

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 August 2016

Public Authority: The Water Services Regulation Authority
(Ofwat)

Address: Centre City Tower
7 Hill Street
Birmingham
B5 4UA

Decision (including any steps ordered)

1. The complainant made a request for information to the Water Services Regulation Authority (Ofwat) for the average total production cost of a cubic metre of water. In response Ofwat said that the requested information was not held.
2. The Commissioner's decision is that the request is for environmental information and therefore the EIR is the correct information access regime to apply. The Commissioner is satisfied that the requested information is not held and so has decided that regulation 12(4)(a) applies. The Commissioner requires no steps to be taken.

Request and response

3. On 9 December 2015 the complainant made a request for information to Ofwat which read as follows:

"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."

4. Ofwat responded to the request initially on 26 January 2016 when it provided the sale price for a cubic metre of water. The complainant

subsequently contacted Ofwat and explained that this was not the information he was seeking. Ofwat issued a second response on 1 February 2016 when it confirmed that the requested information was not held. However it said that it was possible to make an approximate calculation from information published in a water company's annual accounts and demonstrated to the complainant how this might be done.

5. The complainant was dissatisfied with Ofwat's response and said that he would not accept that Ofwat did not have the average cost of delivering water to an average household because all the details of all the water companies were "at [Ofwat's] fingertips".
6. Ofwat responded to the complainant again on 8 February 2016 to confirm that it did not hold the requested information.
7. At the complainant's request Ofwat completed an internal review and presented its findings on 8 April 2016. This found that it did not hold the information in the form the complainant requested. It explained that it did not need to collect information on the average gross production price of a cubic metre of water delivered to a customer as this was not necessary for its functions.

Scope of the case

8. Following completion of the internal review the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner agreed with the complainant that the scope of his investigation would be to consider whether Ofwat held information falling within the scope of the complainant's request.
9. The Commissioner has also considered whether or not the request was for environmental information and therefore whether FOIA or the EIR was the correct information access regime to apply.

Reasons for decision

Environmental information

10. Ofwat's responses to the complainant and the Commissioner referred to both FOIA and the EIR and so it is not immediately clear under which legislation it considered the request. For the sake of clarity the

Commissioner has considered which was the correct access regime to apply.

11. If requested information is environmental information then it should be considered under the EIR. Environmental information is defined under regulation 2(1) of the EIR.

“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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
12. In this case the complainant has asked for production costs of a cubic metre of water. In the Commissioner's view such information is clearly 'on' an element of environment and therefore falls within the definition of environmental information in regulation 2(1)(a).

Regulation 12(4)(a) – information not held

13. Regulation 12(4)(a) provides that a public authority may refuse to disclose information if it does not hold the information at the time the request is received.
14. Ofwat has explained that in order to provide the information the complainant is seeking it would need to hold the actual total cost of providing water to customers. It has confirmed that it does not hold this information because it is not needed to set price controls for companies or to monitor companies' performance, which it said are the two primary reasons it collects and holds data.
15. Companies do publish information on the actual costs they incur as part of their regulatory accounts and Ofwat has said that it also holds this information on its own systems. However, crucially, the information is not broken down in such a way which would allow the calculation of a total production cost just for the supply of water.
16. Ofwat explained that it holds the total operating costs of each water company in relation to the provision of water services and the depreciation on those assets which relate to the supply of water. However, this would not provide the complainant with the information he is seeking because he has made it clear that he wanted the cost Ofwat gave him to include all 'relevant costs' including 'all the ancillary and capital costs'.
17. Water companies provide other services as well as supplying water to customers (most notably, the ten largest companies also supply waste water services). Ofwat has said that companies do not separate out the costs of financing the capital investment which underpins the provision of the service (either the dividends they pay on equity invested in the company or interest they pay on their borrowing) for the supply of water services only. Neither are corporation tax payments broken down for water supply. Without this data being separated out for the water supply service it cannot provide an accurate total cost figure which the complainant is seeking.
18. In his correspondence with Ofwat and the Commissioner the complainant suggested that Ofwat can calculate the information he is seeking by simply subtracting the profit margin of the different water companies from the sales cost per cubic metre of water. However this assumes that Ofwat holds information about the profit margins of the different companies. Ofwat has confirmed that this is not correct because, as the Commissioner has explained, information it holds on the dividends paid to shareholders or the companies' retained profit is not

separated out for water supply only. Furthermore, Ofwat does not directly regulate the amount of 'profit margin' which companies make and therefore it does not need to collect information relating to water supply which would allow the calculation of a 'profit margin' in the manner the complainant has asked for.

19. 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 Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request). In this case Ofwat has provided a reasonable explanation as to why it does not hold the requested information. There is no business need to record the information and because certain cost information is not held for water supply only it is impossible for Ofwat to calculate the figure the complainant is requesting. The complaint also seems to be based on the misconception that Ofwat holds information on the profit margin of each of the water companies and the Commissioner has explained why this is not so. For all of these reasons the Commissioner has decided that Ofwat does not hold the requested information.
20. As with all exceptions under the EIR, regulation 12(4)(a) is subject to the public interest test. However, since the Commissioner has found that the information is not held the public interest clearly favours maintaining the exception.

Right of appeal

21. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

22. 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.
23. 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

Paul Warbrick
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Information Commissioner's Office
Wycliffe House
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