

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

Decision notice

Date: 20 May 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the requested information about discharges at combined sewer overflows doesn't engage regulation 12(5)(b) of the EIR, which concerns the course of justice.
2. The Commissioner requires Northumbrian Water Ltd to take the following step to ensure compliance with the legislation:
 - Disclose the requested information.
3. Northumbrian Water Ltd must take this step within 30 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

4. The complainant made the following information request to Northumbrian Water Ltd (NWL) on 5 September 2023:

“Please could you supply the start and stop times of each discharge recorded at your combined sewer overflows in 2022, and the dates of those discharges, under EIR laws...”
5. NWL’s final position was that the requested information was excepted from disclosure under regulation 12(5)(b) of the EIR.

Reasons for decision

6. This reasoning covers NWL’s reliance on regulation 12(5)(b) of the EIR to withhold the requested information.
7. Under regulation 12(5)(b) of the EIR a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the 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.
8. On 10 May 2024, the Commissioner made a decision about a request for the same information about discharges that was submitted to United Utilities – IC-278687-Q9S1¹. The current decision relies on the same reasoning and background.
9. NWL had advised the complainant that the information was excepted from disclosure because the matter of discharges was subject to regulatory investigations by the Environment Agency (EA) and Ofwat.
10. In its submission to the Commissioner, NWL has discussed the two investigations, their scope and advised that they’re ongoing. It has also said that it’s concerned that releasing the data requested could result in third parties supplanting the statutory regulators and carrying out their own analysis of whether NWL has complied with its discharge permits in respect of the use of storm overflows. NWL says that the data could

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4029577/ic-278687-q9s1.pdf>

become the subject of significant media or political attention and that a public conversation of this kind could result in pressure being applied, directly or indirectly, to the independent investigators. NWL argues that such public scrutiny and pressure, during the ongoing investigations, could be prejudicial to both Ofwat and the EA's investigations.

11. In IC-278687-Q9S1, the Commissioner noted that the information requested here is data; it's not any analysis, commentary or deliberation that's come from the EA or Ofwat. Nor is it information that the regulators created during their investigations; it's purely factual information. In addition, the request covers all start and stop times; it doesn't ask NWL to identify which relate to dry spillages.
12. In previous similar cases, the Commissioner had found regulation 12(5)(b) was engaged. However, since he handled those previous cases, new evidence has come to light. This includes a statement made by David Black, Ofwat's CEO, on 27 November 2023 at paragraph 33 of IC-278687-Q9S1, and the judgement of the appeal of the Commissioner's decision in IC-2069710F0G9, quoted at paragraph 40 of IC-278687-Q9S1.
13. The Commissioner has noted NWL's arguments in its submission to him, however, as in the United Utilities case, he doesn't consider that NWL has sufficiently demonstrated how disclosing the data would adversely affect either regulators' ability to conduct their investigations. The effect of disclosing the information that NWL envisions is based on a series of conjectures. Moreover, NWL hasn't convinced the Commissioner that the EA and Ofwat would permit their investigations to be prejudiced by any publicity that disclosing the requested information may generate or would frustrate NWL's right to a fair trial.
14. The Commissioner therefore finds that NWL has failed to demonstrate that the exception under regulation 12(5)(b) is engaged and that NWL isn't entitled to rely on it. Since regulation 12(5)(b) isn't engaged, it's not necessary to consider the associated public interest test.

Right of appeal

15. 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

16. 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.
17. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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