

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

Date: 5 June 2023

Public Authority: Northumbrian Water Group Ltd
Address: Abbey Road
Pity Me
Durham
DH1 5FJ

Decision (including any steps ordered)

1. The complainant has requested flow data relating to sewage systems. The above public authority (“the public authority”) relied on regulation 12(5)(b) of the EIR to withhold the requested information.
2. The Commissioner’s decision is that the public authority has correctly relied on regulation 12(5)(b) and that the public interest favours maintaining the exception.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 30 January 2023, the complainant wrote to the public authority and requested information in the following terms:

“Under the EIR I request that I be provided with the following environmental information:

“A detailed description of all of the discharges records for the year 2022 for discharges that were made from the Whitburn Steel pumping station situated at Whitburn, South Tyneside discharging through the long sea outfall and into the North Sea at that location. Among the

records I request the times of discharges and the volumes of discharges.

"I also request that you provide me with copies of the Whitburn return flow records for 2022. (detailed description)."

5. The public authority responded on 23 February 2023. It relied on regulation 12(5)(b) of the EIR to withhold the requested information. A position it maintained following an internal review.

Reasons for decision

Is the requested information environmental?

6. 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);

7. As it is information relating to the management of wastewater, the Commissioner believes that the requested information is information on a measure affecting factors which in turn affect the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

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

8. Regulation 12(5)(b) of the EIR allows a public authority to withhold information whose disclosure would adversely affect the course of justice or the ability of a public authority to conduct a formal inquiry.
9. The Commissioner notes that there are ongoing inquiries, by both the water regulator Ofwat and the Environment Agency into the performance of water companies. In previous decision notices, he has accepted that disclosure of data relevant to those inquiries would adversely affect their ability to reach a swift, thorough and fair conclusion.¹
10. The complainant argued that the data he had sought related to a combined sewage discharge – whereas the Environment Agency's investigation was restricted to "flow to treatment" rates at wastewater treatment works.
11. As the Commissioner understands it, the public authority accepts that the data being requested may not be precisely what the inquiries are most closely focussed on, but that it is nevertheless indirectly relevant to their work. The conditions at any individual wastewater treatment works are affected by the wider conditions around the sewage network and should not (in the public authority's view) be looked at in isolation.
12. In the Commissioner's view, the exception is engaged. The implication of the public authority's argument is that this data is likely to form part of its defence as to why it considers that it has complied with the law and with the terms of its licence.
13. If the complainant is correct in his assessment, then such a defence may not be persuasive – but that is beside the point. The public authority has a right to be able to explain to the inquiry why it believes it has complied with its obligations. It is also entitled to put forward any

¹ See for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024898/ic-218612-b1j7.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023920/ic-206971-f9q9.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022404/ic-163737-d3q3.pdf>

evidence it considers provides a defence to an assessment of non-compliance.

14. Disclosing the information would remove the right of the public authority to adduce evidence to the inquiries at a time of its choosing. Doing so would harm the public authority's ability to defend itself and would thus adversely affect the course of justice. Regulation 12(5)(b) is therefore engaged.

Public interest test

15. The Commissioner recognises that the issue of sewage discharges is one that is particularly topical at the present time. He also considers that the information is information on emissions – which has special status under EIR. There is thus a strong public interest in disclosure.
16. However, in this instance, the Commissioner considers that there is a stronger public interest in allowing the inquiries that have been announced to go about their business free from undue influence.
17. It is for an inquiry to decide what material it does and does not consider relevant. It must have the freedom to go about its work and reach a sound conclusion without having its actions second-guessed by those who only have partial access to the necessary information.
18. The Commissioner has taken into account the presumption in favour of disclosure – but does not consider that it should make a difference to the outcome.
19. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exception.

Right of appeal

20. 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

21. 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.
22. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF