

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

Decision notice

Date: 12 December 2024

Public Authority: Department for Environment Food & Rural Affairs (Defra)

Address: Seacole Building, 4th Floor, 2 Marsham Street, London, SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested Defra to disclose information relating to phosphate mitigation and the nutrient neutrality policy for the Dorset, Bournemouth, Christchurch and Poole areas. Defra refused the requests 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 for both requests and the public interest rests in maintaining the exception.
3. The Commissioner does not require further steps to be taken.

Request and response

4. The complainant made two information requests to Defra. The first was made on 26 June 2024 and asked for information in the following terms:

"1. Please disclose the calculations for the outcome (to no longer require costly phosphate mitigation for new developments, under nutrient neutrality guidance in the Dorset, Bournemouth, Christchurch and Poole areas) and the phosphorus reductions "headroom" that underpinned the Defra/Natural England conclusion that Wessex Water had "maximised the impact that upgrades will make in the catchment,

which is so significant that they will reduce phosphorus to levels consistent with conservation objectives".

2. Please disclose relevant communications with Wessex Water, the Environment Agency and Dorset, Bournemouth, Christchurch and Poole councils that led up to the removal of the requirement for phosphorus mitigation by developers of new homes for Dorset, Bournemouth, Christchurch and Poole areas.

3. Please disclose the rationale for a nutrient neutrality policy variation for "Wessex Water going further than LURA requires for other specified Wastewater Treatment Works across the country, at works serving over 1000 population, not 2000 like elsewhere in the country" for the Dorset, Bournemouth, Christchurch and Poole areas."

On 8 July 2024 the complainant also requested the following information:

"Please disclose all information (incl calculations, emails, communications, reports etc) whereby DEFRA concluded that Somerset would not also qualify for the lifting of the requirement for phosphorus neutrality mitigation (as in Dorset) and so advised DEFRA?"

5. Defra responded on 31 July 2024. It refused to comply with the requests citing regulation 12(4)(b) of the EIR.
6. The complainant requested an internal review on 3 August 2024.
7. Defra carried out an internal review and notified the complainant of its findings on 16 August 2024.

Scope of the case

8. The complainant contacted the Commissioner on 19 August 2024 to complain about the way their request for information had been handled. They dispute the application of regulation 12(4)(b) of the EIR.
9. The Commissioner considers that the scope of his investigation is to determine whether or not Defra is entitled to rely on 12(4)(b) of the EIR to refuse to comply with both requests.

Reasons for decision

Regulation 12(4)(b)

10. Regulation 12(4)(b) of the EIR states:
11. 'A public authority may refuse to disclose information to the extent that – (b) the request for information is manifestly unreasonable;'
12. The Commissioner considers that a request can be manifestly unreasonable for two reasons: firstly, if the request is vexatious and secondly where compliance with the request would incur an unreasonable burden on the public authority both in terms of costs and the diversion of resources.
13. Defra is relying on the latter; that compliance with both requests will incur an unreasonable burden on it as a public authority in terms of cost and the diversion of resources.
14. The complainant has questioned the ability of Defra to aggregate the two requests, stating that aggregation is not possible under the EIR.
15. Defra has said that it has aggregated the burden of complying with both requests as it is able to do so, on the basis that the requests are for similar information and they overlap to such a degree that it is practical to treat them as one request. It argued that both relate to the same overarching topic of nutrient neutrality and a new duty implemented to reduce nutrient pollution from wastewater.
16. It outlined how compliance would fall on the same Defra policy team, responsible for nutrient neutrality and water industry, within the Water Industry Strategy and Environment section of Defra. It is a small team and as both requests relate to the same topic it would impact primarily on three officials in that team to complete the process of identifying materials in scope, making any necessary redactions and conducting the final release of the information, all within the same 20 working day period to respond to an EIR request. Defra argued that because both requests relate to the application of the smaller wastewater treatment work upgrade duty, covered by the same Defra policy team, it is considered appropriate to aggregate both requests when considering whether the requests are likely to cause a disproportionate cost or burden.
17. There is no specific provision for the aggregation 'of substantially similar' requests under the EIR, like there is under FOIA. The Commissioner considers that there may be occasions where it is permissible to consider a number of EIR requests together when deciding if they are

manifestly unreasonable because of cost or burden, and within that whether compliance with more than one request would impose a significant burden on the same team. However, strictly speaking there's no ability to aggregate requests for 'substantially similar information' under the EIR.

18. In this case the Commissioner has decided that it is appropriate for Defra to combine the impact of dealing with these two requests, considering that they were made in close succession and would need to be dealt with within the same time period. Additionally, it is noted that the requests would have to be handled by the same three officials within a small policy team, due to the nature of the requests and the information in scope.
19. Defra has estimated that it would take in excess of 38 hours of staff time for the policy team and related officials in other teams to collate, assess, redact and prepare the requested information for disclosure. It argued that this would place a significant burden on staff time and involve a significant diversion of resource away from its ongoing business delivery.
20. It explained how potentially relevant information is spread across hundreds of SharePoint folders and various policy official email inboxes, which all must be searched thoroughly. Defra advised that the officials in the nutrient neutrality and water industry policy teams conducted a review of SharePoint and the team leader's mailbox, using key search terms and across the period stipulated by the complainant to estimate as best as possible how many records fall in the scope of the request and how long it would take to conduct the entire EIR process. It also carried out sample exercises to establish the amount of time it would need to consider each element of the requests.

Question one

21. For question one it confirmed that it does not hold the information; Natural England does, so in fact, there is no time needed to search, collate, identify and prepare information relevant to this element of the requests.

Question two

22. Question two, it asked one official involved in these communications to conduct an initial search of their email inbox to estimate how many emails they would need to go through to accurately and thoroughly identify all relevant communications. It said:

"a) Communications with Wessex Water: The official conducted a search

of all outlook items for "Poole Harbour" "Dorset Council" "@wessexwater.co.uk" which resulted in 28 emails (going back to 26/07/23).

b) Communications with the Environment Agency: The official conducted a search of all outlook items for "Poole Harbour" "Dorset Council" "@environmentagency.gov.uk " which resulted in 24 emails (going back to 15/11/2023).

c) Communications with Bournemouth, Christchurch and Poole councils: The official conducted a search of all outlook items for "Poole Harbour" "Dorset Council" "@bcpcouncil.gov.uk" which resulted in 6 emails (going back to 25/06/2024)."

23. From this initial search the official identified 58 emails as potentially falling in scope. Defra confirmed that there are at least seven Defra staff in total, across the central policy team, wider policy team, analytical teams, senior and private offices who would need to conduct similar searches to ensure that all relevant recorded information is identified and retrieved.
24. Defra stated that based on the first official's search, and on the assumption it would take one minute on average to search for, retrieve and read 10 emails to review if its within scope for each of these officials, this would require approximately 41 minutes of staff time. This is also based on the assumption that each official would have a similar number of emails come up in their searches.
25. It stated that given the search terms are very specific, a good proportion of the emails would be relevant to this element of the requests. However, it noted that many would also appear in multiple individuals' inboxes. It would therefore have to sift for duplicates. Defra estimates this would take 30 minutes of staff time, on top of the initial search.
26. In addition to this, Defra said that it would then need to process the emails that are within the scope of this question, redacting any information that is exempt from disclosure (such as individuals' names). A senior official would then need to conduct a quality assurance check for each email to ensure the appropriate redactions have been made. It estimated that this would require a further five minutes per email.
27. Defra conducted a sampling exercise and estimated that 10% of emails could be relevant to the request. This would mean that each individual may have up to six emails each to go through. For 42 potentially relevant emails in total, across all officials mentioned, Defra estimated it would require 3.5 hours of staff time.

28. In total for this question, Defra estimated that it would take 4.7 hours to process and comply.

Question three

29. Defra confirmed that it asked one individual to conduct an initial search on SharePoint using specified search terms of both "Poole Harbour" and "Dorset Council" to estimate the maximum number of potentially relevant documents. This search resulted in 24 documents being identified, which contain both of these search terms.
30. Based on an initial review of 10 of these documents Defra established that it would take approximately two minutes to scan each document, many of which are more than five pages long, to understand its content and whether it is relevant to this element of the request. To go through all of the documents it therefore estimated that it would take 48 minutes.
31. Defra also said that based on this initial review it also estimates that 10% of these documents could be relevant to this specific question and these 10% would require a more comprehensive review and quality assurance check. It estimates that a thorough review, redactions, and subsequent quality assurance check from a senior member of staff, would take up to 40 minutes per document, based on a sampling exercise it carried out. This added a further 1.3 hours onto its estimate, bringing the total for this question to 2.3 hours of staff time.

Question four

32. Defra advised that the complainant specified that they required it to search all "calculations, emails, communications, reports etc" between 26 October 2023 to the date of the request.
33. It addressed communications and emails first.
34. It estimated that there are at least four members of staff who would have been involved in this policy process and would need to conduct individual searches. It asked one of those officials to do that and to identify how many records they hold which could be in the scope of this question and to estimate how long it would take to review them all in full. It pointed out that no search terms were stated in the request so it used the following terms, which produced the corresponding results:
- "a) "Somerset" AND "phosphorus" AND "small WwTW" – 54 emails; whilst not specified in the request itself, this search is appropriate as the lifting of the requirement for nutrient mitigation is dependent on policy decisions for requiring smaller wastewater treatment work upgrades – policy will have referred to this as small WwTW.

- b) "Somerset" AND "nutrient neutrality" AND "lifting" – 147 emails
 - c) "Somerset" AND "nutrient neutrality" AND "removing" – 181 emails; policy expertise is that this is the terminology that would have been likely to have been used in relevant correspondence to this request, alongside searches (2) and (4).
 - d) "Somerset" AND "nutrient neutrality" AND "falling away" – 5 emails"
35. Defra outlined that this search revealed a total of 387 potentially relevant emails. It stated that it would take 38.7 minutes to review each one (at a rate of one minute per email) to see if it falls in scope. This would then have to be replicated by the other three officials for the records they hold (assuming they hold a similar number), bringing the total to 5.16 hours for this task.
36. It then said that each of the four staff would then need to collate all relevant emails into a folder and for this it estimates that it would take around an hour given the high volume of emails.
37. Based on an assumption that 10% of each staff member's emails will be relevant to the request and not duplicates (total of 38 emails for each staff member, therefore a total of 152 emails), it estimates that it would take 12.6 hours to review the contents, redact exempt information and quality assurance check that prior to disclosure (at a rate of five minutes per record).
38. It therefore estimated in total that it would take 19.4 hours to locate, retrieve, redact and prepare all relevant emails and communications.
39. Defra then looked at documents.
40. It said that it conducted the same search for documents in SharePoint. It used the following search terms and these revealed each of the corresponding results:
- "a) "Somerset" AND "phosphorus" AND "small WwTW" – 24 documents
 - b) "Somerset" AND "nutrient neutrality" AND "lifting" – 23 documents
 - c) "Somerset" AND "nutrient neutrality" AND "removing" – 72 documents
 - d) "Somerset" AND "nutrient neutrality" AND "falling away" – 3 documents"
41. Defra advised that the searches revealed a total of 122 documents, which could be potentially relevant to this aspect of the requests. At a rate of two minutes per document it estimates that it would take around

four hours to review each one to first establish if it is in the scope of this question.

42. Then, based on an assumption that 10% of these documents will be in scope, Defra estimated that it would take 40 minutes per document to review it thoroughly, redact exempt information and double check what has been prepared for disclosure. For 12 documents at 40 minutes each, this equates to eight hours of staff time.
43. The grand total estimated for the documents held in SharePoint is 12 hours. The grand total for question four as a whole is 31.4 hours of staff time.
44. Defra provided a sample of the information it identified during its searches to the Commissioner to highlight how it would require redaction, prior to disclosure. It demonstrated that some of the emails were internal communications and how it would apply regulation 12(4)(e) of the EIR. It showed how some information contained business information relevant to water company sites and assets and general business concerns and how this information would need to be redacted. Either because it is not in scope or because it is but is exempt under regulation 12(5)(e). There would also be information that needs to be redacted under regulation 13 of the EIR, as it constitutes personal data.
45. The sample also revealed that most documents were over five pages long, with the largest being 45 pages long.
46. The Commissioner notes that Defra has explained in detail exactly how it has reached the estimate it has. It has explained how the information is held and what would be involved in complying with each element of the requests. The Commissioner considers this estimate is reasonable and supported by evidence; what the searches undertaken revealed and from sampling exercises how long each element would take.
47. If anything the Commissioner considers Defra has been conservative in its estimate. Considering the focussed nature of the search (to the specific members of staff involved in the subject matter and to the policy team responsible for this work) he considers it is likely that there would be more than 10% of records identified, as falling in scope. Defra has said that most documents are over five pages long; some much longer. The Commissioner considers 40 minutes per document to review and consider the contents and make appropriate redactions is a little conservative.
48. He notes that the requests clearly have serious purpose and value (below, paragraph 51 outlines the complainant's viewpoint on how

important access to this information is to them and the wider community). However, in this case the Commissioner has decided that both requests are manifestly unreasonable due to the cost to comply. Defra has explained comprehensively the impact on time and resources compliance would incur on a small policy team within the authority. Compliance would divert those staff disproportionately away from other key functions and the work they do.

49. For the above reasons the Commissioner is satisfied that regulation 12(4)(b) applies to both requests.

Public interest test

50. Even where a request is manifestly unreasonable, it must still be complied with unless the balance of the public interest favours maintaining the exception. A public authority must also apply a presumption in favour of disclosure.

The complainant's view

51. The complainant believes the public interest rests in disclosure for the following reasons:

"a) 18,000 homes held-up incl 4,000+ social and affordable homes (£6 billion of construction held-up with local builders declaring bankruptcy and local building trades leaving Somerset to find work);

b) Lack of social and affordable homes with local rents rising rapidly due to under supply due to NN impacts;

c) No discernible benefit towards the improvement of the environmental condition of the Somerset Levels and Moors;

d) Two key national infrastructure projects at Hinkley Point C and the coming Gigafactory requiring an additional 16,000 employees thus further increasing housing demand (whilst supply is constrained by NN) - this will impede nationally important projects".

Defra's position

52. Defra recognises the public interest in disclosure of information concerning phosphorus mitigation and in disclosing information relating to decisions on setting wastewater treatment work upgrade requirements. It would inform public understanding of decisions relating to this policy area. It added that disclosure would also demonstrate transparency within the government, which it said it takes very seriously.

53. However, it considers the public interest rests in maintaining the exception. It stated this is because of the significant amount of time it would take to comply with the request as currently worded and the impact that this diversion of resource would have on other critical business activities relating to the water sector.
54. It commented that the whole team who would be responsible for responding to these requests are currently delivering measures within the Water (Special Measures) Bill which ensures regulators have the right tools to take quick and proportionate action against water industry offences. The diversion of resource to instead focus on these requests would impact that work disproportionately and affect the regulation of the water industry.
55. Defra addressed a couple of the complainant's arguments outlined above, In relation to point a) it said that:

"The government recognises the impact of nutrient neutrality advice on house building – which varies between different catchments - and has introduced a range of policy initiatives to unlock housing across the country. The impact of these measures will vary between catchments, due to the unique circumstances of each area.

This includes the wastewater treatment work upgrade duty covered in section (1) of this letter, which is estimated to require £3.3bn of investment (over a 40- year appraisal period. Includes capital and operational expenditure and financing costs in 2019 prices and undiscounted) from water companies, funded by water bill payers through the Price Review process. The duty is estimated to reduce nutrient loads from wastewater by an estimated 69% for phosphorous and 50% for nitrogen, although this will vary between catchments, and consequently reduce the amount of nutrient mitigation that developers must provide and pay for. For those developers benefiting from the upgrades, mitigation cost reductions are estimated to range between 38% to 100% for phosphorus, and between 36% to 65% for nitrogen, depending on the catchment.

To further support local authorities who wish to operate their own mitigation schemes, the Ministry for Housing, Local Communities and Government will allocate grants of up to £110m through the Local Nutrient Mitigation Fund. The first tranche of £57 million was awarded to eight successful bids in December 2023, including £9.6m for Somerset Council. This funding will enable Local Authorities to boost the supply of mitigation, by investing in innovative mitigation schemes and enabling additional mitigation credits. A second round of this £110 million Fund was open until 3 May 2024.

In addition to this, the government has recently announced its Planning and Infrastructure Bill, which aims to accelerate housebuilding and infrastructure delivery by using development to fund nature recovery, in places like Somerset, where currently both are stalled, unlocking a win-win outcome for the economy and for nature.

Therefore, whilst we recognise the complainant's concerns, when considering the significant Government action being taken to address nutrient neutrality across the country, we do not consider that this is a strong argument for disclosure and imposing this significant burden in terms of time onto Defra."

56. In relation to point (b) it commented:

"The environmental benefits of the wastewater treatment work upgrade duty were considered by Parliament during the passage of the provisions and were considered to be beneficial to the overall statutory scheme. Additionally, in contrast to this statement, internal analysis has estimated that because of the upgrade duty that has been implemented in the Somerset Levels and Moors catchment, phosphorus loads from wastewater treatment works are estimated to reduce by 52%. Again, we therefore do not agree that this is a strong argument to favour disclosure.

Upgrades at smaller wastewater treatment works, to decrease nutrient loads further, were assessed on a case-by-case basis and applied where there was a strong case for doing so. This considered guidance from appropriate advisors and relevant factors such as the impact on achieving water quality targets, likelihood of nutrient neutrality advice being lifted, cost and deliverability. For example, in Poole Harbour, the high proportion of phosphorus pollution which originates from wastewater (75%) means the performance of a wastewater treatment works has a large effect on the condition of the protected site. Upgrading a number of smaller wastewater treatment works in this catchment therefore enables the conservation objectives of the site to be met and allows Natural England to remove nutrient neutrality advice for phosphorus in Poole Harbour. Conversely, in Somerset only 33% of phosphorus loads are attributed to wastewater discharges and 54% are from rural land use and so wastewater treatment work upgrades alone would not meet water quality targets.

Whilst we are not currently aware of similar opportunities for Natural England to remove nutrient neutrality advice in other catchments in response to the wastewater treatment work upgrades in other catchments, the power for the Secretary of State to require additional upgrades at smaller wastewater treatment works remains available and

can be applied across further catchments should this become appropriate and be evidenced to deliver similar benefits in the future.”

The Commissioner's position

57. The Commissioner recognises the public interest in openness and transparency. He also acknowledges the public interest in allowing members of the public access to information which will enable them to understand more clearly why certain decisions have been made and how those decisions will affect the environment and local communities.
58. He notes the complainant has strong views on Defra's position in this case and believes there are compelling public interest arguments in favour of Defra being compelled to comply with these requests and disclose the required information. The requests do have serious value and purpose; not only to the complainant but to the wider public, the water industry and to developers.
59. However, the Commissioner also recognises that the purpose of the exception is to protect finite public resources from being unnecessarily consumed.
60. In the circumstances of this case, compliance with the requests in full would consume significant public resources and in particular the specific resources of a small policy team within Defra, which has statutory functions to carry out. Compliance would divert this small team and others across Defra required to assist with the EIR process disproportionately away other public duties and functions. Due to the overlapping nature of the requests and the fact that they would both need to be processed within the same or very similar statutory timeframe, the impact and diversion away from other key tasks is even more significant.
61. Although there are public interest arguments in favour of compliance (and the disclosure of any non-exempt information) due to the impact of the policy on the environment and the associated areas, the Commissioner considers the public interest rests in maintaining the exception in this case due to the significant burden compliance would cause the relevant policy area within a short space of time.

Regulation 9 advice and assistance

62. Regulation 12(4)(b) of the EIR, when applied due to cost, triggers the duty to provide advice and assistance. The public authority is therefore expected to provide the applicant with appropriate advice and assistance so far as it is reasonable and practical to enable the applicant to submit a refined request that could be processed without triggering the exception.

63. In this case, it is noted that Defra outlined various ways of how the complainant could narrow the request. They also offered to discuss the request and the information the complainant wished to obtain to enable them to frame a revised request that could be processed.
64. The Commissioner is satisfied that reasonable and practical advice and assistance has been provided and therefore Defra met its obligations under regulation 9 of the EIR.

Right of appeal

65. 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

66. 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.
67. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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