

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

Date: 10 May 2024

Public Authority: United Utilities Water Limited
Address: Haweswater House
Lingley Mere Business Park
Lingley Green Avenue
Great Sankey
Warrington
WA5 3LP

Decision (including any steps ordered)

1. The complainant has requested information about discharges from United Utilities. United Utilities (“the public authority”) refused to provide the requested information, citing regulation 12(5)(b) (The course of justice and inquiries exception) and regulation 12(5)(d) (confidentiality of proceedings).
2. The Commissioner’s decision is that the withheld information doesn’t engage regulation 12(5)(b) or regulation 12(5)(d). Therefore the public authority isn’t entitled to withhold it.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information.
4. The public authority must take these steps 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

5. On 5 September 2023 the complainant wrote to the public authority and made the following request:

“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...”
6. On 3 October 2023 the public authority responded and refused to comply with the request, citing regulation 12(5)(b) (The course of justice and inquiries exception).
7. The complainant requested an internal review on 4 October 2023.
8. The public authority provided the outcome to its internal review on 21 November 2023. It upheld its previous position.
9. During this investigation, the public authority confirmed to the Commissioner that it was relying on regulation 12(5)(d) (Confidentiality of proceedings) in the alternative.

Background

10. The complainant has made identical requests to Yorkshire Water, South West Water, Anglian Water, Severn Trent Water and Northumbrian Water. All of these complaints have been considered by the Commissioner.
11. These requests relate to dry spillage, where water companies discharge sewage into rivers and seas when it's not raining. This leads to higher concentrations of sewage in waterways.
12. Water companies are allowed to release sewage into rivers and seas, in order to prevent pipe systems becoming overwhelmed, but only in periods of heavy or prolonged rain, in order to dilute the sewage.
13. There have been several claims¹ brought against water companies over alleged dry spillage, which is illegal under environmental laws.
14. There are two bodies currently investigating these allegations. The Environment Agency is conducting a criminal investigation into breaches

¹ [Public could receive hundreds of millions as water firms face sewage lawsuit | Water industry | The Guardian](#)

under the Environment Act 1995, The Environmental Permitting (England and Wales) Regulations 2016 and the Police and Criminal Evidence Act 1984 and Ofwat is conducting an investigation into compliance with the Water Industry Act 1991.

15. The definition of 'environmental information' under the EIR, is laid out in regulation 2(1) and includes:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).'

16. The Commissioner is satisfied that the requested information relates to discharges and so is environmental according to regulation 2(1)(b).

Scope of the case

17. The complainant disputes the public authority's application of regulation 12(5)(b).

18. The Commissioner will first consider whether the public authority is entitled to withhold the requested information under regulation 12(5)(b). Depending on his findings, he may go onto consider the public authority's application of regulation 12(5)(d) also.

Reasons for decision

Regulation 12(5)(b) – The course of justice and inquiries exception

19. Regulation 12(5)(b) of the EIR exempts information from disclosure if doing so 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.
20. The withheld information is the start and stop times, and the duration, of each discharge recorded in 2022. The Commissioner has seen a sample of the withheld information and notes it also contains the site from which the discharge was made. The public authority is withholding

this information because its relevant to both the Environment Agency and Ofwat's investigations (referred to in paragraph 14).

21. However, it's not enough for the requested information to be relevant to any of these investigations. In order to engage the exception, disclosure of the withheld information must adversely affect the investigations.
22. The public authority has explained:

"Withholding the information allows for a fair investigation and ensures the course of justice is not impacted. It would not be in the public interest for the proceedings to be adversely affected or compromised by inappropriate sharing of information, or information that could jeopardise the regulator's ability to take enforcement action."
23. The Commissioner agrees, it's important to carefully consider whether disclosing information would compromise, distract or otherwise impede the investigations. However, just because information is relevant to the investigations, doesn't mean its disclosure would harm the investigation and engage the exception.
24. The information being requested here is data – its the site name, discharge start time and discharge stop time. It's not any analysis, commentary or deliberation that's come from the Environment Agency or Ofwat. It's not information that's been created by the regulators during their investigations - it's purely factual information. The Commissioner is struggling to see how the start and stop times would impact or obstruct any specific investigation, because the public authority hasn't explained **how** this would occur.
25. It's not in dispute that dry spillages have occurred, that is evident by virtue of the investigations being carried out by the Environment Agency and Ofwat. However, the start and stop times won't give any indication of how these dry spills will be considered by either regulator or what action might be taken as a result of the investigations.
26. Disclosure will confirm how many times the public authority released sewage into the river and seas. However, the request covers all start and stop times; it doesn't ask the public authority to identify which relate to dry spillages.
27. The Commissioner considers it unlikely that any individual could successfully cross reference each start and stop time with the corresponding weather, to ascertain whether the spill was dry or not. Even if they could, it's the Environment Agency and Ofwat that will be able to confirm what constitutes heavy or prolonged rainfall and therefore what constitutes a dry spill.

28. The public authority has argued:

“the requested data is the raw data used for the publication of our yearly EDM submission. The EDM submission requires us to complete a specific analysis of the data under specific instructions set out by the Environment Agency as our regulator. There are clear statutory controls relating to the collection and analysis of this data which are reported for regulatory requirements in order to meet statutory controls. Disclosure of the raw data before this stringent analysis has been conducted would lead to misinterpretation of how our assets operate. The data covers numerous assets and it would be disproportionate to review the data and provide an explanation of the data relevant to each asset”

29. The Commissioner doesn't agree that purely factual data, i.e. where, when and for how long, a spillage occurred, can be misinterpreted. Again, he notes the withheld information asks for all spillages, which would include any that occurred in compliance with environmental laws. If the public authority wanted to expand on this point alongside disclosure, it could do so but the Commissioner doesn't agree that it would be disproportionate to explain that the data will include both dry spills and non-dry spills.

30. The public authority has gone onto say:

“Likewise providing this clarification would then adversely affect our position in respect of the ongoing investigations. There is therefore a real risk that disclosing the raw data would distract public debate and therefore seriously affect our resources.”

31. The exception relates to the course of justice and this includes the ability of a person (a legal person in this case, such as the public authority) to receive a fair trial.

32. However, the Tribunal in *Watts v the Information Commissioner*² confirmed that ‘the fact that the information has some connection with the subject matter of a prosecution will not be sufficient justification for non-disclosure.’ For the same reasons discussed above, the Commissioner isn't convinced that the public authority has sufficiently demonstrated **how** disclosure of the withheld information would adversely affect its position or the ability of either of the regulators to conduct the investigations and the wider course of justice, or the public authority's right to a fair trial.

² ([EA/2007/0022, 20 November 2007](#))

33. The complainant has brought to the Commissioner's attention that David Black, CEO of Ofwat, told the public affairs committee on 27 November 2023³:

"We do not think that the investigation itself is a good reason for companies not to provide data. They have some legal obligations to disclose information, and there is a process for working that through. That process does not involve Ofwat directly, but we would encourage companies to be open and transparent about their environmental performance."

34. During this investigation, the Commissioner asked the public authority if either of the regulators had given any indication that they have concerns about the requested information being disclosed and, if so, what those concerns were.

35. The public authority addressed this point in its submission:

"Both regulators have stated throughout the investigation that while the investigation continues, they are limited as to what can be shared about their inquiries."

36. It doesn't appear the public authority has consulted either regulator on disclosure of the start and stop times that are being requested in this case.

37. The Commissioner acknowledges that he has dealt with previous, similar cases, including IC-244671-M5G6,⁴ IC-230605-Q2W0⁵ and IC-206971-F0G9.⁶ These cases involved requests for start and stop times of discharges or 'flow data' and concerned United Utilities and Northumbrian Water Limited. In all cases, the Commissioner upheld the public authorities application of regulation 12(5)(b) and decided the information should be withheld.

38. Understandably, the public authority has cited these, and other relevant cases, in support of its application of regulation 12(5)(b) in this instance. However, the Commissioner must consider each complaint he receives on a case-by-case basis and he isn't bound by any of his previous decisions.

³ committees.parliament.uk/oralevidence/13888/pdf/

⁴ [IC-244671-M5G6 \(ico.org.uk\)](https://ico.org.uk/IC-244671-M5G6)

⁵ [IC-230605-Q2W0.pdf, currently under appeal at the First-tier tribunal \(General Regulatory chamber\) information rights appeal EA/2023/0315 under appeal \(ico.org.uk\)](https://ico.org.uk/IC-230605-Q2W0.pdf)

⁶ [ic-206971-f9g9.pdf \(ico.org.uk\)](https://ico.org.uk/ic-206971-f9g9.pdf)

39. Since the handling of these previous cases, new evidence has come to light, including David Black's statement referred to in paragraph 33 and the judgement of the appeal in IC-206971-F0G9.⁷
40. In this judgement, the Tribunal upheld the complainant's appeal against the Commissioner's decision and found that the exception wasn't engaged. The Tribunal remarked that, in that case, application of the exemption was motivated by its desire to 'avoid media or political attention' and to 'prevent third parties developing "their own subjective, politically driven analysis of network flows with a view to challenging whatever position NWL adopts in response to the Investigation."' ⁸
41. It would be remiss of the Commissioner to ignore this judgement and, in light of new evidence, he has decided that the public authority has failed to demonstrate that the exception is engaged in this instance.
42. Since the public authority has failed to demonstrate that the exception is engaged, it's not entitled to rely on it. Therefore, the Commissioner will go onto consider the public authority's application of regulation 12(5)(d) but he needs to do so alongside regulation 12(9) (information on emissions).

Regulation 12(9) – Information on emissions

Regulation 12(5)(d) - Confidentiality of proceedings

43. Regulation 12(5)(d) exempts information from disclosure if doing so would adversely affect the confidentiality of a public authority's proceedings where the confidentiality arises from statute or common law.
44. Regulation 12(9)⁹ states that certain exceptions, including regulation 12(5)(d), cannot be used to withhold information on emissions.

⁷ [Stephen Lavelle v The Information Commissioner & Ors - Find case law - The National Archives](#)

⁸ [Stephen Lavelle v The Information Commissioner & Ors - Find case law - The National Archives \(para 72\)](#)

⁹ [Information on emissions \(regulation 12\(9\)\) \(Environmental Information Regulations\) | ICO](#)

45. 'Emissions' is meant to be interpreted broadly and will include:
- the by-product of an activity or process;
 - that is added (or potentially added) to and affects the elements of the environment;
 - over which any control is relinquished.
46. The requested information is about the release of sewage into rivers and seas. This is a by-product of the public authority's work, over which it has control in that it chooses when to release the material in question.
47. 'Emissions' in regulation 12(9) is meant to be interpreted in the exact same way as in regulation 2(1)(b), which talks about 'emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).'
48. Since the requested information is environmental under regulation 2(1)(b), it follows that the provision at regulation 12(9) must apply.
49. Regulation 12(9) overrides the use of 12(5)(d). Where regulation 12(9) applies, a public authority cannot rely on regulation 12(5)(d) to withhold information, like in this case.
50. Since the Commissioner has determined that neither regulation 12(5)(b) or regulation 12(5)(d) applies, the requested information must be disclosed.

Right of appeal

51. 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

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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