

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

Decision notice

Date: 22 December 2023

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Environment Agency correctly applied the exception under regulation 12(5)(a) of the EIR to information in the 'Thirlmere Mitigation Section 20 Annual Report' that it disclosed. This exception concerns national security and public safety. The Environment Agency didn't comply with regulations 5(2) and 14(2) as it didn't make information available or issue a refusal notice in respect of the remaining information within the statutory timeframe of 20 working days.
2. It's not necessary for the Environment Agency to take any corrective steps.

Request and response

3. The Commissioner understands that the 'Thirlmere Mitigation Section 20 Annual Report' ('the Report') is an agreement under Section 20 of the Water Resources Act 1991 between United Utilities (UU) and the Environment Agency (EA), which was signed on 22 July 2021. The Section 20 agreement secures the management of releases of water and delivery of habitat improvement works to provide Mitigation Measures.

These Mitigation Measures are to ensure no adverse effect on the integrity of the River Derwent and Bassenthwaite Lake Special Area of Conservation from the operation of UU's Thirlmere [reservoir] Transfer Scheme and the releases UU make to St Johns Beck.

4. The complainant made the following information request to the EA on 16 December 2022:

"As we agreed at our last meeting on 3/11/22, I am now formally requesting from the EA under FOI an unredacted copy of the 1st year Thirlmere S20 report."

5. The EA responded on 5 June 2023. It disclosed relevant information, redacted information in Appendix 2 of the Report under regulation 12(5)(a) and withheld Appendix 3 under 12(5)(e) of the EIR.
6. The complainant requested an internal review on 26 June 2023 and the EA provided one on 14 August 2023. It maintained its position regarding its application of regulation 12(5)(a). The EA disclosed some of Appendix 3 which it had previously withheld in its entirety under regulation 12(5)(e), having redacted personal data from the disclosed information. EA also acknowledged the delay in responding to the request.

Reasons for decision

7. Based on the complaint to the Commissioner, this reasoning covers the EA's application of regulation 12(5)(a) to some of the information associated with the disclosed Report.
8. Under regulation 12(5)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
9. The information that the EA is withholding under this exception is in Appendix 2 of the Report. This appendix concerns a delay to a planned release [of water from Thirlmere] in September 2021.
10. The complainant disputes that the EA can withhold that information. This is because, in addition to available information that they quoted in their request for an internal review, they say that "there is a plethora of other sources in the public domain from which a detailed description of the infrastructure at Bridge End, its connections to the Keswick water supply and to the new West Cumbria supply, can be easily constructed." This is information in planning applications and in published meeting minutes.

11. The Commissioner notes that if that were the case, the complainant wouldn't need the EA to disclose the disputed information, but he asked the EA to address that point.
12. In its submission to the Commissioner the EA has explained that when it received the complainant's request, it consulted with UU as the owner of the information, for its views on disclosure and redaction. EA says it made clear to UU that the final decision on disclosure remained with the EA as the public authority who received the request. It carefully reviewed UU's redactions and submissions and consulted widely internally with colleagues.
13. The EA notes that the complainant was concerned that during the consultation with UU, the EA had accepted all suggested redactions from UU in relation to the Report. The EA says that this is not the case. Following consultation with UU, the EA consulted with internal specialist teams and followed guidance on disclosure in the 'UK National Protocol for the Handling, Transmission and Storage of Reservoir Information and Flood Maps UK Reservoir Safety Liaison Group Version 2.4.5 JUNE 2018.' The National Protocol 2018 illustrates in further detail the harm that can happen as a direct result of disclosing the type of information which was withheld for this request.
14. The EA says that as a result of the complaint to the Commissioner, its technical team has reassessed the withheld information whilst also reviewing information from various planning applications that the complainant had identified.
15. It has conducted a search on the Lake District National Park's planning portal and cross-referenced the information requested by the complainant, additionally taking into consideration the complainant's argument, quoted above.
16. The EA says that, to its reasonable belief, based on the searches it's conducted, the disputed information which the complainant asserts to be in the public domain is, in fact, not publicly available.
17. The EA has provided the Commissioner with planning portal screenshots. These demonstrate the searches its technical planning officers conducted to investigate whether the information referred to by the complainant could indeed be in the public domain. The EA found that some information may indeed refer to the same or similar subject matter, but it's not the identical information.
18. The EA says its review has concluded that certain information about Bridge End Water Treatment Works, Thirlmere Reservoir and other associated infrastructure can be found in the public domain. However,

the redactions from the Report contain details about very specific operating conditions that, in the view of its specialist teams, could be used to identify potential vulnerabilities within the infrastructure. This could have an impact on public safety and to the public water supply. The EA considers that the redacted information is therefore not the same as the information that's already available to members of the public.

19. The Commissioner considers that the EA has given proper consideration as to whether the information is or isn't already available and he accepts that it isn't. As the Commissioner has noted above, if the information that the complainant is seeking was already in the public domain, they wouldn't need to request it from the EA.
20. The Commissioner finds that the EA is entitled to withhold the information in question under regulation 12(5)(a) of the EIR. This is because disclosing it would indicate potential vulnerabilities in the infrastructure concerned, which those so minded could exploit. Disclosing the information would therefore adversely affect public safety and the public water supply.

Public interest test

21. The complainant considers that there's a public interest in disclosing the information as it would highlight the following issues:
 - The new infrastructure not being able to deliver its design requirements.
 - Pre-existing infrastructure which is limiting the performance of the new infrastructure and therefore its ability to meet its design intent.
 - Provision of the potable water supply to Keswick during operation of "the new LSVs."
 - Prevention of the required environmental mitigations of the Report being achieved.
22. The EA says it would only withhold information if it were sure that disclosure would cause substantial harm. Here the harm is that disclosure would be likely to have an adverse effect on UU's ability to protect the public water supply. Disclosing potential vulnerabilities in the reservoir endangers public safety from potential acts of sabotage. Whilst the likelihood of sabotage may appear remote, the current threat level in the UK is 'Substantial', therefore this scenario cannot be ruled out.

23. Moreover, the EA says, the likelihood of sabotage is increased if the withheld information were to be combined with information that **is** already in the public domain; the harm and repercussions of disclosure could potentially be catastrophic.
24. The Commissioner has found that disclosing the withheld information would adversely affect national security and public safety. He's taken account of the presumption in favour of disclosure under regulation 12(2) of the EIR but hasn't been presented with any public interest arguments for disclosing the information that would justify that affect. The Commissioner considers that the public interest in transparency has been met satisfactorily through the information that EA has disclosed, which includes the majority of Appendix 2. His decision is that the public interest favours withholding the information that he's found to be excepted under regulation 12(5)(a) of the EIR.

Procedural matters

25. Under regulation 5(2) of the EIR, a public authority must make requested information available, if it's held and isn't subject to an exception, within 20 working days following the date of receipt of the request. Similarly, under regulation 14(2) a public authority must issue a refusal notice in respect of any excepted information within the same time period.
26. In this case, the complainant submitted their request on 16 December 2022 and didn't receive a response until six months later. The EA explained to the complainant the pressures it was under that caused the delay. Nevertheless, the EA's response to the request didn't comply with regulations 5(2) and 14(2) of the EIR.

Right of appeal

27. 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

28. 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.
29. 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

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