

## **Freedom of Information Act 2000 (FOIA)**

### **Environmental Information Regulations 2004 (EIR)**

#### **Decision notice**

**Date:** 30 August 2024

**Public Authority:** Environment Agency  
**Address:** Horizon House  
Deaney Road  
Bristol  
BS1 5AH

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the water industry national environment programme (WINEP) sent by the Environment Agency to water companies. The Environment Agency refused the request under regulation 12(4)(d) EIR – material in the course of completion.
2. The Commissioner’s decision is that the Environment Agency has correctly applied regulation 12(4)(d) and that the public interest favours maintaining the exception and withholding the information. However, the Commissioner finds the Environment Agency has breached regulation 11(1) as it failed to provide an internal review within 40 working days.
3. The Commissioner does not require any steps.

#### **Request and response**

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4. On 19 December 2023 the complainant wrote to the Environment Agency (EA) and requested information in the following terms:

“Please provide a copy of the Water industry national environment programme (WINEP) as supplied by the Agency for business plan development purposes to the water companies, as envisaged in Water industry national environment programme (WINEP) methodology - GOV.UK (www.gov.uk): “31 March 2023: The Environment Agency makes available the version of WINEP to be used for business plan development to water companies”

5. The EA responded on 17 January 2024 under the EIR and refused to provide the requested information on the basis of regulation 12(4)(d) – material in the course of completion, unfinished documents and incomplete data).
6. The complainant requested an internal review on 22 January 2024 arguing that when the water industry national environment programme (WINEP) document was supplied to the water companies it was no longer material in the course of completion, regardless of whether it might be revised in the future.
7. Following an internal review the EA wrote to the complainant with the outcome on 19 March 2024 upholding its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 26 March 2024 to complain about the way their request for information had been handled.
9. During the course of the Commissioner’s investigation the EA also sought to rely on regulation 12(5)(d) EIR – confidentiality of proceedings.
10. The Commissioner considers that the scope of his investigation is to determine if the EA has correctly withheld the requested information under regulation 12(4)(d) or 12(5)(d) EIR.

### **Reasons for decision**

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#### **Regulation 12(4)(d) – material in the course of completion**

11. Regulation 12(4)(d) of the EIR provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.

12. Regulation 12(4)(d) is a class-based exception, which means that if the information falls within its scope, then the exception is engaged. It is not necessary to demonstrate that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is subject to the public interest test.
13. The Commissioner understands the WINEP has been developed by the EA, the Department for Environment, Food and Rural Affairs (Defra) and the Water Services Regulation Authority (Ofwat) with the support of a WINEP taskforce.
14. The EA explained the WINEP process is divided into six stages:
  - 1) Setting the WINEP framework – considering legislative requirements and government priorities.
  - 2) Identifying risks and issues – identify environmental risks/issues that will be addressed through the WINEP.
  - 3) Proposing solutions – options to resolve environmental risks/issues (lead by water companies using the WINEP guidance).
  - 4) Assess proposals – the EA assesses the water companies' proposals and ensures WINEP requirements and outcomes can be achieved.
  - 5) Price review – Ofwat led price review where Ofwat determines the cost allowances for the water companies for the delivery of the WINEP.
  - 6) Delivery – of WINEP actions by water companies and partners. The EA tracks and records progress.
15. The WINEP methodology<sup>1</sup> includes a timetable for activities. The complainant pointed this out in their complaint as it states that by 31 March 2023 the EA will make available the version of WINEP to be used for business plan development to water companies.
16. The EA does not dispute that a version of the WINEP was shared with water companies in March 2023 as part of stage 4 (assess proposals) of the WINEP process. This version of the WINEP is shared with water companies to produce business plans but the WINEP continues to be

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<sup>1</sup> [Water industry national environment programme \(WINEP\) methodology - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/water-industry-national-environment-programme-winep-methodology)

developed beyond this point. The WINEP itself is a spreadsheet comprising of several thousand individual actions.

17. The EA explained the WINEP process is currently at stage 5 of the process (price review). Ofwat is carrying out its business plan assessment and whilst this is taking place the WINEP continues to be updated. Ofwat had stated it would publish its draft determinations on 11 July 2024 and open a public consultation. Once this concludes on 28 August 2024 Ofwat will then issue final determinations on water companies' business plans in December 2024 that include the WINEP.
18. The EA has provided the Commissioner with explanations as to how Ofwat's price control determinations for the water sector occur and how the WINEP spreadsheet forms part of the process.
19. It explained that one of the ways Ofwat regulates the water companies is to set the price, investment and service package that customers receive. This includes setting controls that limit what companies can charge their customers. Ofwat carry out a review of these price limits every five years and this is the price review. The next price review, due to be determined in December 2024 (PR24) will set the prices for 1 April 2025 – 31 March 2030.
20. Water and wastewater companies had, at the time of the request and at the time of this notice, submitted their business plans to Ofwat for PR24 with final decision to be made in December 2024. The WINEP is part of water company business plans submitted to Ofwat. The WINEP spreadsheet sets out a list of actions water companies need to take to meet their environmental obligations. The list of actions in the WINEP are specific to each company and define what they must include as part of their business plans.
21. The EA further explained the water companies themselves are responsible for developing the WINEP (stage 2 of the WINEP process outlined at paragraph 14). The EA assess the water company proposals in the WINEP spreadsheet during stage 4 of the WINEP process. This stage allows the EA to ensure regulatory needs are being met by the proposals and best outcomes will be achieved for customers and the environment.
22. The EA maintains the development of the WINEP spreadsheet for PR24 is an iterative process; policy decisions continue to be made by Government and these are reflected in in the WINEP to ensure legal environmental obligations are included in water company business plans for assessment by Ofwat up until the point of final determination (December 2024).

23. The EA explained that the WINEP reflects government strategic priorities and legal framework and this framework is flexible and new policies have, and continue, to emerge that government expect to be included in the WINEP. The EA states there are many on-going changes to the WINEP. The initial WINEP documents were shared with water companies on 31 March 2023 and since then have undergone many revisions and changes.
24. To illustrate this point the EA has explained that the WINEP of 31 March 2023 contained 8,531 environmental obligations whereas the version dated 5 July 2024 contained 18,190 environmental obligations. There have been several thousand changes to the WINEP, some of which are removals and others are additions. The EA has also provided the Commissioner with some more specific examples of outstanding areas where it is expected there will be changes required to the WINEP for the final release.
25. In summary, the EA argues the WINEP is a working live document and the spreadsheet was being actively worked on at the time of the request. It argues that regulation 12(4)(d) can be engaged if the material requested is in the course of completion or is relates to information in the course of completion. The version of the WINEP shared with the water companies relates to the final WINEP that is still in the course of completion.
26. The complainant argues that the request did not ask for WINEP as it may be now but as it was at the point it was supplied to the water companies. At this stage, regardless of whether it might be revised in the future, it was no longer material in the course of completion.
27. The version of the WINEP requested is from stage 4 of the WINEP process where the EA has assessed water companies' options and proposals. The complainant argues the WINEP at this point is the result of a completed assessment by the EA as to whether water companies have applied the WINEP options development guidance to ensure the WINEP outcomes can be achieved.
28. Further to this, once the WINEP options moved to stage 5 (the PR24) the complainant argues the EA's role is over as it is Ofwat who are considering the WINEP options. As such the version of the document requested (stage 4) is complete for the purposes of regulation 12(4)(d).
29. At stage 5 (PR24) the WINEP methodology states that "Ofwat determines the funding that water companies will have to complete the agreed WINEP". The complainant considers this further proof that at the end of stage 4 the information was 'agreed' and not unfinished for the purposes of regulation 12(4)(d).

30. The complainant accepts the WINEP process is incomplete but maintains the information itself (the WINEP at stage 4) was a complete document.

### **The Commissioner's view**

31. The Commissioner's guidance on regulation 12(4)(d)<sup>2</sup> is clear that the material itself must be in the course of completion, not the wider project. Draft documents are only 'in the course of completion' if they are actively being worked on or will be worked on within a reasonable amount of time.
32. The key issue here is whether the version of the WINEP requested (stage 4) is a complete piece of work in its own right.
33. The complainant has referred to the decision in *Highways England v Information Commissioner and Manisty* [2018] UKUT 423 ACC (12 Dec 2018)<sup>3</sup> as being of relevance to this as it related to a request for a 'stage 3' report and route maps that were part of a wider ongoing project. The Upper Tribunal (UT) found that the stage 3 report and the route maps were complete and separate pieces of work.
34. The UT decision dealt with a simpler issue as the route maps and report were complete documents and the UT could clearly see the request related to the maps and not to the wider policy that these were a part of. The Commissioner does not consider this analogous with this situation as the WINEP will continue to evolve until the wider programme of work has been completed.
35. The UT decision did not dispute the First Tier Tribunal's conclusion that a particular document that has itself been finished may still be part of 'material which is still in the course of completion' and that this will be determined by the facts of the case and the terms of the request. The UT was very clear that a judgement will need to be applied to cases involving this EIR exception.
36. The version of the WINEP released to water companies as part of stage 4 of the WINEP methodology is used by those companies to produce business plans. The WINEP is not a stand-alone document and it continues to be worked on. The EA has provided evidence to show the WINEP has undergone a significant number of changes since stage 4.

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<sup>2</sup> [Regulation 12\(4\)\(d\) - Material in the course of completion, unfinished documents, and incomplete data \(Environmental Information Regulations\) | ICO](#)

<sup>3</sup> [2019 AACR 17ws.pdf \(publishing.service.gov.uk\)](#)

37. On this basis the Commissioner does not consider the WINEP at stage 4 can be considered separately from other versions of the WINEP as it is an evolving document. The Commissioner has also considered whether the request related to only the WINEP at stage 4 or to the wider programme of work. The complainant argued they had specifically requested the version of the WINEP used for business planning and shared with the water companies to ensure the request was for the 'completed' document and that this could be viewed separately from the 'incomplete' process.
38. Again the Commissioner does not agree with the complainant that the versions of the WINEP can be easily viewed as separate from each other. Each version of the spreadsheet forms part of the final version and remains in the course of completion. At the very least, the version of the WINEP requested 'relates to' the final WINEP that is currently in the course of completion.
39. The Commissioner accepts that the methodology, as written, suggests a clean process with clear separation between each stage. However, the reality as described by the EA is not as straightforward and it seems apparent that the WINEP continues to be developed between the stages of the methodology.
40. On this basis the Commissioner accepts that the exception at regulation 12(4)(d) is engaged. The Commissioner will now go on to consider the public interest arguments.

### **Public interest arguments in favour of withholding**

41. The EA has explained the WINEP represents a significant financial cost and it is important to take a precautionary approach to revealing early iterations of the programme to mitigate any potential market sensitivity. The EA is concerned that the public may be misled about the investments involved and this could cause unnecessary speculation as to the impact this will have on customer's bills.
42. The EA recognises the significant public interest in matters relating to water companies and understanding the need to ensure the public are aware of how public bodies reach their decisions but there is also a significant risk that the EA, water companies and regulators will be diverted in having to deal with explaining matters of concern and correcting inaccurate reports and conclusions reached by the public and media.
43. Ofwat's consultation process on water companies' business plans (that will include the WINEP) will allow the public to provide their views on water companies' business plans including WINEP activities as details



will be made public, although not at the detail contained in the WINEP spreadsheet. The EA considers this PR24 process will enable the public to receive details of WINEP actions and comment on the consultation process but releasing the earlier, inaccurate, version of the WINEP may impact the ability of Ofwat to complete an effective consultation process.

44. The EA explained, the WINEP is developed to meet the policy steer from government. However, government policy has continued to evolve around this area and this has been reflected in changes to the WINEP. It will continue to be developed until Ofwat's final determination. It is important that this process is allowed to be completed in a safe space and without undue pressure from the public.
45. The process involves free and frank discussions enabling contribution of ideas to achieve the best for the environment. To be able to do this in a meaningful way, it is important that those involved in the process can discuss matters openly and freely without fear that information will be released to the public whilst the WINEP is being developed. Matters of a sensitive or radical nature that are proposed but may not form part of the final WINEP can be shared without fear or risk of media and public scrutiny.
46. The EA believes there is a strong public interest in withholding the information. Releasing a document that has changed significantly will prejudice the effective running of the EA and the safe space needed to reach decisions and direct resources where necessary. This would not be in the public interest.
47. The EA also states it relies on voluntary engagement, exchange of information and views to reach a final WINEP. Disclosure of information that relates to materials in the course of completion may result in discussions not having the frankness and openness that is required. There is a real risk that the process would be severely hindered and delayed as a result of the public seeking specific actions without understanding the full background in which decisions are reached.
48. The EA has also stated the 'chilling effect' argument applies as officers both at the EA and water companies would be reluctant to express themselves openly and fully knowing that draft strategies and proposals could be the subject of public and media scrutiny whilst the issue is live and discussions and decisions are ongoing. Further it would result in officers failing to discuss ambitious targets, or potential risks that they believe may cause public alarm, leading to the conduct of public affairs becoming less transparent rather than more which is clearly not in the public interest.



49. A safe space enables the effective running of public authorities as allows the debate of 'live' issues and for the best strategies and decisions to be made without being hindered by premature external comment. The considers disclosure at this stage is not in the public interest as this would harm its efforts in trying to achieve the best for the environment through WINEP.
50. The EA states the WINEP is not a simple document. Substantial changes have already taken place and will continue to take place. There is a public interest in ensuring that any information it discloses is factually correct and not likely to be misleading to the public. This factor is relevant to the release of information that relates to material in the course of completion concerning live issues. This is particularly relevant where there will be misinterpretation of investment and funding.
51. Releasing details relating to live matters (which are yet to agreed and approved) into the public domain would distract public debate away from the substantive issue and cause unnecessary alarm. As water companies are ultimately funded by the consumer, there is likely to be speculation and incorrect conclusions drawn as to the amount of funding that will be required and the amount consumers will pay. This would not be in the public interest.
52. The EA is aware the Commissioner would generally suggest any misleading information can be released with explanations to avoid speculation or wrong conclusions. However the EA's position is that given the level of changes and those continuing to take place to the WINEP, it would be impossible to explain the changes due to the ongoing live nature of matters. It would not be possible to explain what considerations have been amended or are no longer relevant and why as there is no final document produced yet..
53. Finally the EA emphasised that it did not consider that withholding this document would impact upon public participation - the WINEP actions form part of water companies' business plans. Whilst the version will not be shared as part of the consultation process, the public will have an opportunity to consider the WINEP actions and funding made available as part of Ofwat's consultation process.

### **Public interest arguments in favour of disclosure**

54. The EA recognised there is an inherent public interest in making environmental information available to aid openness and transparency. However it argued a significant amount of information is made available to the public to assist them with understanding the process for decision making and the Ofwat consultation would provide information on WINEP actions and funding relating to those activities.

55. The complainant argues that there is a very strong public interest in being able to see the stage 4 WINEP and compare this to what emerges later in the process. This would allow the public to see what projects initially in stage 4 have been put to one side by Ofwat during its consideration at stage 5.
56. The complainant does not consider the EA's arguments that disclosure might 'cause alarm' have any weight and have not been backed up. In any event, they argue even if there is a remote possibility of this it would be outweighed by the presumption in favour of disclosure inherent in the EIR.
57. The complainant argues the EA has not explained how disclosure of the requested information might distract the public away from considering what level of water industry investment in the environment is required.
58. The complainant does not dispute that a safe space was provided and used by the EA during stages 1 to 4 of the WINEP process but safe space arguments carry less weight when there have been external contributors to the process. The complainant also dismisses the EA's chilling effect arguments on the basis that at the end of stage 4 the WINEP is 'agreed' and any discussions between the EA and water companies have already taken place behind closed doors.

### **Balance of the public interest arguments**

59. The Commissioner understand there is significant interest in water companies and the WINEP is an important environmental programme aimed at providing information to water companies on the actions they need to take to meet the environmental legislative requirements that apply to them.
60. Stage 4 of the process involves the EA and others, such as Natural England, assessing the water companies preferred options to resolve any environmental risks identified at stage 2 of the process. Once assessed and agreed the WINEP options move to stage 2 (PR24) to be considered by Ofwat.
61. The Commissioner has already explained he considers that the WINEP at stage 4 relates to material in the course of completion and cannot be considered in isolation as a finished document as it subject to continuous changes through stage 5 with the EA having demonstrated that it has been amended based on Government policy changes.
62. The safe space and chilling effect arguments do carry some weight here. Whilst Ofwat are considering the water companies options and conducting the PR24 the EA are still responsible for maintaining the 'live' dataset and updating it with any changes. They explained they are still

developing the WINEP at this point as policy continues to change and develop and both internal and external discussions continue. The safe space and chilling effect argument the EA has presented relate to the continued safe space needed to discuss policy options as the WINEP progresses prior to the end of stage 6 of the WINEP methodology process.

63. In line with the Commissioner's guidance, there are circumstances in which weight can be given to the argument that disclosing incomplete information would be misleading or give an inaccurate impression.
64. The stage 4 WINEP will vary significantly from the final version as the EA has explained. The reasons for this variance can be broadly explained ie changes to policy, changes following PR24. However, the WINEP spreadsheet is voluminous and if it were disclosed in its early iteration and members of the public were to question individual lines or actions within it the effort required to provide explanations could be significant and distracting, particularly as the WINEP will already have moved on and changed significantly from the stage 4 version.
65. The final version of the WINEP will be significantly different than this version, Ofwat will release details of the WINEP as part of PR24 but the full version of the spreadsheet will remain confidential until after PR24 and Ofwat has issued its final determination. At this stage the action in the WINEP will be set and the WINEP will be published.
66. The complainant's arguments for disclosure are that seeing the stage 4 version of WINEP would show what Ofwat has put aside during stage 5 of the process and it will provide information in WINEP actions and funding related to those actions. Disclosure would provide more information on the level of water industry investment in the environment and allow for scrutiny of whether this is sufficient.
67. The Commissioner accepts there is public interest in understanding how the WINEP actions may have changed from one stage to another, to see how priorities have changed and evolved and what options for meeting environmental obligations were put forward and followed through or dismissed. However, at this stage there is no comparison to be made and the Commissioner's view is that there would be a more significant argument for disclosing earlier versions of the WINEP once the final version has been published.
68. The Commissioner's guidance on regulation 12(4)(d) makes it clear that a key factor in assessing the public interest is the extent to which the information would inform public debate. He acknowledges there is a public interest in disclosing information that gives a full picture as to how decisions have been reached. However, he does not consider that

disclosing an earlier version of an incomplete and live spreadsheet would enhance the public debate on water industry investment in the environment when decisions have not been finalised and it would be impossible to see what entries have remained and been removed at this stage.

69. The Commissioner's view is that the disruption to the WINEP process and Ofwat's PR24 at this stage would not be in the public interest, particularly as the process is at such an important and advanced stage. There is a strong public interest in maintaining the safe space needed for debate and to allow for continued changes to the WINEP before final determinations are made. The public consultation by Ofwat on PR24 will satisfy much of the public interest in understanding what level of investment water companies are committing to environmental issues as there will be information on WINEP activities included in this.
70. The EA has stated there is an intention to publish the WINEP once everything has concluded and it may well be that the public interest in disclosing earlier versions of the WINEP spreadsheet at different stages of the process is more substantial when there are comparisons to be made and there is less risk of distraction and erosion of the safe space needed to continue to develop WINEP. However, at the time of the request the Commissioner's decision is that the EA has correctly withheld the requested information under regulation 12(4)(d).
71. The Commissioner has not gone on to consider the use of regulation 12(5)(d).

## **Right of appeal**

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72. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. 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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