

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

Decision notice

Date: 21 August 2019

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

Decision (including any steps ordered)

1. In a five part request, the complainant has requested information associated with the operation of the sewerage system at Whitburn, and information associated with a previous request for information he had submitted to it. The Environment Agency (EA) refused to comply with parts 1, 2, 3 and 4 of the request. EA complied with part 5 of the request. EA subsequently confirmed to the Commissioner that it is relying on regulation 12(4)(b) (manifestly unreasonable request).
2. The Commissioner's decision is that parts 1, 2, 3, and 4 of the request are manifestly unreasonable under regulation 12(4)(b) of the EIR - by virtue of being vexatious - and that the public interest favours maintaining the exception.
3. The Commissioner does not require the EA to take any remedial steps.

Request and response

4. On 15 January 2019, the complainant wrote to EA and, included in his wider correspondence, submitted five requests as follows:

"[1] 10... I request under the EIR that you provide all information that brought about this change from 6XDWF to 4.5XDWF and how such calculations comes to 1291/s for Whitburn and is legal. [2] I request a copy of the consent that allows the CSOs to spill at 4.5XDWF?..."

[3] I request under the EIRs a copy of the discharge consent that allows for this type of discharge to take place and when the change was advertised..."

[4] 11... please under the EIRs provide all correspondence showing where the system was not only designed to spill at 4.5XDWF, it has consent to do so?..."

[5] 13... For that reason I ask that you provide this so-called report which allows the EA to under the EIR block my requests for information?"

5. EA responded on 12 February 2019 – its reference 116198. EA advised the complainant that it had previously advised him that it would not enter into any further correspondence with him about this topic and would not be complying with his request. However, with regard to part 5 of the request, EA clarified that its reference to a “report” in previous correspondence to him was a reference to the Commissioner’s decision in case reference FER0230659. EA advised it had previously provided the complainant with a copy of this decision notice and it provided a hyperlink to where this notice is published.
6. The Commissioner notes that FER0230659 was from 2009 and also concerned the complainant and EA. The Commissioner had found that EA could rely on regulation 12(4)(b) to refuse to comply with the complainant’s request.
7. With regard to the current request, the complainant requested an internal review on 12 February 2019. In correspondence to the complainant on 13 March 2019 the EA advised again that it would not correspond with him further on the matters raised in his request and would not carry out a review.

Scope of the case

8. The complainant contacted the Commissioner on 24 February 2019 to complain about the way his request for information had been handled. The focus of his complaint is EA’s response to parts 1 – 4 of this request.

9. In its submission to the Commissioner, EA has confirmed that it is relying on regulation 12(4)(b) to refuse to comply with these four parts of the request, by virtue of these parts being vexatious.
10. The Commissioner's investigation has focussed on EA's application of regulation 12(4)(b) to parts 1 – 4 of the request, and the associated public interest test.

Reasons for decision

11. Regulation 12(4)(b) of the EIR says that a public authority may refuse to disclose information if the request is 'manifestly unreasonable'. This exception can be used when a request is vexatious or when the cost of complying with a request would be too great. In this case, EA considers the complainant's request to be vexatious requests (the equivalent of section 14(1) of the FOIA).
12. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
13. In line with her published guidance on vexatious requests, the Commissioner considers whether the request itself is manifestly unreasonable rather than the individual submitting it. Sometimes, it will be patently obvious that a request is manifestly unreasonable. In cases where it is not so clear cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually be a matter of objectively judging the evidence of the impact on the authority and weighing this against any evidence about the purpose and value of the request. Public authorities may also take into account the context and history of the request where relevant.
14. Where the exception is engaged it is subject to a public interest test under regulation 12(1)(b) to determine whether the information should be disclosed in spite of the exception applying.
15. In its submission to her, EA has provided a background to the request. It says that the complainant has been corresponding with the EA on the subject of sewage flows at the Hendon Sewage Works and the Whitburn sewage treatment system since 1992.

16. EA has explained that since secondary treatment was installed at Hendon sewage treatment works in 2000 (a requirement of the Urban Wastewater Treatment Directive), the adjacent bathing waters at Roker and Whitburn have almost always been at "Excellent" standard. The expected standard for the Revised Bathing Water Directive is "Sufficient". Following a Public Inquiry and the Planning Inspectors recommendations of 2001, Northumbrian Water has complied with its permit. Even in 2012, which EA says was a very wet year, the bathing waters were classed as "Good" standard. Following a decision of the European Commission that it would be possible to reduce the number of spills, despite the cost being considerable for marginal environmental benefit, Northumbrian Water delivered improvements to reduce spills to a modelled average of fewer than 20 per year at a cost of £10 million. The works were completed before the end of 2017, on time, and are being monitored. EA confirmed that it is satisfied that the system is operating as it should.
17. EA says that prior to the improvements to the Whitburn sewerage system in 2017, there were an average of 27 spills per year (based on 10 years data) with an average spill volume of 657,993m³. In 2018 there were 17 spills with a total discharge volume of 376,593m³. This volume is less than 2% of what is treated at Hendon works and then discharged to sea. This represents a 37% reduction in the number of spills and a 40% reduction in volume discharged. Because the discharges are made during high rainfall, it is very dilute. Spills are controlled, measured and reported.
18. EA has noted that Whitburn and Roker are amongst the best beaches in the country.
19. EA's submission goes on to discuss the FER0230659 decision. As discussed this had found that EA was not obliged to comply with a previous request from the complainant as the Commissioner found it was manifestly unreasonable under regulation 12(4)(b). The Commissioner had noted that she had considered 699 communications primarily directly between the complainant and EA. She had also noted that a Public Inquiry had taken place before applications were approved by government and EA and that there had been a parliamentary ombudsman's decision on a complaint by the complainant that had found in EA's favour.
20. The complainant had appealed against the decision notice to the First Tier Tribunal (Information Rights) ('FTT'). The FTT upheld the Commissioner's decision and dismissed the appeal. EA has highlighted what it considers to be the main points of the FTT decision, as follows:

Point 36 – *"What did strike the Tribunal was the inordinate patience shown by the EA over a number of years towards a series of requests for information that had either been provided or was not held. Objectively the EA could have drawn a line at a much earlier stage -- and saved considerable management time -- in relation to all these enquiries."*

Point 39 – *"The Tribunal wishes to emphasise that – in dismissing this appeal on the grounds it has – this decision does not give the EA a licence to ignore future requests from the Appellant in relation to new information (as opposed to repetitious requests in relation to the information covered in this appeal)."*

21. The Upper Tribunal refused the complainant permission to appeal the FTT decision.
22. The EA's submission goes on to explain that in 2013 the complainant again complained to the Commissioner regarding EA's decision not to provide information requested relating to the Hendon Sewage Works. EA had responded referring the complainant to a letter it sent to him on 14 February 2012 which had explained that it would not be responding to any further correspondence on the subject of the Sunderland sewage system as it considered such requests to be manifestly unreasonable under regulation 12(4)(b) of the EIR.
23. The Commissioner decided in the decision notice FER0473714 that the complainant's request was again manifestly unreasonable under regulation 12(4)(b) of the EIR and that the public interest in maintaining the exception outweighed the public interest in disclosure. EA notes that it was not required to carry out an internal review before the Commissioner considered the complainant's appeal to her. EA considers that this case is relevant as it references the same information requested in the current case and is evidence that EA has dealt with this matter before. The Commissioner has reviewed the FER0473714 decision and notes that the complainant's voluminous request in that case also concerned Sunderland sewerage system (including Whitburn) and included requests for consents, calculations and correspondence.
24. The complainant's subsequent appeal to the FTT - of the Commissioner's decision in FER0473714 - was dismissed and the Upper Tribunal again refused the complainant permission to appeal the FTT decision.
25. EA argues that outstanding parts of the request made on 15 January 2019 continue to ask for the same information relating to the Hendon sewage works. EA does not believe this to be new information.

26. EA has provided the Commissioner with a chronology of requests it has received from the complainant since 2013 (when this same issue was last investigated).
27. It says this chronology not only illustrates the volume of ongoing communication it continues to have with the complainant, but that the EA does provide him with responses to his requests for new information. The outstanding requests made on 15 January 2019 were for information EA says it has answered "*time and time again*" in the past and is repeated.
28. The number of requests the EA has received from the complainant over the years is, EA says, extreme. The requests remain repetitive and do not take into account how it has already responded.
29. Finally, EA has told the Commissioner that the ongoing dealings with the complainant over requests and appeals have imposed an immense and significant burden in the past, and continue to do so. It says that the request, being repeated, imposes a burden in terms of time and resources and also serves to distract EA from its core functions. Given the complainant's history of making repeated requests, EA considers that complying with this request is likely to lead to him making future requests for information.
30. The Commissioner recognises that the subject matter of the request that is the subject of this notice is quite clearly of significant importance to the complainant and she has noted the significant volume of material he has sent to her to support his complaint. She has reviewed a submission the complainant sent to her on 23 July 2019. In this submission the complainant discusses his concerns about Whitburn sewerage system, the 2001 Public Inquiry and the involvement of the European Court of Justice in the matter (in 2010/12).
31. The Commissioner has, however, considered all the circumstances of this case. As in her decisions in FER0230659 and FER0473714 the Commissioner considers that the complainant continues to demonstrate an unreasonable persistence regarding his concerns about Whitburn sewerage system, and that there remains an obsessive quality to his previous requests to other authorities and this most recent request to EA. This is because of the length of time the complainant has been corresponding with EA on this matter (well over 20 years); the fact that the matter has been considered independently at a Public Inquiry; and the complainant's interaction with other public authorities on this matter, under EIR.
37. The Commissioner considers that any serious purpose or value behind the complainant's request is further diminished by the fact that it has

already been answered. It is therefore very difficult to justify EA allocating any time to complying with the request. This would effectively keep re-opened a topic that has long since been independently concluded.

38. As such the Commissioner is satisfied that EA has correctly applied regulation 12(4)(b) to parts 1, 2, 3 and 4 of the request in this case as these parts can be categorised as manifestly unreasonable by virtue of being vexatious. By way of a general observation, the Commissioner notes that in its submission the EA refers to the request as being a repeat of previous requests. While the FOIA has a separate subsection that covers repeat requests – section 14(2) - there is no separate provision for repeat requests under the EIR; such requests are caught by regulation 12(4)(b).

39. The Commissioner has gone on to consider the public interest test.

Public Interest Test

Public interest arguments in favour of disclosing the information

39. EA says that, as always, it takes into account the general public interest in transparency and accountability. It says it is mindful of the presumption in favour of disclosure and says it does provide the complainant with responses to requests for new information.

Public interest arguments in favour of maintaining the exception

40. EA argues that the information requested in the request of 15 January 2019 would not contribute to the effective running of the public sector or sustainable development; rather, the opposite as corresponding to the complainant's requests over many years has been a distraction from its core functions.

41. EA maintains that the public interest test factors show an extremely strong indication for not complying with the request – as has been confirmed in the Commissioner's previous decisions, the decisions of the FTT and the judges of the Upper Tribunal over a period of 10 years.

Balance of the public interest

42. None of the material the complainant has provided to her in the course of this investigation has persuaded the Commissioner that the complainant's concerns have any wider public interest. Given the history and circumstances of the request, the Commissioner is satisfied that the public interest in favour of disclosure is clearly outweighed by the public interest in favour of maintaining the exception.

Right of appeal

43. 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

44. 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.
45. 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

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