

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

**Decision notice**

**Date:** 13 May 2024

**Public Authority:** Department for Environment, Food and Rural Affairs (Defra)

**Address:** Seacole Building, 4<sup>th</sup> Floor, 2 Marsham Street, London, SW1P 4DF

**Decision (including any steps ordered)**

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1. The complainant has requested Defra to disclose a copy of all internal submissions to ministers' documents sent by its water quality team with regards to waste water treatment works in 2021. Defra refused to disclose the requested information citing regulation 12(4)(b) of the EIR – manifestly unreasonable.
2. The Commissioner's decision is that Defra is entitled to rely on regulation 12(4)(b) of the EIR and met its obligations under regulation 9, in terms of providing appropriate advice and assistance. He has however recorded a breach of regulation 11 of the EIR, as Defra failed to respond to the complainant's request for an internal review within 40 working days of receipt.
3. The Commissioner does not require further steps.

**Request and response**

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4. On 17 September 2023, the complainant wrote to Defra and requested information in the following terms:

"A copy of all internal 'submission to ministers' documents sent by the water quality team with regards to waste water treatment works in 2021."

5. Defra responded on 13 October 2023. It refused to disclose the information citing regulation 12(4)(b) of the EIR.
6. The complainant requested an internal review on 13 October 2023. They disputed that regulation 12(4)(b) of the EIR applies and stated that their request was precise. They argued that a submission to minister is a formal document with an associated sign off process. The request was also for information held by one single team. The complainant commented that given the sign off required they could not imagine there being high volumes of these documents. They also provided an example of the sign off sheet to assist Defra and said that it had obtained one submission from the court and the description of the document the court used is the same as the one they used in their request.
7. Defra acknowledged the internal review request but failed to complete the process in time.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 18 December 2023 to complain about the way their request for information had been handled. The Commissioner accepted the complaint for full investigation on 8 January 2024 without the internal review process being completed. Defra completed the internal review on 15 January 2024 and upheld its previous application of regulation 12(4)(b) of the EIR.
9. The Commissioner considers that the scope of his investigation is to establish whether or not Defra is entitled to rely on regulation 12(4)(b) of the EIR. He will also consider if there has been any procedural breaches of the EIR.

### **Reasons for decision**

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#### **Regulation 12(4)(b) – manifestly unreasonable**

10. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information if the request is manifestly unreasonable. It is subject to the public interest test.

11. When determining whether a request for information is manifestly unreasonable, a public authority is directed to consider whether a request is likely to cause a disproportionate cost or burden, or an unjustified level of distress, disruption or irritation.
12. Whether a request will result in a disproportionate cost or burden being caused is fact specific, and the EIR does not contain a limit at which the cost of complying with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time.
13. The Fees Regulations stipulate that a cost estimate must be reasonable in the circumstances of the case. The limit given for central government departments is £600, or 24 hours work; for local government it is £450, or 18 hours work. Included within the limit the authority can consider the time taken to:
  - a) determine whether it holds the information;
  - b) locate the information, or a document which may contain the information;
  - c) retrieve the information, or a document which may contain the information; and
  - d) extract the information from a document containing it.
14. For the purposes of the Fees Regulations, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable.
15. Defra explained how the complainant has requested a copy of all internal "submission to ministers" documents sent by the water quality team with regards to waste water treatment works over a 12 month period. It advised that waste water treatment works will touch on a variety of topics, including sewage, water quality in general as well as others. It said that advice could potentially come from multiple different teams to multiple different ministers because the topic in question is broad and far reaching.
16. The request is also for the water quality team. Although it is not certain, Defra has taken this to mean its water quality policy team and it has focused its response on that. It however said that in reality a fuller search would need to include colleagues from other professions, such as

legal, analytical and communications teams, as they also work on water quality.

17. Defra confirmed that it is not possible to limit this search to just the ministers themselves and/or their private office (thinking that all the requested information would have been directed to them and so it would make any search more focussed) because they only hold information going back three months. The request is for the year of 2021 so they will no longer hold the requested information.
18. It stated that very few of the officers in the present water quality policy teams – which numbers well over 40 - worked in the water quality team during the period in question. While the team in 2021 was smaller, many former officers in the water quality policy team have now found positions elsewhere in Defra. It explained how identifying and contacting them would be a significant undertaking and even then it might be unable to access their records.
19. Defra said that its policy is that emails are stored in a personal account for two years and they are then automatically moved to the user's online archive. User mailboxes are deleted in their entirety without review when individuals leave the organisation. It confirmed that a number of officers will have left Defra now and their accounts deleted in accordance with its records and retention policy.
20. It advised that there are two officers who it understands may have been in the team in 2021 who are currently on career breaks. Accessing their files and email accounts for this purpose would also be extremely difficult and it has no guarantee that they still hold any of the requested information.
21. In terms of its central files, Defra outlined how these follow a structure that allows it to search for documents that are in specific files or individually. It commented how a "submission to minister" might be located in files that might be called "briefings", "submissions", "correspondence" as well as the name of any one of the several policy strands.
22. An officer in the team conducted a sample search of the file names by accessing the "Water Quality" overarching file to search for relevant documents. They found a minimum of three subfiles where the documents might be held. Beneath each of these subfiles there were several other files, each containing more subfolders. Defra advised that this high level search for file names (as opposed to document names themselves) took five minutes. It explained that it was highly likely that documents in scope would also be held in other teams' file structures so

it is therefore not possible to give a reasoned estimate of how long it would take to search for all the relevant files in its central system.

23. Defra explained further that given the breadth of files that would need to be searched it performed a sample search for the document names. The documents themselves also have nuanced names – for example it would expect a “submission to Minister” to have any of the following names (as well as many others):
  - Submission to Secretary of State
  - Sub to SoS
  - Sub to Eustice
  - Note of sewage to SoS
24. It explained that “Eustice” refers to the name of the Secretary of State who was in post in 2021. It has not listed the names of all the relevant ministers for the period in question or variations of their names. When multiplied together and taken over the course of the year, the search terms used are extremely extensive. Nevertheless, it said that it performed some sample searches to give an indication of how long some of the searches might take.
25. An officer was asked to search for “submission on sewage 2021”, this resulted in 26,969 results. The search was narrowed to “core Defra” (Defra agencies such as the Environment Agency were excluded) and this yielded 10,484 results. Defra explained that the search was then narrowed further to include only results that were older than one year and which were Word documents, this yielded 2,302 results.
26. That officer then opened a number of the search results to check whether they fell in scope. The first five documents were clearly outside of scope. The sixth document opened fell within the scope of the request but did not have a recorded annex attached to it, so the officer would then need to search for it. This part of the sample search took approximately 15 minutes and yielded only one document which fell in scope, but which was incomplete.
27. Defra confirmed that if it was assumed that it will take 30 seconds to open each document and scan it to check whether it falls in scope, the total time for the exercise would be 69,060 seconds or 1,151 minutes or 19 hours.
28. The same officer then searched for:

- "submission to Secretary of State on sewage 2021" (12,999 results)
  - "sub to Secretary of State on sewage 2021" (18,577 results)
  - Submission to Eustice on sewage 2021" (1,200 results)
29. The officer sampled three documents in the final search that appeared to fall in scope, of those three:
- Two were policy submissions to the Minister of State and Secretary of State that were in draft format. The officer did not perform a search for the final version.
  - One was a policy submission to the Minister of State and Secretary of State that does not include its annexes – the drafters are now on career break or do not work in core Defra any longer; to obtain the annex Defra would need to see if it is possible to access their personal files.
30. Defra argued that these searches and consideration of the documents themselves took the officer 30 minutes to carry out. If it was assumed that it would take 30 seconds to only scan each of the documents to check whether it falls in scope, this would take 10 hours (although there may be some duplication with other searches). It said that if it were to search the documents in the two sample searches this would take 29 hours.
31. Defra was keen to highlight that these searches are based on limited search terms which would need to be expanded to be certain that it had captured all the information that falls in scope.
32. The Commissioner is satisfied that the cost of compliance would be overly burdensome on Defra in terms of time and resource. Using the Fees Regulations as a guide, it is clear that it would take Defra well in excess of 30 hours to locate and retrieve the requested information due to the manner in which it is held and stored. It has explained how it is not possible to limit the search to the ministers themselves and/or their private offices, being the recipient of the requested information and how it would need to consult the records held by the water quality team. Even consulting the centrally held files, Defra has explained how many potential documents are returned from the search terms they have used and this only focussed on submissions to ministers in relation to sewage in 2021. As explained previously, waste water treatment works would encompass a number of different topics on which searches would need to be performed. The searches undertaken have also revealed that duplication is likely, that draft documents will be included and

documents where the relevant annexes will not be attached, so further work would be required to track these down.

33. For these reasons the Commissioner is satisfied that regulation 12(4)(b) of the EIR is engaged.

### **Public interest test**

34. Defra confirmed that it recognises the public interest in the disclosure of information concerning the work of water companies at present, and that disclosing information provided to ministers on waste water treatment works would therefore inform public understanding and debate of the issues surrounding water companies. It commented that disclosure of the requested information would also demonstrate accountability and transparency within the government.
35. However, it decided that the public interest rests in maintaining the exception due to the significant and overly burdensome amount of time it would take to comply with the request as it is currently worded.
36. The Commissioner acknowledges under the EIR there is a presumption in favour of disclosure. He accepts that disclosure would promote openness and transparency and allow members of the public to see what ministers were considering in 2021 over waste water treatment works. He notes that in November 2021 Ofwat and the Environment Agency announced investigations into all water and wastewater companies in England and Wales as a result of several companies saying that they might not be treating as much sewage at their works as they should be. The Commissioner recognises the public interest in this issue and in understanding more closely what actions and deliberations took place within the relevant authorities leading up to this announcement.
37. However, he notes that compliance with this request, as it is worded, would place a significant and overly burdensome pressure on Defra in terms of time and resources and this is not in the public interest. There is a need to protect the limited and valuable resources of public authorities from having to respond to such burdensome and wide reaching requests. Defra has explained how the information is held and what would be involved in retrieving the requested information and this would be comfortably over the cost limit set out in the Fees Regulations, which is used as a guide for EIR requests.
38. Despite the presumption in favour of disclosure, due to the sheer amount of time and resource compliance would incur, the Commissioner has decided that the public interest in this case rests in maintaining the exception.



## **Regulation 9 advice and assistance**

39. The application of regulation 12(4)(b) of the EIR triggers the duty to provide advice and assistance so far as it is reasonable and practicable to do so to enable an applicant to refine a request that could be processed within the cost limit.
40. The Commissioner notes that Defra advised the complainant in its correspondence of 13 October 2023 how they may submit a more focussed and refined request, which could be potentially processed within the cost limit. It suggested the complainant reduced the time period specified or specify an area of interest with regards to waste water treatment works.
41. The Commissioner considers this advice and assistance seems reasonable in the circumstances and was offered within its initial response to the complainant. He is therefore satisfied that Defra has complied with the requirements of regulation 9.

## **Procedural matters**

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42. Regulation 11 of the EIR requires a public authority to carry out an internal review within 40 working days of receipt. It is noted that Defra did not complete the internal review process until 15 January 2024. The Commissioner has therefore recorded a breach of regulation 11.



## **Right of appeal**

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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: 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)

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.

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