

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

### **Decision notice**

**Date:** 11 April 2013

**Public Authority:** Environment Agency  
**Address:** Horizon House  
Deanery Road  
Bristol  
BS1 5AH

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

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1. The complainant made a request to the Environment Agency for information related to the Sunderland sewerage system. The Environment Agency refused the request on the basis that it was manifestly unreasonable under the exception from disclosure in regulation 12(4)(b) of the Environmental Information Regulations 2004 (EIR). The Commissioner has investigated the complaint and found that regulation 12(4)(b) applies and the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### **Request and response**

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2. On 10 September 2012 the complainant made a request to the Environment Agency for information regarding the Sunderland Sewerage system. A full copy of the request is included as an annex to this Decision Notice.
3. The Environment Agency responded to the request on 16 October 2012 when it provided a copy of the Whitburn Steel Storm Pumping station Annual return 2012-13 as it said that this was a straightforward request which did not take long to produce (parts 5 and 6 of the request). For the remaining parts of the request the Environment Agency referred to a letter it sent to the complainant on 14 February 2012 which had explained that it would not be responding to any further correspondence on the subject of the Sunderland Sewage System as it considered such requests to be manifestly unreasonable under regulation 12(4)(b) of the EIR.

4. No internal review was offered.

### **Scope of the case**

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5. On 6 November 2012 the complainant contacted the Commissioner to complain about the Environment Agency's decision to refuse his request.
6. The EIRs contain a legal obligation on a public authority to provide an internal review. The Commissioner would therefore normally expect this to be completed before he considers the application of any exceptions. However in this case the Environment Agency has explained that it considered it to be an unnecessary burden on its resources to do so in this case bearing in mind the findings of the Tribunal in a previous case in 2009<sup>1</sup>. It acknowledged the need to carry out an internal review where it was for the first time issuing a refusal notice on the grounds of Reg 12(4)(b) but it also took into account the longevity of the correspondence in this case in reaching the decision that it would not be appropriate to do so. In light of this the Commissioner has accepted the need to avoid any undue delay to the complainant and accepted the complaint without an internal review being completed on this occasion.

### **Reasons for decision**

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7. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. The Commissioner is clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than being simply "unreasonable". "Manifestly" means that there must be an obvious or clear quality to the unreasonableness referred to.
8. The Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances: 1) where it is vexatious and 2) where it would incur unreasonable costs for the public authority or an

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<sup>1</sup> EA/2009/0018

unreasonable diversion of resources. Depending on the circumstances of a particular case there may be other situations where regulation 12(4)(b) will apply. Therefore in this case the Commissioner has considered the cost of complying with the request and the burden this would impose on the Environment Agency, whether the request can be considered vexatious and whether there are any other circumstances which mean that the request should be seen as manifestly unreasonable.

9. The Environment Agency's arguments for relying on section 12(4)(b) focus on the vexatious nature of the request. The term vexatious is used under the Freedom of Information Act (FOIA) and the Commissioner considers that the principles used to decide if a request is vexatious under FOIA can also be used to decide if a request can be refused as manifestly unreasonable under the EIR.
10. In arguing that the request was vexatious, the Environment Agency referred to a decision of the Upper Tribunal in *Information Commissioner v Devon CC and Dransfield*, where Judge Wikeley discussed factors that may be considered when deciding if a request can be characterised as vexatious:  
  
*"It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes –(1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff)."*<sup>2</sup>
11. The Commissioner has used these headings below and has set out the Environment Agency's arguments together with his own comments and observations. However, before discussing this specific request the Commissioner finds it helpful to briefly set out the background to the issues raised by the complainant in his request and his history of dealing with the Environment Agency.
12. The complainant has been corresponding with the Environment Agency regarding the Sunderland Sewerage system since 1992. In January 2008 the complainant made a request for information to the Environment Agency regarding the Sunderland Sewerage system which was also refused under regulation 12(4)(b) of EIR. The decision to refuse the request was upheld by the Information Commissioner in a

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<sup>2</sup> Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC), para. 28.

previous decision notice issued in February 2009.<sup>3</sup> The Commissioner's decision was subsequently upheld on appeal to the Information Tribunal.<sup>4</sup> In his decision notice the Commissioner noted that the Environment Agency had recorded 699 communications it had had with the complainant and others regarding the issues he raised in his requests. The complainant has been provided with a great deal of information regarding the issues raised in this request and has in the past visited the Environment Agency and met with members of its staff. The complainant's concerns were also considered at a public inquiry. Since 8 September 2009 up until the date of this request there have been a further 33 items of correspondence exchanged with the complainant related to issues raised in his request.

13. The Environment Agency has stressed that it has continued to consider each request sent by the complainant to assess whether he is asking for new information.

#### Burden

14. The Environment Agency argues that the complainant's requests are often detailed and complex, requiring specialist understanding and input. A feature of the complainant's requests, as in this case, is to ask for an opinion or an explanation rather than recorded information. Whilst noting that the volume of requests is not on its own decisive the Environment Agency has said that the number and volume of requests it has received from the complainant over the years is extreme. In its view the requests remain repetitive and do not take into account how it has already responded – for example by asking for information it has already said it does not hold.
15. The Environment Agency has said that its dealings with the complainant have imposed a significant burden in the past and it anticipates that it will represent a continued future burden. The Commissioner would agree that when seen in the context of his previous involvement with the Environment Agency the request imposes a burden in terms of time and resources and also serves to distract the public authority from its core functions. Given the complainant's history of making repeated requests, complying with this request is likely to lead to him making future requests for information.

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<sup>3</sup> FER0230659

<sup>4</sup> Latimer v Information Commissioner [EA/2009/0018]

### Motive

16. The Environment Agency acknowledges that the complainant is not “on some campaign of deliberate harassment”. Rather he is, in its view, “seeking...to challenge the decisions taken by those with powers and duties to deal with the disposal of sewage”. It has said that the complainant has a long standing grievance whereby he disagrees with the current practical solution for the disposal of sewage where he lives and operates his business. The Environment Agency has said that it appears that the complainant wishes to obtain evidence of wrong-doing or deceitfulness on the part of officers of the Environment Agency which has led him to sometimes make accusations about particular members of staff. For example, in his request of 10 September 2012 the complainant questions the honesty of several members of staff.
17. It appears to the Commissioner that the purpose of the request is to challenge the Environment Agency’s policies or actions in relation to this particular part of the Sunderland sewerage system rather than an actual desire to obtain the information. The complainant would appear to be using the request as a means to further his grievance or dispute as evidenced by the fact that parts of the request in his email of 10 September 2012 is for information he has already received or repeats of previous requests where he has been told that the information does not exist (for example question 8).

### Value or serious purpose

18. The Environment Agency referred to the decision of the Upper Tribunal in *Dransfield* where it found that the “weight that may be attached to that value or serious purpose may diminish over time” and that “if it is truly the case that the underlying grievance has been exhaustively considered and addressed, then subsequent requests (especially where there is ‘vexatiousness by drift’) may not have a continuing justification”.<sup>5</sup> It suggested that many years ago when the complainant first started requesting information there was a greater purpose to his requests. Since then his concerns have been investigated and there has been a public inquiry. It says that for the complainant to continue to go back and ask questions as he has in this request, relying on letters prepared before the public inquiry, which have been overtaken by the public inquiry and its findings, and which he is aware of, suggest that there is no longer a serious purpose to the questions he asks. Whilst the

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<sup>5</sup> Dransfield, para. 38.

focus of this request appears to be the recent loss of the Blue flag at Seaburn Beach, which he suggests is the result of failings of the sewage system, the Environment Agency says that the questions asked in the requests have been exhaustively covered before.

19. The Commissioner would agree with the Environment Agency that there is little value to the complainant's request. For instance in parts 1 and 2 of the request the complainant refers to letters sent to him from as far back as 1998 to seek to establish whether conflicting information was given by members of the Agency's staff about the rate (given as a multiple of what is referred to as the "Dry weather flow") at which part of the Sunderland sewerage system, at Whitburn, flows into an interceptor tunnel. The complainant feels that he has been misled. However, the Environment Agency explains that any figures given to him previously were given in good faith at the time. It said that the Dry weather flow for the Whitburn part of the system was discussed extensively at the public inquiry in 2001, which the complainant attended, and supersedes any earlier knowledge of the system and information provided in these earlier letters.
20. In part 2 of the request the complainant asked the Environment Agency whether a particular member of his staff was aware that he had been previously advised that the dry weather flow for the Whitburn tunnel was a certain figure when he wrote to the complainant, several years later, and gave a different figure. The Environment Agency has explained that there have been hundreds of letters exchanged with the complainant and that it would be manifestly unreasonable to use a considerable amount of time searching through this amount of information to confirm this one way or another when the letters have been superseded and are no relevance to the environment or the regulation of the sewage system.
21. The complainant's requests cover the same ground as previous correspondence with the Environment Agency and in the Commissioner's view there is little to be gained from disclosure given that the complainant's concerns have been discussed extensively. Disclosure would do little to inform debate on the issues raised in the request.

#### Harassment or distress

22. As indicated, the Environment Agency has already said that it does not think that it is the intention of the complainant to cause distress by his continued correspondence. However, it says that the impact of staff having to "repeatedly consider his detailed and lengthy letters, working

out what is a new request, what he has had previously, what is a request for information or explanation, particularly given the very localised nature of his requests and therefore the need continually to involve the same staff who understand the system at Whitburn and the history there" means that the requests cause harassment. In addition it has said that where the honesty of staff is questioned that will cause distress and harassment if they have to be consulted on how to respond.

23. The Environment Agency has provided recent examples of where the complainant has used disparaging remarks in his letters about members of staff. Whilst recognising the strong feelings the complainant has about the issues raised in his request the Commissioner also takes the view that a reasonable person would be likely to feel some distress or harassment at receiving a request like this, especially given the history of previous correspondence from the complainant.
24. Having taken all the circumstances into account the Commissioner has decided that the request is vexatious when seen in the context of the complainant's previous history with this public authority. The Commissioner accepts that responding to this request would impose a burden on the public authority, has the effect of harassing or causing distress and has no serious purpose. The complainant's continued requests regarding the Sunderland sewerage system are obsessive which no longer have a proper justification. Consequently the Commissioner has decided that the request is manifestly unreasonable and that regulation 12(4)(b) applies.

#### Public interest test

25. All exceptions in the EIR are subject to the public interest test. Therefore, in deciding whether the information should be withheld the Commissioner has had to balance the public interest in maintaining the exception against the public interest in disclosure.
26. As regards the public interest in disclosure the Commissioner has taken into account the general public interest in transparency and accountability. He is also mindful of the presumption in favour of disclosure and the need to read exceptions restrictively. However, balanced against this is the burden that would be imposed on the Environment Agency. There is also the wider public interest in protecting the integrity of the Environmental Information Regulations and ensuring that they are used responsibly.
27. On balance the Commissioner finds that the public interest strongly favours maintaining the exception as there is little value in the complainant's request. From reading the correspondence containing the



request it seems that the complainant's concern is that a Blue Flag has been lost at a local beach as there has been a reduction in environmental standards in the area. However, as the public authority highlighted in its submission to the Commissioner, disclosure of the requested information would not inform that debate in any meaningful way. The information would not contribute to the effective running of the public sector or sustainable development, rather the opposite as the Environment Agency has shown that corresponding to the complainant's requests over many years has been a distraction from its core functions. In the Commissioner's view the complainant's request is simply another means of pursuing his dispute with the Environment Agency and this amounts to an abuse of the EIR.

28. Finally, the Commissioner would highlight the fact that the Environment Agency did actually disclose to the complainant requested information contained within its public register (information which it is otherwise required to maintain and make available under various legislation). It also provided the complainant with the rainfall data in part 7 of the request after he made his complaint to the Commissioner because, it said, it could be prepared in just a few hours. This further demonstrates that the Environment Agency has taken a reasonable and proportionate approach to the request, only refusing to disclose requested information where the burden imposed is significantly great and where the requests are about matters that have already been debated with the complainant.
29. In all the circumstances of the case the Commissioner finds that the public interest in maintaining the exception in regulation 12(4)(b) outweighs the public interest in disclosure.



## Right of appeal

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30. 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: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

31. 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.
32. 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 – Complaints Resolution  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Annex – the Request

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I ask you to provide copies of all correspondence, emails, reports, memos and consents relating to the Whitburn, Seaburn, Roker and St Peters sewage system that I request below: -

1. I enclose various letters and emails that I have received from the Environment Agency over the years, all state the dry weather flows and spill rates from the Whitburn system CSOs spill at 6XDWF before they spill into the Interceptor Tunnel. I refer to the letter dated 13 December 1999 from [named individual] Environment Agency Environment Planning Manager as an example, where he states the dry weather flow in the Whitburn sewer is 19 l/sec and the Formula A 6XDWF is 129 l/sec. This is confirmed in the Whitburn discharge consent that was issued by the EA following directions from the Secretary of State that conditions were to be placed in the consent under what conditions a CSO could spill into the Interceptor Tunnel. I refer to page 117 of the discharge consent provided to me by [named individual] of Defra on the 29 June 2009 where it states in Condition 4: -

***"Occurrence c) A flow of storm sewage from Whitburn CSOs to the Interceptor Tunnel shall occur only, when and for as long as"***  
***"i) the rate of flow in the CSO location STY21 exceeds 129 l/s due to rainfall and/or snow melt and shall only consist of flows in excess of that figure;"*** [complainant's emphasis]

- a) Defra now inform me that the CSOs on the Whitburn system spill into the Interceptor Tunnel at 4.5XDWF, clearly this is not only in conflict with evidence I enclose, it also in conflict with the conditions of the consent which are calculated at 129 l/s from 6XDWF – Please would you provide under the EIR all information, calculations, reports, estimates, emails explaining how the spill rate of 129 l/s equates to 4.5XDWF and meets the terms of the conditions of the consent?
- b) If you say Defra is right then would you please provide under the EIR all information, consents, calculations and reports that explains why the EA have lied to me and to the Public Inquiry?

2. I refer again to the correspondence (I enclose) from the Environment Agency, letters from [named individual] dated 28 January 2008 EA Water Quality Consenting Team leader, [named individual] dated 5 May 1999 EA Customer and Business Services Manager, [named individual], dated 11 October 1999 EA Operations Manager (Bristol), [named individual] EA dated 13 December 1999 EA Environment Planning Manager, [named individual] dated 23 February 2000 EA Environment Planning Manager all

of these letters refer to the Whitburn system CSOs spilling at 6XDWF. I find the honesty of these people is now called into question because Defra tell me that [named individual] of the EA informed Defra on the 2 March 2010 that not only does the system spill at 4.5XDWF but went on to say, I quote: -

***"The Inspector at the public Inquiry provided for this in his consent (245/1207) that includes settings for pass forward flow at Whitburn systems pumping stations at Whitburn Bents, Seaburn and Roker that reflected the discussions and decisions at the Public Inquiry. These conditions by which flows can spill to the tunnel. To the best of my knowledge, at no time have we ever said that the Whitburn part of the system passes forward times dry weather flow, as [the complainant] suggests"*** [complainant's emphasis]

I have to say while the EA use the EIR exemptions very cleverly in an attempt to evade answering the questions, it appears they have gone too far and shot themselves in the foot because if [named individual] is right then the others and all the evidence is wrong, as can be seen by the evidence I enclose, the EA have told me that the Whitburn part of the system passes forward six times dry weather flow. Under the EIR please provide all the evidence that confirms that [named individual] had no knowledge that the EA had told me the Whitburn part of the system spills at 6XDWF?

3. Although [named individual] states in his letter dated 5<sup>th</sup> May 1999 that the capacity of the tunnel was 14,000 cubic meters he later changed this to over 15,000 cubic meters. Under the EIR please would you provide evidence confirming the storage capacity of the Whitburn Interceptor Tunnel?
4. There has been talk that the Interceptor Tunnel capacity should be increased, I dispute this as further capacity has been added to the system. Under the EIR please would you provide and calculation, reports, correspondence etc, explaining and verifying the capacity of the holding tank that has been constructed at Seaburn Dene since the Public Inquiry was held?
5. Please supply under the EIR the discharge to sea records for Whitburn Steel Storm Sewage Pumping Station for 2011/12?
6. Please supply under the EIR the return flow records for Whitburn Steel Storm Sewage Pumping Station for 2011/12?

7. Please supply under the EIR the rainfall records for the Whitburn/Sunderland area during 2011/12?
8. Please supply under the EIR the discharge records relating to St Peters CSO discharging into the River Wear for 2011/12?
9. We understand that the EA supplied Defra with a copy of a study carried out on the Whitburn sewage system during 2010, under the EIR please provide a copy of this study?

I must add that this request is not intended to be vexatious or manifestly unreasonable, this request is for new information that has not been requested for before. Following the loss of the Blue Flags from both the beaches is not only a disgrace but it shows without doubt that although this is in the 'public interest' the Environment Agency have failed miserably to protect that interest.