

Environmental Information Regulations 2004

Decision Notice

Date: 17 February 2009

Public Authority: Environment Agency
Address: Millbank Tower
25th Floor
21/24 Millbank
London
SW1P 4XL

Summary

The complainant wrote to the Environment Agency to request information regarding the Hendon Sewage Treatment Works. The Environment Agency refused the request under section 14 of the Freedom of Information Act 2000 on the grounds that it was vexatious. The complainant subsequently complained to the Commissioner who found that the request was for environmental information and therefore should have been administered under the Environmental Information Regulations 2004 (EIR). The Commissioner has investigated the complaint and found that the public authority was not obliged to comply with the request as it was manifestly unreasonable under regulation 12(4)(b). By failing to deal with the request under the EIR the public authority breached regulation 14(2) and 14(3) but the Commissioner requires no steps to be taken.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 23 November 2007 the complainant wrote to the public authority to request information under the Act regarding sewage flows at the Hendon Sewage Works which is operated by Northumberland Water Limited. The request read as follows:

*"I would like to request, under the FOI Act, all correspondence, e-mails, reports, notes, memo's and faxes that the EA hold confirming the **flows entering** [complainant's emphasis] Hendon Sewage Treatment Works were measured as the Inspector recommended in his report and were sent to Ofwat, allowing them to inform [name redacted] that all the Inspectors recommendations had been carried out?"*

I would also like to request under the FOI Act that the EA also provide all correspondence relating to my 6 questions that I asked Ofwat?"

3. On 14 December 2007 the public authority wrote to the complainant to say that his correspondence raised issues which it had already responded to in full. It said that it has already informed him that it would not deal with matters that have been previously addressed and would only consider genuinely new points he raised and that therefore it could not help him further. At this point it appears that the public authority had failed to address his request as a freedom of information request under the Act.
4. The complainant subsequently contacted the Commissioner to complain that the public authority had failed to properly respond to his request. As a result the Commissioner reminded the public authority of its obligation to respond to requests in accordance with the Act.
5. On 9 January 2008 the public authority contacted the complainant to say that, after being contacted by the Commissioner, it was now in a position to issue the correct form of refusal notice. It said that, under section 14 of the Act, it would not enter into further correspondence with the complainant because it believed his request was vexatious and it said it was not obliged to respond to requests that are substantially similar. It explained to the complainant that it had already provided him with an exhaustive amount of information on the issue of his request and had no further information to provide him with.
6. On 10 January 2008 the complainant asked the public authority to carry out an internal review of its handling of his request. In doing so the complainant explained that he was requesting specific information that had not previously been provided to him. In particular the complainant said that he wanted to see the records of flows entering the Hendon Sewage Treatment Works being measured or else the public authority should confirm that no such records are held.
7. The public authority presented the findings of its internal review on 11 January 2008. At this point it confirmed its initial view that it had provided the complainant with an exhaustive amount of information on the subject of his request and no further purpose would be served by continuing to correspond with him on this matter.

The Investigation

Scope of the case

8. On 14 January 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to disclose the information he requested.

Chronology

9. On 5 November 2008 the Commissioner contacted the public authority with details of the complaint. Firstly, the Commissioner said that whilst the public authority had responded to the request under the Act it appeared to him that the requested information, were it held, would fall within the definition of environmental information under regulation (2)(1) of the EIR. The Commissioner suggested that the request should have been administered under the EIR and invited the public authority's comments on this point.
10. The Commissioner explained that there is no exception under the EIR for vexatious requests although the Commissioner acknowledged that under that legislation a request could be refused if it was manifestly unreasonable. The Commissioner said that if the public authority was still minded to refuse the request on the grounds that it was vexatious and/or substantially similar to previous requests it should provide him with information to evidence this.
11. The public authority responded to the Commissioner on 1 December 2008. As regards the Commissioner's suggestion that the request should have been administered under the EIR, the public authority agreed that the request was for environmental information and that therefore the EIR would apply. However, it explained that it was minded to refuse the request as manifestly unreasonable.
12. The public authority explained that it had spent considerable time and resource dealing with requests from the complainant and also similar requests from a local campaign group of which the public authority said the complainant was a member. It went on to say that it had provided the complainant with all of the information it had on the subject (the issue of the Hendon Sewage Treatment Works and the complainant's wider concerns regarding the Sunderland Sewerage system) and had no further information. It said that its belief was that the intent of the request was to harass the public authority and added that dealing with the complainant had caused significant stress for its staff.
13. The public authority provided the Commissioner with a list of all the communications it had had with the complainant and others regarding the issues raised in his request, which it explained dated back to 1992. It said that it also had a great deal of correspondence related to a planning Inquiry and Parliamentary Ombudsman case regarding the issues raised by the complainant in his request. It explained that it had already been through this with the complainant but had not had time to chronicle the information for the Commissioner.

14. On 7 January 2009 the Commissioner wrote to the public authority to ask it to elaborate on some of the points it raised in its letter. The Commissioner now asked for further details of the investigation by the Parliamentary Ombudsman referred to by the public authority. The Commissioner asked the public authority to outline in more detail what information it had previously disclosed to the complainant. The Commissioner pointed out that the complainant's request was for specific information; namely information showing that records of flows entering Hendon Sewage Treatment Works were being measured. The Commissioner asked the public authority to confirm whether it had previously disclosed this to the complainant and asked it to provide him with details.
15. The public authority responded to the Commissioner on 19 January 2008. It provided the Commissioner with further information regarding the Ombudsman's investigation and provided him with a copy of the ruling. It explained that it had provided the complainant with all of the environmental information it held in response to his requests until such time as it took the decision to cease corresponding with the complainant. It added that this information was provided to the complainant free of charge and was often accompanied by detailed explanations of how the information related to the operation and regulation of the Sunderland Sewage System. It said that when it did not hold requested information it made this clear to the complainant and when relevant told him which other body held the information.
16. As regards the specific information requested by the complainant, it said that it had provided the complainant with flow information relating to the flow monitoring exercise at Hendon in 2003 on several occasions. It said that there is no further flow information because there is no monitoring point for flows entering Hendon Sewage Treatment Works due to engineering constraints. It said that the complainant did not seem to accept this and therefore had continued to ask for, what it described as, "non-existent monitoring information".

Findings of fact

17. The list provided by the public authority records 699 communications. This list includes internal communications between the public authority's staff and also communications between the public authority and third parties regarding the complainant and issues he raised regarding the Sunderland sewage system. However the records featured on the list are overwhelmingly of direct communications between the public authority and the complainant.
18. A public inquiry took place in October 2001 into applications by Northumbrian Water Ltd to discharge sewage in an emergency and storm sewage during storms at Hendon Sewage Treatment Works and Whitburn Pumping Station. The applications were approved by Government and the consents were granted by the public authority.
19. The complainant had previously made complaints to the Parliamentary Ombudsman against the public authority regarding its predecessor the National Rivers Authority and other bodies regarding the regulation of the Sunderland

Sewerage System. The Ombudsman made a ruling on the complaint in April 2003, finding in favour of the public authority.

20. The public authority was established under the Environment Act 1995 and is the body responsible for the control of water pollution.

Analysis

21. A full text of the provisions of the EIR referred to in this section is contained within the legal annex.

Procedural matters

Environmental Information

22. Environmental information is defined under regulation 2(1)(b) as any information in written, visual, aural, electronic or any other material form on –
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect elements of the environment referred to in (a):

The factors referred to in (a) are:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organism, and the interaction among these elements;
23. The Commissioner is satisfied that the requested information falls within the meaning of regulation 2(1)(b) as it relates to waste and other releases into the environment which are likely to affect elements of the environment including water and coastal areas.
24. In any event, the issue of whether the request is a request for environmental information is not a point of contention as the public authority has itself acknowledged to the Commissioner that the request should have been administered under the EIR.

Procedural Matters

25. However, by failing to respond to the request under the EIR the public authority breached regulation 14(2) and 14(3) which provide that a refusal of a request must be made no later than 20 working days and shall specify the reasons not to disclose the information, including details of the exception relied on and matters the public authority took into consideration with respect to the public interest.

Exception

Regulation 12(4)(b) – Manifestly Unreasonable

26. The public authority originally refused the request under section 14 of the Freedom of Information Act on the grounds that the request was vexatious. When alerted to the fact that the request was for environmental information the public authority said that it was minded to refuse the request under regulation 12(4)(b) on the grounds that the request was manifestly unreasonable.
27. Under the EIR there is no specific exception for vexatious requests. However, the Commissioner is satisfied that a request may be refused under regulation 12(4)(b) if it would otherwise be characterised as vexatious if dealt with under the Act. The guidance issued by the Department for Environment, Food and Rural Affairs (Defra) states that “Manifestly unreasonable would include vexatious requests or requests where the authority has evidence that the purpose of the request is to waste the time of the authority”.¹
28. In this case the Commissioner has followed the approach he would normally take in investigating whether a request is vexatious², which is to consider the circumstances of the particular case in relation to the following categories:
- whether compliance would create a significant burden in terms of expense **and** distraction
 - whether the request is designed to cause disruption or annoyance
 - whether the request has the effect of harassing the public authority or its staff
 - whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable
 - whether the request has any serious purpose or value
29. The Commissioner is satisfied that the principles to be considered when looking at a case under section 14 of the Act are also relevant when considering if a request is manifestly unreasonable under regulation 12(4)(b) and notes that this approach has found support in the Information Tribunal.³
30. In considering whether the complainant’s request would fall within any of the above categories the Commissioner believes that the following factors are relevant in this particular case:
- The volume of communications between the complainant and the public authority.

¹ <http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/pdf/guidance-7.pdf>

² http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/awareness_guidance_22_vexatious_and_repeated_requests_final.pdf

³ Mr S Carpenter v The Information Commissioner [EA/2008/0046]

- The volume of communications since the complainant made his request.
- The previous behaviour of the complainant.
- The complainant has already received a great deal of information on the subject of his request and has visited the public authority to view information in situ.

31. In dealing with cases such as this the Commissioner will look at the history of the request and the context in which it is made in order to reach a decision. The Information Tribunal has supported this approach when it stated that:

“...it is possible for a request to be valid if made by one person but vexatious if made by another, valid if made to one person and vexatious if made to another”⁴ and similarly “...it is not only the request itself that must be examined, but also its context and history”.⁵

Significant Burden

32. Where a public authority has concerns that a request would impose a significant burden, in order for it to rely on a claim that the request is vexatious or manifestly unreasonable the Commissioner would expect it to be able to demonstrate that dealing with the request would impose a significant burden in terms of both expense and distraction.

33. The Information Tribunal has supported this approach when it said:

“...in considering whether a request is vexatious, the number of previous requests and the demand they place on the public authority’s time and resources is a relevant factor.”⁶

34. In this case dealing with the complainant’s various requests and correspondence has required the involvement of staff from across the public authority and at all levels from the Chairman of the public authority down. On other occasions the public authority has had to approach external organisations in order to obtain information to provide to the complainant or else to agree on how best to deal with his continued correspondence. In light of this the Commissioner is satisfied that dealing with requests and correspondence from the complainant has caused a significant administrative burden to the public authority and a distraction from its core functions. Indeed the Commissioner believes that this has been compounded by the manner in which the complainant has contacted the public authority. The Commissioner notes that the complainant made overlapping requests in the sense that he wrote to the public regarding the same issues and made new requests to the public authority before responses to preceding requests were received.

⁴ Mr J Welsh v Information Commissioner [EA/2007/0088], para. 21.

⁵ Mr David Gowers v Information Commissioner [EA/2007/0114], para. 29.

⁶ Welsh, para. 70.

35. The Commissioner accepts that this request, taken in isolation, would not place too onerous a burden on the public authority. However when seen in the context of his wider correspondence the Commissioner believes that it is reasonable to conclude that in view of what has occurred before, the evidence suggests that complying with this particular request would lead to further requests, correspondence and complaints that would impose a significant burden both in terms of expense and distraction.
36. The Information Tribunal has itself suggested that it may still be reasonable for a public authority to conclude that compliance would result in a significant burden if in answering that request, it was:
- “...extremely likely to lead to further correspondence, further requests and in all likelihood, complaints against individual officers...”⁷*
37. It is relevant at this point to highlight the fact that even after the complainant had been presented with the findings of the internal review on 11 January 2008, advising him that no further purpose would be served by continuing to correspond with him on this matter, he contacted the public authority a further 89 times up until 23 October 2008 regarding the Hendon Sewage Treatments Works and the wider issue of the Sunderland sewage system.

Harassment

38. The public authority has argued that the purpose of the complainant's request and wider correspondence is to harass it and its staff. Indeed it has suggested that dealing with the complainant has caused significant stress for its staff. Whilst the Commissioner makes no comment on whether the intention of the request was to harass the public authority and its staff the Commissioner has considered whether the effect of the request was to harass the public authority.
39. Having reviewed the communications on the list supplied by the public authority, the Commissioner has observed that whilst the complainant has contacted members of staff from across the public authority he has also focused a lot of his correspondence on particular individuals within the public authority. Furthermore, in the past the complainant has demanded that certain members of staff within the public authority resign and has levelled various charges against the public authority accusing it of incompetence, lying and collusion. The Commissioner has seen no evidence of this and notes that the investigation by the Parliamentary Ombudsman found in favour of the public authority. Seen in this context, and bearing in mind the sheer volume of correspondence from the complainant, the Commissioner appreciates that a reasonable recipient of the request would be likely to feel harassed.
40. The Commissioner feels that by making his request the complainant was in effect attempting to get the public authority to re-open discussions regarding the discharges from the Hendon Sewage Treatment Works which had already been addressed by the public Inquiry, an investigation by the Parliamentary

⁷ Mr Graham Betts v Information Commissioner [EA/2007/0109], para. 34.

Ombudsman and in numerous exchanges of correspondence between the public authority and the complainant.

Obsessive

41. The categories do overlap and therefore factors which may suggest that the request would impose a significant burden or harass the public authority may also be evidence that the request is obsessive. Certainly the complainant's obvious intention to re-open long since concluded discussions on the issue of the Sunderland Sewage system is also a relevant factor when considering if the request is obsessive.
42. In deciding whether the request could be characterised as obsessive the Commissioner has applied a 'reasonable person' test, that is to say, would any reasonable person standing in the shoes of the complainant on reasonable grounds characterise the request as obsessive. In this case the complainant has corresponded with the public authority on the issue of perceived problems with the Sunderland sewage system since 1992, almost without pause. The public authority has gone to the trouble of compiling a list of almost 700 communications it has had regarding the complainant and the issues he raised. The Commissioner is of the view that the request when seen in that context can be considered obsessive.
43. The Commissioner also wishes to highlight that the complainant has already received a great deal of information regarding this issue in response to informal requests for information, formal requests for information under the Act and EIR and by viewing information in situ at the public authority's premises. The Commissioner also notes that information was made available through the public inquiry into the issue and a subsequent investigation by the Parliamentary Ombudsman. The Commissioner understands that the complainant was involved in this process and received information as a result, in addition to the information supplied by the public authority.
44. The public authority has previously informed the complainant that it does not hold any further information regarding flow data for the Hendon Sewage Treatment Works and has in the past been forced to inform the complainant that it will not correspond with him further on issues related to the Hendon Sewage Treatment Works, the Whitburn Pumping station and the wider Sunderland sewage system unless new issues of substance are raised. Yet despite this the complainant has failed to moderate his behaviour and has continued to contact the public authority. The Commissioner is of the view that this is further evidence of the obsessive nature of the complainant's request.
45. The Commissioner acknowledges that there is often a fine line between being persistent and being obsessive, however in this case the Commissioner is satisfied that the complainant's request meets the threshold at which it could safely be said to be obsessive.

Public Interest Test

46. For the reasons given above the Commissioner is satisfied that the request is manifestly un-reasonable and therefore falls within the exception in regulation 12(4)(b) of the EIR. However under regulation 12(1)(b) the complainant's request may only be refused under this exception if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. It should be noted that under regulation 12(2) there is a presumption in favour of disclosure.
47. The Commissioner is of the view that there is a legitimate public interest in greater transparency in the way in which the public authority carries out its regulatory functions. However, the fact that there is a significant amount of information regarding the Hendon Sewage Treatment Works and the Whitburn Pumping station has already been released and the fact that the issues raised by the complainant have already been the subject of a planning inquiry and investigation by the Parliamentary Ombudsman means that the public interest in disclosure is very much reduced.
48. On the other hand the Commissioner feels that there are compelling arguments in favour of maintaining the exception because of the public interest in protecting the integrity of the Environmental Information Regulations and ensuring that they are used responsibly. The Commissioner is very strongly of the opinion that public authorities should be able to concentrate their resources on dealing with legitimate requests rather than being distracted by requests that have little or no merit and where the wider public interest would not be served by disclosure.
49. Therefore, in all the circumstances of the case the Commissioner finds that the public interest in maintaining the exception in regulation 12(4)(b) is not outweighed by the public interest in disclosure.

The Decision

50. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority correctly withheld the requested information under regulation 12(4)(b).
51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- The public authority breached regulations 14(2) by failing to respond to the request under the EIR within 20 working days.
 - The public authority breached regulation 14(3)(a) by failing to specify to the complainant the reasons for refusing the request under the EIR including the exception it was relying on.

- The public authority breached regulation 14(3)(b) by failing to specify to the complainant the reasons for refusing the request under the EIR including the matters it took into consideration in reaching its decision with respect to the public interest test.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 17th day of February 2009

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

–

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and
“working day” has the same meaning as in section 10(6) of the Act.

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 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;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).