

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 7 January 2022

Public Authority: Thames Water Utilities Ltd
Address: Clearwater Court
Vastern Road
Reading
RG1 8DB

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence relating to a particular planning application. Thames Water Utilities Ltd ("Thames Water") initially stated that the request did not seek environmental information, but eventually disclosed some information and relied on Regulation 12(4)(d) of the EIR (material in the course of completion) to withhold some information – which it said was the only other environmental information it held within the scope of the request.
2. The Commissioner's decision is that Thames Water is not entitled to rely on Regulation 12(4)(d) of the EIR to withhold the information that it has identified as falling within the scope of the request. She also finds that Thames Water holds additional environmental information within the scope of the request and therefore failed to comply with its duty under Regulation 5(1) of the EIR. Finally, the Commissioner finds that Thames Water breached Regulation 5(2) of the EIR as it failed to communicate non-exempt information within 20 working days.
3. The Commissioner requires Thames Water to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, copies of the incorrectly submitted section 104 application and all the emails that were identified in Thames Water's correspondence to the Commissioner of 23 December 2021. Thames Water may make appropriate personal data redactions.

- Either disclose, to the complainant, a copy of any proof of payment documentation Thames Water holds or, if and to the extent that the company wishes to withhold that information, issue a refusal notice that complies with Regulation 14 of the EIR.
4. Thames Water must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 December 2020 the complainant contacted Thames Water via the whatdotheyknow.com website and, referring to a development at a specific address, requested information of the following description:

"[1] Please provide COPIES of information relating to any consultation/comments by Thames Water regarding this development. (This should include those that relate to any pre-planning application by the developer and any contact by the local authority).

"[2] Please also provide COPIES of any information regarding what 'trigger level' has been set by your 'Asset Planners' for this location."

6. On 29 December 2020, Thames Water responded. It refused to provide the requested information. It referred to the information being outside the scope of the EIR, but argued that, if it wasn't, it would be personal data and thus exempt from disclosure anyway.
7. The complainant requested an internal review on 31 December 2020. Thames Water sent the outcome of its internal review on 8 January 2021. It revised its position and now stated that it did not hold any information within the scope of element [1], but provided the information within the scope of element [2].
8. The complainant challenged the outcome of the internal review on the same day and argued that Thames Water had adopted too narrow an interpretation of element [1] of his request. There was a further exchange of correspondence, but Thames Water maintained that it held no relevant information.

Scope of the case

9. The complainant contacted the Commissioner on 1 May 2021 to complain about the way his request for information had been handled. At this point Thames Water was still maintaining that it held no further information – although a response it provided in respect of another similar request indicated that it had treated the request as applying only to planning and not pre-planning correspondence.
10. The Commissioner commenced his investigation on 7 October 2021 with a letter to Thames Water asking it to set out its rationale for deciding that it held no environmental information.
11. Thames Water responded to the Commissioner on 3 November 2021. It explained that it had now identified further searches that it should have carried out at the time the request was responded to. These searches had identified some further documents that fell within scope. The Commissioner asked Thames Water to either disclose the information or cite a valid EIR exception to withhold it.
12. Thames Water issued a fresh response to the request on 11 November 2021. It disclosed some information to the complainant but now stated that it was relying on Regulation 12(4)(d) and Regulation 12(5)(e) of the EIR (commercial interests) to withhold some information. It also apologised for failing to identify this information at an earlier stage.
13. Thames Water responded to the Commissioner on 19 November 2021 to explain why it considered that Regulation 12(4)(d) applied to the information it was withholding.
14. The complainant disputed the exceptions that Thames Water had applied, but he also disputed that Thames Water had, even now, identified all relevant information. The complainant identified several categories of information that he believed ought to be held.
15. The Commissioner then wrote to Thames Water a third time on 25 November 2021 to point out these apparent omissions and asking it to either provide the information, apply an exception or explain why each category of information was not held.
16. Thames Water responded to that correspondence on 30 November 2021 explaining that it had confused the request with another similar request made by the complainant and that in fact it did not hold any further information. The Commissioner was not satisfied with this explanation and asked for a full substantive response to his letter of 25 November 2021.

17. Thames Water issued its substantive response on 23 December 2021. It now accepted that it did hold some further environmental information, but was relying on Regulation 12(4)(d) of the EIR to withhold it. It also admitted that it held some additional information but that it was not environmental. However, it was now confident that it held no further environmental information within the scope of the request. It again apologised for its handling of the request and said that it was happy to discuss its position further with the Commissioner.
18. The Commissioner notes that Thames Water has been dealing with this request for over a year and that its position has changed numerous times since then. It has provided three sets of submissions to the Commissioner and he therefore considers that it would be unfair to the complainant if Thames Water was to be allowed a further opportunity to explain its position or apply other exceptions. The Commissioner has therefore assessed Thames Water's position based on the submissions provided to date.
19. The Commissioner considers that the scope of his investigation is to determine:
 - a) To what extent is the information that Thames Water holds environmental?
 - b) Is Thames Water entitled to rely on Regulation 12(4)(d) of the EIR to withhold the environmental information it has identified?
 - c) Does Thames Water hold any further environmental information within the scope of the request?
 - d) Has Thames Water complied with the procedural requirements of the EIR?

Reasons for decision

To what extent is the information that Thames Water holds environmental?

20. Regulation 2(1) of the EIR defines environmental information as being information 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)...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);*
21. The Court of Appeal in *DBEIS v IC and Henney* [2017] EWCA Civ 844 ruled that when deciding whether information was or was not environmental the first step should be to identify any relevant "measure" for the purposes of Regulation 2(1)(c). The Commissioner considers that the process of developing a site for housing is a measure likely to affect the elements of the environment (particularly soil and landscape). The Commissioner also notes that development requires adequate drainage plans to dispose of foul water. This is a measure affecting waste and discharges into the water table which are "factors" affecting the elements of the environment. The Commissioner is thus satisfied that there is a relevant measure.
22. The next step, according to *Henney* is that, having identified the relevant measure, the public authority needs to determine whether the information is "on" that measure – and this should be determined with reference to the Aarhus Convention on increasing access to environmental decision-making. In short, if information is likely to assist the public in understanding why a measure is necessary, why an organisation is carrying out such a measure, how it is carrying out that measure or what that measure will involve, the information is likely to be information "on" that measure.

23. In the present case, Thames Water has identified a number of documents pertaining to the developer's application to drain the property in question of foul water. Such documents clearly demonstrate how such a measure will be carried out and therefore will be information "on" that measure.
24. When a developer submits an application under section 106 of the Water Industry Act 1991 to be allowed to connect their development's drainage system to the public sewer, they must pay a fee to the water company that owns that section of sewer. Thames Water admitted that it held information relating to the payment transaction for this particular property, but argued that it was not environmental because it did not meet the criteria set out in Regulation 2(1)(e) of the EIR.
25. The Commissioner consider that the question of whether such information engages Regulation 2(1)(e) is irrelevant, as the information engages Regulation 2(1)(c). It is information "on" the drainage scheme as it relates to the process to be followed to allow a developer to connect to the public sewer. It is therefore environmental information.
26. The Commissioner considered whether to order Thames Water to disclose this information but has decided not to do so. Firstly, he has not seen the information in question and has therefore been unable to make an assessment of its sensitivity. Secondly, as Thames Water has only identified this information at a late stage and considers that it falls outside the scope of the EIR, it has therefore not had the opportunity (at least in theory) to consider whether any of the EIR exceptions apply. Given the nature of the information, there may be some financially sensitive information involved. The Commissioner has therefore ordered Thames Water to consider this element of the request afresh and respond in accordance with its EIR obligations.

Is Thames Water entitled to rely on Regulation 12(4)(d) to withhold information?

27. Regulation 12(4)(d) of the EIR states that public authority may refuse to disclose information to the extent that:
 - (d) *the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.*
28. The EIR do not define what "material in the course of completion" actually is, but in *Highways England Ltd v Information Commissioner & Manisty* [2018] UKUT 423 (AAC), the Upper Tribunal laid down the following guidelines:

"The exception must, nevertheless, be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

"It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered...The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception...

"...The way that the public authority has treated the material is relevant but not decisive. A public authority cannot label its way out of its duty to disclose. A label like draft or preliminary thoughts may, or may not, reflect the reality. The scope of the exception depends on the substance, not the form in which the material is stored or presented."

29. Thames Water explained to the Commissioner that the developer in question had originally submitted the wrong application – submitting a section 104 application (adoption of a sewer) instead of the section 106 application (connection to an existing sewer). It held the original (incorrect) application form and some associated correspondence, but relied on this exception to withhold them.
30. Thames Water noted that the section 106 application had not been determined until 18 January 2021 – after the point at which it completed its internal review. Therefore at the point at which the request was made (and up to the date of the internal review), all correspondence relating to the application (including the incorrectly submitted section 104 application) related to material in the course of completion – the completion date being the date on which the section 106 application was determined.
31. Given that the application had now been determined, Thames Water was content to release the (correctly submitted) section 106 documentation, but not the incorrectly submitted section 104 application.

32. The Commissioner does not consider that, at the point Thames Water completed its internal review, the information in question was material in the course of completion.
33. The withheld information relates to a particular application that the developer made, ostensibly under section 104 of the Water Industry Act 1991, asking for consent to have Thames Water adopt a section of sewer. The developer may well have *intended* to make an application under section 106, but the paperwork they submitted was for a different type of application.
34. It is illogical to claim, as Thames Water is trying to do, that the section 104 application formed part of the section 106 application. They are two discrete processes. Once the error was identified, Thames Water was not going to carry out any further assessment of the section 104 application – it had no need to do so.
35. To claim that the section 104 process was “unfinished” is to confuse form with substance. The application may not have reached a final determination, but the process had been “completed” in the purposive sense because both sides had agreed that this application did not need to be processed further. Even if the section 106 application process had not been completed, the material that the withheld information forms part of *was* complete at the point that the request was made.
36. For completeness and as Thames Water was not clear as to which limb of the exception it was applying, the Commissioner has considered whether, in the alternative, the withheld information comprises of unfinished documents. He does not consider that it does.
37. Application forms are not submitted in draft form. The final determination may look different to the original application but that does not mean that the documents are, in their own terms, incomplete.
38. Once the developer had realised their error, there was no reasonable prospect that anything would be added to the application form. Those documents were complete and nothing else would be added to them. Had the application been correctly submitted, the final permission may have departed from the original application – but that would be a different document.
39. The Commissioner is therefore satisfied that the withheld information does not engage Regulation 12(4)(d) of the EIR and must therefore consider whether to order disclosure.
40. The Commissioner has not seen the withheld information. However, he identified, at an early stage of the investigation, his reservations about Thames Water’s reliance on this particular exception. Thames Water has

had ample opportunity to cite other appropriate exceptions but has chosen not to do so. Therefore the Commissioner has ordered disclosure of the all the information that this exception has been relied upon to withhold – except such information as Thames Water needs to redact to comply with its data protection obligations.

Does Thames Water hold any further environmental information within the scope of the request?

41. Regulation 5(1) states that: "*a public authority that holds environmental information shall make it available on request.*"
42. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
43. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
44. In his letter of 25 November 2021, the Commissioner identified five categories of information which it appeared that Thames Water ought to hold. These were based on a detailed and helpful submission from the complainant. The five categories were:
 - A) The section 104 application
 - B) Any correspondence to or from Thames Water relating to the section 104 application
 - C) A pre-application sewerage capacity check
 - D) Proof of payment details
 - E) Documentation showing a change from an indirect to direct connection to the public sewer
45. The information falling within category D is information that the Commissioner has already determined (above) that Thames Water holds for the purposes of the EIR.

46. The information falling within categories A and B is the information that Thames Water has relied on regulation 12(4)(d) to withhold and which the Commissioner has said it must disclose. That leaves the information falling within categories C and E.
47. The Commissioner pointed out to Thames Water that the notice of consent it had issued to the developer, allowing them to connect to the public sewer indicated that the connection was contingent on there being sufficient sewerage capacity – yet no such document, confirming capacity, had been identified.
48. Thames Water responded to say that:

The Notice of Consent letter states: "This consent does not guarantee capacity exists within our network ". If a capacity check was required, the consent letter invites an application for a Pre-planning Enquiry. As we did not receive a Pre-Planning Enquiry application there is nothing to disclose in this respect. If there are capacity concerns in the area, we would expect to be consulted by the Local Planning Authority during the planning process.

"The caveat is included in the letters to ensure that developers do not use their section 106 consent to attempt to discharge any drainage related planning conditions. No powers are afforded to us under the Water Industry Act 1991 to refuse connections due to capacity concerns, this can only be managed during the planning process."

49. The Commissioner accepts that the description of the wording in the letter is accurate. He also notes that his role is not to determine whether a particular public authority *ought* to hold a particular piece of information, but whether it does in fact do so.
50. On the balance of probabilities, the Commissioner is therefore satisfied that Thames Water does not hold this particular information.
51. Finally, in respect of the change of connection, the complainant pointed out that the notice of consent was for a *direct* connection to the public sewer – yet the plans that Thames Water had disclosed labelled the connection as an *indirect* connection. He argued that if the type of connection had indeed been changed, there should be some documentation confirming or correcting this – although he suspected that the change may have been agreed to informally.
52. Thames Water responded to say that although the label on the drawing incorrectly described the connection as indirect, the drawing actually showed a direct connection.

53. The complainant indicated that the section 104 application may shed some light on this discrepancy and the Commissioner agrees that this is a possibility. The Commissioner also notes that if, as the complainant suggests, an informal agreement has been reached to change the connection, documentation confirming this would be unlikely to exist.
54. Whilst the Commissioner is not wholly persuaded by Thames Water's arguments, he is also not persuaded that it is more likely than not that Thames Water holds further information than it has already identified.
55. The Commissioner therefore concludes that Thames Water has, albeit belatedly (and, in one case, reluctantly) identified all the environmental information it holds within the scope of the request.

Procedural matters

56. Regulation 5(2) requires a public authority to identify the environmental information it holds within the scope of an information request "*as soon as possible and no later than 20 working days after the date of receipt of the request.*"
57. Until 23 December 2021, more than a year after the request was submitted, Thames Water had still failed to identify all the relevant information it held within the scope of the complainant's request. Whilst Thames Water has apologised, both to the Commissioner and the complainant, on several occasions, the Commissioner still considers the handling of the request to have been unacceptably poor.
58. The Commissioner therefore finds that Thames Water breached Regulation 5(2) of the EIR in dealing with this request.

Other matters

59. The Commissioner considers that the way Thames Water has dealt with both this request and subsequent complaint to have been unacceptably poor.
60. Thames Water has noted that it has received several similar requests from the complainant and has occasionally confused them. Whilst the Commissioner accepts that mistakes do happen, he does not consider that an organisation the size of Thames Water should have struggled so badly to deal with what was a relatively simple request.
61. Thames Water's original searches were, by its own admission, inadequate. It compounded the problem during the investigation by either changing or appearing to change its position, confusing *withholding* information with *not holding* information and referring to exceptions it was no longer relying on. It is not surprising that the complainant has been and remains sceptical that he has received all the information he is entitled to receive – and his tenacity has already resulted in further information being disclosed.
62. The Commissioner would advise Thames Water, if it has not already done so, to review its responses to the complainant's other requests so as to ensure that the mistakes that have been made in this case have not been repeated elsewhere.

Right of appeal

63. 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

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

64. 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.
65. 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

Roger Cawthorne
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