

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

Date: 6 November 2024

Public Authority: Northern Ireland Water
Address: Westland House
Old Westland Road
Belfast
County Antrim BT14 6TE

Decision (including any steps ordered)

1. Through an initial twelve part request, and a later, related request, the complainant requested information about Drumbeg Wastewater Treatment Works and a planning proposal. Northern Ireland Water (NIW) addressed the parts of the request, and its position was that some of the requested information is excepted from disclosure under regulations 12(4)(a) and 13 of the EIR. These exceptions concern information that isn't held and personal data respectively.
2. The complainant focussed their complaint to four concerns, that related to NIW holding further information, the clarity of the information it had provided and its reliance on regulation 13.
3. In the course of the Commissioner's investigation into those concerns, NIW identified information that appears to be in scope of the later request. It advised that it was prepared to disclose some of this information but that the remainder was excepted from disclosure under regulation 12(5)(c) of the EIR, which concerns intellectual property rights. Finally, NIW withdrew its reliance on regulation 13.
4. The Commissioner's decision is as follows:
 - NIW has now identified all the information it holds that falls within scope of the requests being considered and, on the balance of probabilities, holds no further relevant information.

- NIW hasn't complied with regulations 5(1) and 5(2) of the EIR as it hasn't made available relevant information it holds within the statutory time frame.
 - NIW incorrectly applied regulation 12(5)(c) to mapping information that it holds.
5. The Commissioner requires NIW to take the following steps to ensure compliance with the legislation.
- Disclose the information about a member of NIW staff, discussed at paragraph 43 of this notice.
 - Disclose the information in Annex B of NIW's submission to the Commissioner, with any personal data redacted as appropriate.
 - Disclose the mapping information in Annex C of the above submission, with any personal data redacted as appropriate.
6. NIW must take these steps within 30 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

7. On 7 March 2024, the complainant submitted a 12 part request to NIW. The request is given in the appendix to this notice.
8. NIW responded to this request on 4 April 2024, addressing the 12 parts. In response to Q1, NIW advised that a review of the capacity of Drumbeg Waste Water Treatment Works (WwTW) had been carried out in 2021.
9. The complainant requested an internal review on 10 April 2024. They considered that NIW hadn't adequately addressed their request and that there were anomalies in its response.
10. In this correspondence the complainant also submitted requests for new information. The majority of these new requests aren't considered in this notice, which is focussed on the original request of 7 March 2024 only.
11. However, in relation to NIW's response to Q1 of the 7 March 2024 request, the complainant asked for the following information:

"...Please also provide:

- a copy of the 2021 Review;
 - information regarding the reason for conducting it;
 - details of the date of commencement of the review and what grade of staff undertook the review;
 - details of any independent assessor, or agency, which participated in the review;
 - the date of completion of the review;
 - details of all parties who received a copy of the review or were asked to comment on the review at either draft or finalisation stages.”
12. This is a new request but, because it's related to Q1 of the original request, the Commissioner will consider this further request in this notice, on this occasion.
13. Following an internal review NIW wrote to the complainant on 7 June 2024. In respect of the 7 March 2024 request, it addressed the various concerns the complainant had raised and advised that:
- it had applied the exception under regulation 12(4)(a) to the request for 'Population Equivalent' updates, site specific assessments, and a request for an explanation about certain connections
 - had applied regulation 13 to personal data, namely the name of the member of staff who had carried out a review.

Scope of the case

14. The complainant contacted the Commissioner on 24 June 2024 to complain about the way their requests for information had been handled.
15. It wasn't clear from the complainant's correspondence to NIW or their complaint to the Commissioner what recorded information it was that they considered NIW holds that it either hasn't disclosed in response to their request(s) or applied an exception to. In relation to their requests of 7 March and 10 April 2024, the Commissioner asked the complainant to clarify their complaint.
16. This investigation will focus on the four concerns the complainant identified, namely:
- "A copy of the 2021 Drumbeg Waste Water Treatment Work Review which was completed early in 2022. NI Water has not provided us with precise dates of the Review. NI Water has provided the Appendix to the Report. This is inadequate as there is no legend attached. We,

therefore, cannot determine how the non-residential measure was determined by NI Water.

- NI Water has refused to identify the grade of staff responsible for undertaking the 2021 Drumbeg WwTw Review. The degree of robustness of the Review can be evidenced by the grade of staff employed to undertake it.
 - NI Water has refused to clarify the Table it provided in respect of new connections to Drumbeg WwTw since April 2021. As the data provided appears contrary to that which we observe we believe the clarification sought by us is reasonable.
 - We have previously requested NI Water's mathematical calculations, which may be within the 2021 Review of Drumbeg WwTw, but without success. We have conducted a range of mathematical calculations on figures extracted from a range of sources which confirms our concerns about potential harm."
17. As a result of the complaint to the Commissioner, NIW identified further relevant information. In relation to the complainant's four concerns, this investigation will consider the extent to which NIW complied with regulation 5 of the EIR, and its late application of regulation 12(5)(c) to some of the information it subsequently identified.
18. The Commissioner had indicated to the complainant that he'd consider NIW's application of 12(4)(b) to information they'd requested. However, on further review he notes that NIW applied that exception to one of the new requests the complainant submitted on 10 April 2024 and that isn't being considered in this notice. The Commissioner therefore won't be considering NIW's reliance on regulation 12(4)(b) here.

Reasons for decision

Regulation 5 – duty to make environmental information available on request

19. Regulation 5(1) of FOIA requires a public authority to make recorded information available on request.
20. Under regulation 5(2), information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
21. The complainant's first concern and fourth concerns appear related:

“A copy of the 2021 Drumbeg Waste Water Treatment Work Review completed in 2022”

and

“NI Water’s mathematical calculations, which may be within the 2021 Review of Drumbeg WwTw...”

22. In the second request of 10 April 2024, the complainant is seeking a copy of a 2021 review and the dates of the review. The request for “mathematical calculations” isn’t included in the requests of either 7 March 2024 or 10 April 2024 being considered here. The Commissioner is therefore only considering this concern as the complainant has indicated that the 2021 review that they’ve requested may contain those calculations.
23. In its submission to the Commissioner, NIW said that the type of assessment that is discussed in the complainant’s first and fourth concerns doesn’t result in a “report” or a “review”. The assessment is undertaken, and the data that’s gathered informs a much wider database, accessible by colleagues across the company for their purposes (eg for determining whether there’s available capacity for a development). NIW says that to provide the official record would necessitate providing an entire database, “which is not a public-facing record.”
24. NIW went on to say that the assessment in this instance was undertaken on site and rough site notes were recorded. These notes were then used to calculate the Population Equivalent (PE) based on the NIW standard document.
25. NIW said “The information is transcribed into the table which was subsequently provided.” It said that that the initial request referred to a ‘report’ and requested information about an external review, etc. NIW says that [what it holds] is more of a transcription of site notes for record purposes “and inclusion in the overall Headroom register.”
26. NIW said its position therefore continues to be that it doesn’t hold the type of document the complainant is requesting – ie some form of official report, assessment or other document that details the outcome of an assessment.
27. Regarding the dates of the review, NIW says it doesn’t hold precise dates that the review began and ended but can advise it was likely undertaken between September 2021 (judging from a creation date on one of the Assessor’s notes) and early 2022 (again, no firm date is held). NIW has confirmed that it doesn’t hold information about dates of onsite visits.

28. NIW said that the table it provided to the complainant, and which is referenced above, wasn't an appendix to any report as no report exists - as it has explained. The information that was provided is a table denoting PE information that was considered in the course of the assessment. NIW says it isn't sure what type of legend would be applicable to this item but would welcome an explanation [from the complainant] in order to ascertain whether it holds something matching that description or can provide information to clarify.
29. Finally, in relation to the complainant's first concern, NIW said that the population estimates are based on 2011 Northern Ireland Statistics and Research Agency Census data because the 2021 data hadn't at that stage been published (it was published in June 2022).
30. The Commissioner asked NIW for further explanation about the table it has referenced above – Table 1. NIW explained that it has developed an Asset Standard. This defines the procedure for determining flow, PE and loadings for both wastewater treatment facilities and networks. The current Asset Standard is Wastewater Flow & Population Determination v1.6 Issued January 2019. This Asset Standard formed the basis of the Drumbeg WwTW PE review. The results of PE updates are fed into the Headroom Register, which holds information on PEs and Capacity for all WwTws.
31. NIW provided the complainant with a summary of the review in its internal review response – this is Table 1.
32. NIW told the Commissioner that it didn't originally provide the Asset Standard Wastewater Flow & Population Determination to the complainant as, at the time of the request, NIW had been made aware of a Pre-action Protocol. NIW was later informed that Judicial Review proceedings were never issued and so it's content now to disclose these Asset Standards to the complainant to help them understand the decision-making.
33. The requests the Commissioner is considering here didn't include a request for these Asset Standards and so the Commissioner can't formally instruct NIW to disclose it to the complainant. However, as NIW has advised that it is content to disclose this information, the Commissioner expects that it will proactively provide it to the complainant.
34. However, the focus here is a 2021 review. The complainant considers that this review would have generated a narrative 'report'. NIW has explained that the assessment that was carried out wouldn't have generated such a report. An assessment is undertaken, and the data that was gathered was entered into a much wider database. The

assessment in this case was undertaken on site and rough site notes were recorded.

35. In addressing the Commissioner's query about Table 1, NIW provided the Commissioner with a copy of what it described as, in effect, the electronic notes of the Assessor who undertook the assessment described above. This information comprises information in Annex B and Annex C of NIW's submission. Annex B is a print of an Excel spreadsheet with associated data. The information in Annex C is maps with notations. NIW says that Annex C is information that was found during the assessment, and which is taken account of in the data inputted into the spreadsheet at Annex B.
36. NIW says that it's content to provide the complainant with a copy of the Annex B information. However, it says the mapping information in Annex C is excepted from disclosure under regulation 12(5)(c) of the EIR.
37. The information in Annex B and Annex C might not be presented in a form that is obviously a "report" or "review" as one might imagine such a document. However, the Commissioner considers that the information falls within scope of the "2021 review" requested on 10 April 2024.
38. The EIR oblige a public authority to make information available, not to make copies of documents holding the information available. As well as maps, Annex C also includes electronic notes added to the maps. However, NIW says in its submission that the "marked-up maps, with sticky notes, etc." denoted "information found during the assessment and taken account of in the data inputted onto the spreadsheet at Annex B." The Commissioner therefore considers that the Annex B information that NIW intends to disclose incorporates that particular information ie the electronic "sticky notes" on the maps.
39. NIW has confirmed that it will disclose the information in Annex B. As it is disclosing the Annex B information, which incorporates the information in the "sticky notes" in Annex C – and the information about dates that it holds - outside of the required 20 working days, NIW has breached regulations 5(1) and 5(2) in respect of that information.
40. The Commissioner will consider separately whether the remaining mapping information in Annex C is excepted from disclosure under regulation 12(5)(c) of the EIR.
41. The complainant's second concern is:

"NI Water has refused to identify the grade of staff responsible for undertaking the 2021 Drumbeg WwTw Review. "

42. The complainant requested this information in their second request of 10 April 2024.
43. NIW had originally applied regulation 13 to this information. In its submission to the Commissioner, NIW says that it has now consulted the member of staff in question, and they have consented to the disclosure of their grade. NIW will therefore disclose this information.
44. Because NIW is also disclosing this information outside of the required 20 working days, its response to this element of the second request has breached regulations 5(1) and 5(2) of the EIR.
45. The complainant's third concern is as follows:

"NI Water has refused to clarify the Table it provided to us in respect of new connections to Drumbeg WwTW since April 2021."
46. The table referenced here is the table that NIW disclosed in response to part 7 of the original request of 7 March 2024 - Table 2.
47. NIW has told the Commissioner that it isn't clear what further information can be lawfully provided to clarify this table. It says that the complainant hasn't provided any information that contradicts the information that NIW provided. NIW has questioned how the complainant could possibly observe new connections to any of NIW's systems in the absence of access to its systems. NIW says it doesn't hold:

"any information as to where the information the [complainant] observes is held, refers or relates to. Therefore, NI Water cannot make any comment on any perceived contradictions. We can comment only on the facts known to NI Water at this time."
48. NIW has gone on to confirm that there have been no new connections (by its definition) since April 2021 to the Drumbeg WwTW that did not have pre-existing approval. By "new", which has been explained to the complainant, NIW means connections that either did not exist prior to the date stated or did not already have planning approval at the date stated.
49. The table, or list, is of four separate properties that have been connected to Drumbeg WwTW since 2021, but are not "new", as explained in its replies to other requests from the complainant. The first two were like-for-like replacement connections, while the second two were individual properties that had had existing planning approval for some three and four years prior to connection (2017 and 2018 respectively).

50. NIW notes that in their request for an internal review, the complainant asked whether the first two properties in the table were the same property. NIW has acknowledged that it was perhaps overly cautious when it identified street-level information only, which it did to avoid providing other individuals' personal data to the complainant. However, NIW says, it no longer has any objection to confirming that all four properties provided in the table are separate and distinct. However, it says whether this clarification meshes with whatever the complainant has observed by whatever means is unknown to NIW.
51. The third of the complainant's concerns involves NIW explaining its response to Q7 of their request. EIR, like FOIA, concerns recorded information only. The EIR don't oblige a public authority to provide clarifications or explanations, to give opinions or to answer general queries. Nor is it concerned with the accuracy of information that a public authority may have disclosed. The Commissioner is satisfied that Table 2 NIW provided in its response to Q7 of the first request satisfactorily addressed the four parts of that question. It has also now clarified that response through this notice. He finds that NIW complied with regulation 5(1) and 5(2) in respect of its response to that question.

Regulation 12(5)(c) – intellectual property rights

52. Under regulation 12(5)(c) of the EIR, a public authority may refuse to disclose information to the extent that its disclosure would adversely affect intellectual property rights.
53. NIW has applied this exception to the mapping information in Annex C of its submission to the Commissioner.
54. In its submission, NIW has explained that it creates Digital Corporate Asset Register records as the Licensor, from the Company's Geographic Information System and these are only provided to third-party Licensees under strict licence conditions.
55. These licence stipulations include acknowledging that ownership of all intellectual property rights (IPR) in the data belong to and will remain with the Licensor, NIW. The rights explicitly prohibit further dissemination, publication, distribution, or transfer of the data.
56. The licence agreement states that such data is only made available for a limited period (a defined licence start to end date) and then the data should be returned securely to NIW as Licensor, at the end of the Data Sharing Agreement (the Licensee removing and securely destroying all copies and derivatives of the data as soon as this Agreement has expired).

57. NIW says that regulation 12(5)(c) applies if there's a risk of infringement of IPR by any person who may receive the information. It says that while it recognises that it wouldn't itself infringe IPR if it disclosed the data in response to an EIR request (because this is, it says, an activity expressly permitted within regulation 5(6) of the EIR), NIW's inherent IPR would explicitly prohibit what the recipient could do with it (eg third-party publication to the blog or website in this case) because it is still protected.
58. In applying this exception, NIW says that it believes that the "Database right" applies. The request relates to material held in a NIW database, the creator of which (NIW as Licensor and right holder) has invested substantial effort in obtaining, verifying, presenting and maintaining the information included in it.
59. Similarly, NIW says that it believes that the "Copyright in databases" right also applies; that is, the intellectual and creative process for NIW in deciding what goes into a database and how it is arranged.
60. Disclosing recorded information under the EIR is, in effect, disclosing it to the world at large. NIW says that if it disclosed this mapping information it would therefore lose control over how its data would be re-used and it would lose the ability to enforce its IPR once the information enters the public domain.
61. NIW has advised that IPR exist to reward the creativity or the significant work that goes into producing the material. They give the right holder control over how the information is used and by whom. However, NIW acknowledges that it sees the value in proactively making certain information available to the wider public, such as that provided on the Reservoir Levels and Storm Overflow pages on its website, both of which remain within the control of NIW.
62. The Commissioner considers that in order for the regulation 12(5)(c) exception to apply the authority must demonstrate that:
 - the information is protected by IP rights
 - the person(s) holding the IP rights would suffer harm (infringement alone will not necessarily result in harm)
 - the identified harm is a consequence of the infringement or the loss of control over use of the information; and
 - the IP rights holder could not prevent the harm or loss by enforcing their IP rights.
63. Public authorities are entitled to consider a 'worst case scenario' regarding what any person who wished to infringe the IPR might do given unrestricted access to the information.

64. However, the Commissioner doesn't consider that NIW has satisfactorily addressed the above four points in this case.
65. The maps in question are 'fixed' pdf documents; the information in them can't be manipulated. NIW hasn't adequately explained who would exploit this information to NIW's detriment and how they'd do this. It hasn't made a compelling case that disclosing the maps would cause NIW harm.
66. In addition, the request isn't for the database behind the maps, and which generate the maps. As such, the Commissioner hasn't been persuaded that database rights or copyright in databases are relevant.
67. The Commissioner therefore doesn't accept that regulation 12(5)(c) is engaged. Because he's found this exception isn't engaged, it hasn't been necessary to consider the public interest test associated with this exception.

Other matters

68. The Commissioner notes that the complainant has submitted a multi-part request and then submitted further, new requests in their request for an internal review of NIW's response to that request. This approach potentially creates complication and confusion. The Commissioner also understands that the complainant had submitted requests for information to NIW prior to those considered here.
69. First, the Commissioner reminds the complainant that, as mentioned above, EIR concerns recorded information only and the EIR don't oblige public authorities to provide explanations, clarifications or opinions, or to answer general queries. Those are more customer service matters that public authorities can manage as they choose.
70. The Commissioner also recommends that the complainant uses the EIR (or FOIA) responsibly. This includes making sure requests for recorded information are made clear in wider correspondence and kept separate from requests for an internal review. The complainant may find the Commissioner's guidance on writing an effective request for information¹ helpful.

¹ <https://ico.org.uk/for-the-public/official-information/preparing-and-submitting-your-information-request/>

Right of appeal

71. 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

72. 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.
73. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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

Appendix

“1. Since at least 2019 NI Water has stated that the Drumbeg WwTw was at capacity. Please confirm when NI Water first identified capacity issues at Drumbeg WwTw and network?”

2. In view of the longstanding capacity issues at Drumbeg WwTw please supply information on the basis for NI Water providing assurance to Atkins in respect of a headroom for the connection of 17 dwellings to Drumbeg WwTw in correspondence dated 19 August 2021. Para 2.4.1 of the Atkins Report stated that Pre-Development Enquiry to NIW ‘confirmed that there was sufficient capacity in the existing combined public sewer and Waterway Treatment Works (WwTw) to take the new foul flows from the 17 residential units.’

3. The Pre-Development Enquiry was responded to four months before the developer applied for planning permission (LA05/2022/0033/F) in December 2021. What is the position of NI Water in respect of determining capacity for 17 new connections when prior to that decision it had already stated Drumbeg WwTw was at capacity? At the time NI Water made this determination no planning application had been submitted to the Planners in respect of the proposed development?

4. The letter of 19 August 2021 stated that the position in respect of capacity held for 18 months and that the developer would have to reconfirm that position. When did either the developer or the Planning Authority seek an extension as the stated position of August 2021 lapsed in February 2023?

5. When NI Water confirmed the headroom with the planners in August 2023 what factors were taken into account?

6. Does NI Water consider it has an agreement to provide 17 connections for this proposed development, even though the initial position cover only an 18 month period?

7. How many connections into Drumbeg WwTw occurred between August 2021 and August 2023? When was approval provided for those new connections? How many approvals for connection are outstanding because dwellings are still at various stages of development? When was approval provided for these pending connections?

8. The capacity of the Drumbeg WwTw has been the subject of a reply by NI Water to Mrs Emma Lyttle-Pengelly MLA in December 2022 confirming that there is not capacity at the Drumbeg WwTw, ‘except for those with extant planning permission’. This excludes new connections or those without extant planning permission. What account has NI Water taken of that response and how did it influence its decisions in respect of these 17 proposed new connections as set out in its letter of August 2023?

9. NI Water wrote to David Honeyford MLA, dated 2 February 2023 (case reference number DH249 and CMS reference 9200123/56542), stating 'that Drumbeg WwTw is currently operating at capacity. As a result, any new planning applications received by NI Water for consultation will receive a negative response, with a recommendation for the planning authority to disapprove the application, except for those with extant planning permission'. Please not planning application LA05/2022/0033/F has no planning permission. How given this correspondence, when the assurance in respect of 17 headroom capacity expired on 19 February 2023 did NI Water issue a letter in August 2023 confirming the headroom remained as previously stated in August 2021? What regard was taken to other connections to Drumbeg WwTw when determining that the headroom remained at 17?

10. In June 2023 NI Water identified a number of WwTw facilities which were at or near capacity, one of which was Drumbeg. In June 2023 NI Water advised that waste water network capacity issues had been identified in Drumbeg. How given these statements did NI Water confirm in August 2023 that there was capacity at Drumbeg WwTw for 17 new connections? Did this number take account of other new connections or further connections which are pending?

11. On 29 January 2024 Dr Blockwell, NI Water, briefed LCCC Councillors. Minutes of that meeting show that Dr Blockwell stated that Drumbeg WwTw was now at capacity. What does 'now' mean for NI Water?

12. Given that storm and foul water enter a single piping system in the area of the proposed development what regard is given to storm water and run off by the Department of Infrastructure which has responsibility for the various divisions responsible for protecting the area from flooding, pollution and the Lagan Valley Regional Park and the River Lagan?"