

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 7 June 2023

Public Authority: South West Water

Address: Peninsula House
Rydon Lane
Exeter
EX2 7HR

Decision (including any steps ordered)

1. The complainant has requested information relating to various named sewage treatment works. South West Water disclosed some of the requested information, however it refused to disclose the remainder, citing regulation 12(5)(b) as a basis for non-disclosure.
2. The Commissioner's decision is that South West Water is entitled to rely on regulation 12(5)(b) – the course of justice, to withhold the requested information. He also finds that South West Water has breached regulation 5(2) of the EIR.
3. The Commissioner does not require South West Water to take any steps as a result of this decision notice.

Request and response

4. On 16 December 2021, the complainant wrote to South West Water and requested information in the following terms:

“For each of the following Sewage Treatment Works (STW):

(i) Lutton STW; (ii) Lee Mill STW; (iii) Yealmpton STW; (iv) Brixton STW; and (v) Newton Ferrers STW; including (vi) Elburton South Sewage Pumping Station; please could you provide the following

information, requested under the Environmental Information Regulations:

1. From 1st January 2016 to the present date, all available 15-min Monitoring Certification Scheme (MCERTS) effluent and flow to treatment data taken in accordance with your Environment Agency permit(s) and for any other reasons, including dates taken.
2. All event duration monitoring (EDM) start-stop times from installation to present; for any combined storm overflow (CSO), storm overflow or other sewage overflows, including on associated incoming networks and pumping stations, whether officially commissioned or not. Please supply on-off or spilling times for each overflow, including the periods that the EDM was active and recording.
4. From 1st January 2016 to the present date, details of any pollution event however classified that has occurred in the same period, whether or not reported to the Environment Agency. I also impress that I do not need any of the above data in printed form, which printing would appear to have comprised about half of your estimated costs. Instead, please provide the above data in electronic spreadsheet or tabulated format. If the data cannot be sent by email, we will be happy to receive them on a USB stick or by any cloud storage and sharing facility."

This is a refined version of the complainant's original request made on 4 October 2021 and omits Items 3 and 5 of that request.

5. South West Water responded on 31 March 2022 and provided the information for parts 2 and 4 of the request. However, it refused to provide the remainder (Part 1) citing regulation 12(5)(b) of the EIR as its basis for doing so and stated that water industry regulators were currently undertaking an industry-wide investigation into the use of overflows.
6. In their request for internal review the complainant included a link to a press release by the Environment Agency dated 16 February 2022. The complainant also stated as follows:

"Following the above statement, under similar circumstances, Northumbrian Water since revised their earlier decision not to provide flow data in response to an EIR request, explaining their change of position on the basis that: "in this statement, the Environment Agency made it clear that it would continue to provide data on request in the vast majority of cases. It also pointed out that water companies are

bound by the same Environmental Information Request requirements on the provision of data as is the Agency. Given this clarification by the Environment Agency, it is our view that the high threshold of adverse effect in Regulation 12(5)(b) has not been engaged. As the exception does not apply, the information can now be provided”.

7. Following an internal review, South West Water wrote to the complainant on 24 June 2022 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 15 September 2022 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of this investigation to be to determine if South West Water is entitled to rely on regulation 12(5)(b) to withhold the information in Part 1 of the complainant’s request.

Reasons for decision

Regulation 12(5)(b) – the course of justice

10. Regulation 12(5)(b) of EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - the course of justice, ability of a person to receive a fair trial or
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
11. On 18 November 2021, Ofwat (the Water Services Regulation Authority) made a public statement¹ that:

“The Environment Agency (EA) and Ofwat have launched a major investigation into sewage treatment works, after new checks led to water companies admitting that they could be releasing unpermitted sewage discharges into rivers and watercourses.

¹ <https://www.ofwat.gov.uk/joint-ofwat-environment-agency-and-defra-announcement-november-2021/>

This will see an investigation involving more than 2000 sewage treatment works. Any company caught breaching their legal permits could face enforcement action, including fines and prosecutions. Fines can be up to 10% of annual turnover for civil cases, or unlimited in criminal proceedings.”

12. A further statement, as referred to in paragraph 6 above, was given by the Environment Agency on 16 February 2022 reiterating Ofwat’s statement.

13. South West Water applied regulation 12(5)(b) on the basis of that investigation, which is still live. Its internal review response to the complainant stated that:-

“it is important that the regulators are given the opportunity to make their own assessment following their investigations and that the investigations are protected against the risk of any undue influence from outside sources that might be caused by the prior release of relevant information into the public domain.”

14. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

15. In this case it is clear to the Commissioner that the balance of the public interests lies in maintaining the exception, rather than being equally balanced. Where an investigation is ongoing and, where that investigation could lead to criminal charges, it cannot be in the public interest to disclose information that is relevant to that investigation. Any information held by South West Water that is within the scope of part 1 of the request is, as South West Water states, directly relevant to the investigation.

16. South West Water states that it has provided relevant information requested by the EA and Ofwat and considers that they should be left to investigate and pursue any action as a result of their independent findings without undue influence from third parties or the press.

17. It is important that the regulators are given the opportunity to make their own assessment following their investigations and that the

investigations are protected against the risk of any undue influence from outside sources that might be caused by the prior release of relevant information into the public domain.

18. It would be inappropriate for the Commissioner to order disclosure of the requested information in these circumstances and he has concluded that South West Water is entitled to rely on regulation 12(5)(b) to withhold the information requested in part 1 of the request. The Commissioner also finds that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information. He also notes the fact that South West Water has stated that it would be pleased to reconsider the request once the investigations have concluded and their outcome is known.

Regulation 5(2) – time for compliance

19. Regulation 5(2) of the EIR states: "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
20. In this case the complainant initially requested information on 16 December 2021. The complainant clarified his request on 13 January 2022, however South West Water did not issue its refusal notice until 31 March 2022.
21. The Commissioner's guidance² states:

"You must consider all relevant public interest arguments within the normal time for compliance – no later than 20 working days after the date you receive the request.

Unlike the Freedom of Information Act, the Regulations do not permit any extension beyond this for you to specifically consider the public interest.

The only circumstance under which you can have more time is if the complexity and volume of the information make it impracticable for you to comply, or decide to refuse to do so, within the 20 working days."

² <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/>

22. In this case the Commissioner does not consider it was reasonable to take more than 20 working days to respond to the request, as South West Water was relying on regulation 12(5)(b) to withhold the information in its entirety. He therefore finds that South West Water has breached regulation 5(2) of the EIR.

Right of appeal

23. 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@justice.gov.uk

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

24. 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.
25. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF