impossible to surmise a sensible reason for OFWAT to suppress such data, if it had held them.

23. In fact, OFWAT provided Mr. Evans with a quite simple means of calculating a figure close to that which he requested. Its responses to his request demonstrated a willingness to assist him so far as was possible and provided a lucid explanation as to why it did not keep such statistics and could not create them on the data available.

24. The Tribunal finds that OFWAT did not at any material time hold the information that Mr. Evans requested. The civil standard of proof is amply satisfied.

25. This appeal is therefore dismissed.

26. This is a unanimous decision.

27. As a footnote, having regard to the overriding objective, the Tribunal invites the ICO to consider, where appropriate, a more restrictive approach than was adopted here to relevance and the inclusion of repetitive material when negotiating, especially with an unrepresented appellant, the content of the agreed bundle of documents. If, as a result, no agreement is possible, the matter can be referred to the registrar or a judge for decision, pursuant to the powers conferred by Rule 5. Whilst

tribunal panels must, of course, read in advance all the evidence arguably material to the issues, a lot of time can be wasted, even by an experienced tribunal member, in perusing lengthy documents, often not specifically linked to the written submissions, which, as he/she in due course discovers, neither advances nor undermines any party's case or merely illustrates a point already amply evidenced.

David Farrer Q.C.

Tribunal Judge,

30th. January, 2017

.