

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

Date: 17 April 2024

Public Authority: Southern Water Services Ltd
Address: Southern House
Yeoman Road
Worthing
West Sussex BN13 3NX

Decision (including any steps ordered)

1. In a nine-part request, the complainant has requested information about a 2012 project at Old Roar Gill, East Sussex. Southern Water Services Ltd (SWS) advised it doesn't hold information within scope of parts 1, 2, 6, 9 and 10. It addressed part 4 and directed the complainant to its website where it indicated that information relevant to parts 3 and 8 is available. SWS also relied on regulation 13 of the EIR to refuse parts 5 and 8, which concerns personal data. In their complaint to the Commissioner, the complainant disputed SWS's response to parts 3 and 8 of their request.
2. SWS has subsequently confirmed that it doesn't hold historical mapping data but identified a small amount of information it holds that's within scope of part 10 of the request.
3. The Commissioner's decision is as follows:
 - SWS doesn't hold the historical mapping information within scope of parts 3 and 8 of the request. Regulation 12(4)(a) of the EIR is therefore engaged in respect of that information, which concerns information that isn't held.

- The personal data contained within current mapping data that's of some relevance to part 8 of the request is excepted from disclosure under regulation 13.
 - SWS didn't make non-excepted information available or refuse excepted information within the statutory time period and therefore breached regulations 5(2) and 14(2) of the EIR.
4. The Commissioner requires SWS to take the following step to ensure compliance with the legislation.
 - Disclose to the complainant the presentation discussed at paragraph 54 of this notice with any personal data appropriately redacted under regulation 13.
 5. SWS must take this step 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

6. On 21 July 2023, the complainant wrote to SWS and requested information in the following terms:

"Part of Southern Water's AMP5 business plan was the implementation of measures in 2012 to prevent pollution in Old Roar Gill and its catchment area. A Southern Water foul/combined sewer runs through and parallel with Old Roar Gill. Flooding caused by hydraulic incapacity had been reported from this sewer, historically resulting in pollution to the watercourse.

Measures included surface water separation to resolve hydraulic overload and create new capacity within the network. Separating surface water runoff from residential estates and highways from the combined sewer system and discharging surface water flows to an existing surface water outfall into Old Roar Gill.

The project included the construction of a new surface water sewer to convey the newly separated flows to an existing surface water outfall to Old Roar Gill east of Copper Beeches. Fundamentally, it reduces sewer hydraulic overloading by diverting existing surface water flows draining to the combined sewer to a new surface water sewer.

Further details of the project can be found in the article
http://ftp2.ciwem.org/2013/2013%2024_%20...

There have been sewage leaks into the Gill this year. These leaks have caused harm to wildlife and the environment.

I request under EIR the following information:

1. All environmental and water quality reports done prior to the implementation of the 2012 project
2. All environmental and water quality reports done at the completion of the project
3. Maps of the surface water scheme implemented as described in the article "new surface water sewer of between 150 and 400mm diameter, which was laid through both 'adopted' and privately owned roads".
4. The number of properties that were connected to the new surface water sewer.
5. The location of properties that were connected to the new surface water sewer.
6. Details of how many properties were modified as described in the article "lateral connections and drainage modifications were carried out, including alterations to downpipes of a number of private properties to capture the maximum amount of surface water from roofs and gullies"

[There is no question 7.]

8. Details of any surface water sewers that discharged surface water from properties in the Old Roar Gill catchment area prior to the 2012 project.
 9. A copy of the fluvial flood risk assessment document referred to in the article "A fluvial flood risk assessment was carried out to demonstrate the effect of additional flows on the downstream Catchment."
 10. Copies of all documents (in any format including emails) concerning the 2012 project."
7. SWS responded on 13 September 2023. It advised that it doesn't hold the information requested in parts 1, 2, 6, 9 and 10 of the request and as such, regulation 12(4)(a) was engaged. However, SWS also said that, with regard to parts 1, 2 and 10, if water quality reports **had** been available, it was likely they'd be excepted from disclosure under

regulation 12(4)(e) of the EIR as they'd be internal communications. SWS provided a link to its website¹ from which it said information relevant to part 3 of the request was available and addressed part 4. SWS withheld the information requested in part 5 and part 8 under regulation 13 of the EIR but, with regard to part 8, directed the complainant to the same website from which it indicated that information of some relevance was available.

8. The complainant requested an internal review on 25 October 2023.
9. SWS provided an internal review on 21 November 2023. It maintained its reliance on regulation 12(4)(a) in respect of the information requested in parts 1, 2 and 10 of the request as it said it doesn't hold this information.
10. SWS confirmed that mapping information – relevant to parts 3 and 8 of the request – is available from the website to which it had referred the complainant, and they could access that information from there. Finally, SWS maintained its reliance on regulation 13 of the EIR in respect of part 8 of the request.

Scope of the case

11. The complainant contacted the Commissioner on 3 December 2023 to complain about the way their request for information had been handled. Their complaint focussed on the following:
 - 1) SWS's reference to regulation 12(4)(e) in its response to parts 1, 2 and 10 of the request.
 - 2) In its response to part 3, SWS didn't confirm whether map data exists for the requested area. The website to which SWS directed them also charges to provide mapping information and SWS should, instead, provide them with a snapshot of the requested area for no charge, under the EIR.
 - 3) SWS's reliance on regulation 13 in respect of part 8 of the request.
12. Point 1 of the complainant's request is discussed under 'Other matters.'

¹ <https://www.southernwater.co.uk/help-advice/sewer-and-water-maps>

13. Regarding point 2, on 3 April 2024 SWS wrote to the complainant and provided screen shots of mapping information that it originally had advised was available online. The complainant now has that particular information, and the information – which is current mapping information – isn't what the complainant had specifically requested in part 3 [and part 8.] As such, the Commissioner doesn't intend to consider that matter further.
14. The Commissioner's investigation will focus on point 3 of the complaint to him. As noted, parts 3 and 8 of the request concern historical information not current information. However, the Commissioner will consider first whether SWS correctly applied regulation 13 to current mapping data that's of some relevance to that part 8.
15. He will also consider procedural aspect of SWS's handling of the request. This includes the matter of the mapping information which SWS has confirmed it doesn't hold and the information it considers could fall within scope of part 10 of the request and which it has now identified it holds.

Reasons for the decision

Regulation 13 – personal data

16. In part 8 of their request the complainant requested details of any surface water sewers that discharged surface water from properties in the Old Roar Gill catchment area prior to the 2012 project.
17. SWS withheld information about addresses it considered was caught by part 8 of the request; addresses of private/customer properties and details of potentially illegal connections. However, it should be noted that this is current mapping information and part 8 of the request was for details "of any surface water sewers that discharged surface water from properties in the Old Roar Gill catchment area **prior to the 2012 project.**" [The Commissioner's emphasis.]
18. In their request for a review the complainant said that SWS hadn't explained how details of surface water sewers that discharge into old Roar Gill is personal data. They considered that it wasn't.
19. But in their complaint to the Commissioner, the complainant said they hadn't requested details of individual properties or private surface water sewers. They said they'd requested details of the surface water sewers for which SWS is responsible. The surface water sewers that SWS is responsible for that discharge into the gill will be fed from a number of

properties. As such, the complainant considers the requested information isn't personal data.

20. The Commissioner put that point to SWS on 6 March 2024. In its submission SWS has stated that the complainant's explanation in their complaint to the Commissioner is a modified request. It noted that in their original request of 21 July 2023 the complainant had requested "Details of any surface water sewers that discharged surface water **from properties** in the Old Roar Gill catchment..." [Commissioner's emphasis.]
21. SWS says that it's clear that the original request was seeking details of the locations of surface water sewers that discharged 'from properties.' To fulfil such a request the location of the properties from which surface water sewer discharges were occurring necessarily had to be identified, ie the details and location of individual customers' properties. In SWS's view it's impossible to fulfil such a request without divulging the location of customers' properties from which discharges into the surface water sewers took place. Indeed, SWS says, in their reframed question the complainant accepts that the discharges into the gill "will be fed from a number of properties."
22. The Commissioner considers that SWS's interpretation of part 8 of the request of 21 July 2023 was reasonable. As such, he's considering whether SWS is entitled to apply regulation 13 to the current mapping data it holds.
23. Regulation 13 of the EIR provides that information is exempt from disclosure if it's the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) of the Data Protection Act is satisfied.
24. The relevant condition is contained in section 40(3A)(a). This applies where disclosing the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
25. Personal data is information that relates to a living individual and from which they can be identified.
26. SWS has noted that the effect of EIR disclosure is that information is put into the public domain. The issue, it says, is whether any member of the public could identify an individual from information, and whether there's a meaningful risk of this happening.
27. SWS notes that a piece of information in and of itself may not enable any member of the public to identify an individual, but that an individual

could nevertheless be identified by combining apparently anodyne information with other information they may have access to.

28. SWS considers that disclosing the supply of addresses or locations of customers' properties from which there were discharges into surface water sewers in the Old Roar Gill catchment prior to the 2012 project, can be combined with other information (eg Land Registry information or the electoral register). Combining this information would lead to a meaningful risk that an owner of a property, an occupier of a property, and/or a customer of SWS could be identified.
29. The Commissioner is satisfied that the information in part 8 of their request, as originally requested on 21 July 2023, can be categorised as personal data for the reasons SWS has given; the information relates to individuals – the data subjects – and they could be identified from it.
30. The Commissioner has next considered whether disclosing the personal data would contravene one of the DP principles. The most relevant DP principle in this case is principle 5(1)(a) of the UK GDPR. This says that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
32. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
33. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”
34. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it's necessary to consider a three-part test: the legitimate interest test, the necessity test, and the balancing test.
35. The complainant has an interest in sewage discharges into Old Roar Gill and that's an entirely legitimate interest for them to have. There's also a general public interest in public authorities being open and transparent.

36. The Commissioner has gone on to consider the necessity test; whether it's necessary to disclose the information in order to meet the complainant's legitimate interests, and also, the general interest in transparency. In this case the Commissioner, notes the information that SWS has provided which is referenced at paragraph 43 but considers it would nevertheless be necessary to disclose the information in order to help to develop a fuller picture of discharges into Old Roar Gill over time.
37. The Commissioner's therefore finally carried out the balancing test; whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects. In doing so, it's necessary to consider the impact of disclosure. For example, if the data subjects wouldn't reasonably expect that the information would be disclosed to the public under EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
38. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
39. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. In its submission to the Commissioner, SWS says that disclosing the information would reveal something about those individuals that isn't already in the public domain ie whether or not they discharged from their properties into surface water sewers. Some of these discharges may be potentially illegal ie if this includes a misconnection [when toilets, washing machines, dishwashers and other goods are incorrectly plumbed into a surface water drain].
41. The Commissioner is satisfied that the data subjects in this case – as private citizens – would have the reasonable expectation that their personal data wouldn't be disclosed to the world at large as the result of an EIR request. Disclosing the information would therefore be likely to cause them unwarranted damage or distress.
42. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there's no Article 6 basis for processing and so disclosing the information wouldn't be lawful.

43. The Commissioner is satisfied that the complainant's legitimate interests and the general interest in transparency are met to a satisfactory degree though information SWS has disclosed including that 122 properties were connected to the new surface water sewer and approximately 2,600 properties are served by the area.
44. The Commissioner has therefore decided that SWS was entitled to withhold the information of some relevance to the request of 21 July 2023 under regulation 13 of the EIR.

Procedural matters

45. Under regulation 12(4)(a) of the EIR a public authority may refuse to disclose information to the extent that it doesn't hold that information when an applicant's request is received.
46. Parts 3 and 8 of the request in this case are for historical mapping information; that is such information about a 2012 project and information related to the period prior to 2012. SWS has been asked to consider whether it holds historical information relevant to parts 3 and 8 more than once during the course of this investigation and it's confirmed that it does not. SWS has confirmed that the mapping information it holds is current mapping information which is available through its website.
47. The Commissioner has seen no evidence to suggest that this isn't the case and he's satisfied that SWS doesn't hold the historical mapping information. Regulation 12(4)(a) of the EIR is therefore engaged in respect of that information.
48. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request if it's not subject to an exception.
49. Regulation 5(2) says that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request if the authority holds the information and it's not subject to an exception.
50. Under regulation 14(2), an authority must issue a refusal notice in respect of excepted information within the same timescale.
51. In this case, the complainant submitted their request to SWS on 21 July 2023 and SWS didn't comply with regulation 5(1) or refuse excepted information until 13 September 2023. SWS therefore didn't comply with regulation 5(2) or 14(2) of the EIR.

52. To address point 2 of the complaint to the Commissioner, it's now clear from its submission to him that SWS doesn't hold the historical mapping information requested in parts 3 and 8 of the request. As discussed, regulation 12(4)(a) is therefore engaged in respect of that information.
53. In its response to the request and internal review, SWS didn't indicate that the specific mapping information requested, which concerns the 2012 project and the period prior to 2012, wasn't available on the website to which it directed the complainant, or that it didn't hold that information. However, SWS had already breached regulation 14(2), as above.
54. Finally, SWS has subsequently advised the Commissioner that having considered the request again, and any relevant information it may hold, it has discovered one further document. This is a PowerPoint presentation that appears to respond to part 10 of the request, which is for "all documents." SWS says it can't confirm whether the map included in the PowerPoint presentation shows the same surface water scheme as implemented in the article the complainant has referred to in their request. This is because, due to the passage of time (possibly circa 12+) years, SWS is unsure of the date of the PowerPoint presentation and whether the scheme is the same as that referenced in the article.
55. Due to the passing of time, SWS says it's unable to provide comment on the origin of this historical document, or its date. However, it intends to disclose the presentation having redacted personal data from it under regulation 13 ie the location of customers' properties in line with the regulation 13 analysis above.
56. To summarise, SWS has now confirmed that it holds information it considers to be within scope of part 10 of the request ie the PowerPoint presentation. SWS didn't make the non-excepted information in the presentation available to the complainant or issue a regulation 13 refusal notice within the required timescale but, as above, had already breached regulations 5(2) and 14(2).

Other matters

57. Point 1 of the complaint to the Commissioner concerns SWS's reference to regulation 12(4)(e) in its response to parts 1, 2 and 10 of the request. The complainant queried why SWS had referred to this regulation when it had also confirmed it didn't hold that information. It suggested to the complainant that SWS had "a predetermined position to refuse the release of ALL information concerning water quality test reports."

58. The Commissioner agrees with the point SWS made in its submission to him; that its reference to 12(4)(e) has become an academic debate with no direct relevance to the supply of environmental information. As such the Commissioner can't make a formal decision on this matter.
59. It may have unintentionally confused matters somewhat, but the Commissioner considers that SWS referred to 12(4)(e) simply to be helpful. In addition, SWS didn't say that such information, if held, **would** be excepted from disclosure but that it would be likely to be. As all public authorities are expected to do, going forward SWS should consider each request for environmental information on a case-by-case basis, taking into account the circumstances that exist at that time.

Right of appeal

60. 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

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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