

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 February 2025

Public Authority: The Water Services Regulation Authority
(Ofwat)

Address: Centre City Tower
7 Hill Street
Birmingham
B5 4AU

Decision (including any steps ordered)

1. The complainant has requested communications between Ofwat and other bodies on the interpretation and enforcement of the Urban Waste Water Treatment Regulations 1995 (UWWTR). Ofwat refused the request as manifestly unreasonable under regulation 12(4)(b) EIR.
2. The Commissioner's decision is that the complainant's request for is not manifestly unreasonable under regulation 12(4)(b) of the EIR.
3. The Commissioner requires Ofwat to take the following step to ensure compliance with the legislation:
 - Provide the complainant with a fresh response to their request that doesn't rely on regulation 12(4)(b).
4. Ofwat must take this step 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

5. On 20 May 2024 the complainant made a request to Ofwat. This was a refined request related to Q5 of a request previously refused as manifestly unreasonable. Q5 was as follows:

"Copies of all communications (including letters, emails, messages in any other format and notes of telephone conversations) involving senior staff at Ofwat (from Director grade upwards) with Defra and/or the EA in relation to the interpretation of and enforcement of the provisions of the UWWTR since 1 January 2021."
6. Ofwat had already responded to Q1-4 of the request and refused these parts under EIR exceptions that had not been challenged further by the complainant. For Q5 Ofwat had provided a breakdown of the time/costs associated with complying with the request and invited the complainant to narrow the scope further.
7. The complainant suggested the following ways to narrow the scope:
 - Restricting the request to electronic communications only
 - Structuring the search to Ofwat mailboxes of Director grade and above, with recipients being Defra and/or the Environment Agency (EA)
 - Looking for email headers as follows: Urban Waste Water, Urban Waste Water Treatment, Urban wastewater, UWWT, UWWTR, UWWTD, BTKNEEC, Wastewater enforcement, Wastewater investigation, Flow to Full Treatment, FFT, Section 94.
8. The complainant also accepted personal data may need to be redacted.
9. Ofwat responded on 16 July 2024 stating that, despite the new parameters, it would still be manifestly unreasonable to process the EIR request.
10. The complainant requested an internal review on 30 July 2024. Ofwat responded on 25 September 2024 upholding its position.

Scope of the case

11. The complainant contacted the Commissioner on 14 October 2024 to complain about Ofwat's refusal of the request as manifestly unreasonable.

12. The Commissioner considers the scope of his investigation is to determine if Ofwat has correctly applied regulation 12(4)(b) to refuse to respond to the refined request.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

13. Regulation 12(4)(b) of the EIR states:

‘A public authority may refuse to disclose information to the extent that – (b) the request for information is manifestly unreasonable;’

14. 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.
15. The public authority is relying on the second theme in this instance, and it’s considered this request as manifestly unreasonable alongside the other requests (Q1-Q4) that it has already responded to from the initial request made on 12 January 2024.
16. The public authority has explained that it’s aggregated the burden of complying with all of the requests and it can do so because ‘they share a common context in terms of their interest in the linked issues’ of the Information Notice Ofwat received from the Office for Environmental Protection (OEP) and information around the interpretation of the provision of the UWWTR.
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 Ofwat to combine the impact of dealing with all parts of this request, considering that they were made at the same time and would have needed to be dealt with within the same time period.

19. Ofwat explained it took 7 hours to consider Q1-4 of the request. This involved locating and retrieving the information and considering if any exceptions under the EIR would need to be applied. Ultimately, Ofwat concluded two exceptions would need to be applied – regulation 12(5)(b) course of justice and regulation 12(5)(d) confidentiality of proceedings. This position was not challenged by the complainant.
20. The Commissioner must now consider whether compliance with Q5, refined for the final time on 16 July 2024 would be manifestly unreasonable to deal with. As part of this deliberation the Commissioner has taken into account the burden already imposed on the public authority in dealing with Q1-4 of the complainant's request.
21. Under FOIA, a public authority can refuse to comply with a request if it estimates that doing so would exceed the 'appropriate limit'. This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations')⁴ as £600 for central government departments and £450 for all other public authorities.
22. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference for a public authority that is considering the application of 12(4)(b) of the EIR. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether the information is held;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
23. It's insufficient for the request to involve a large amount of data for regulation 12(4)(b) to have been applied correctly. The public authority needs to demonstrate that to carry out the activities discussed would be too burdensome, and at the very minimum exceed the appropriate limit. In this instance, for Ofwat, that limit is £600, which at a rate of £25 per hour works out at 24 hours.
24. Importantly, any estimate as to how long compliance with a request would take must be based on the quickest method of retrieving the information that falls within scope of the request

25. Regulation 12(4)(b) is all about avoiding any disproportionate burden to a public authority. However, the only burden that can be considered is that of complying with the request.
26. Ofwat has explained that the searches it carried out in relation to the refined request were broadly as the complainant suggested i.e. electronic communications only, only mailboxes of Director grades and above, sent to Defra/EA and containing one of the listed email headers. Ofwat made one change – to eliminate searching for emails from a small number of directors who would not have been involved in the communications or who had had explicitly stated they had not been involved in communications.
27. Ofwat explained its estimates of time for search activities was based on actually carrying out the activities so the times given are times actually incurred. The only 'estimates' are for the time needed to review any returned emails for relevance and consider the application of any exceptions under the EIR.
28. In terms of the searches, Ofwat advised that there's not a single person whose job it is to routinely carry out centralised electronic IT searches in response to information requests. When searches are needed the usual procedure is for the Information Governance team to work with areas of the business to identify individuals who may hold relevant information and those individuals would then carry out their own electronic searches of their email accounts and other electronic storage locations.
29. In the earlier iterations of the request Ofwat had assumed this search methodology and asked individual members of staff to carry out their own searches. However, for the final refined version of Q5 Ofwat trailed a centralised electronic searching method as proposed by the complainant. This involved setting up a bespoke internal process for searching the information in scope.
30. An initial search exercise by Ofwat's IT team was unsuccessful. To be clear, the time taken to run this exercise was not include by Ofwat in it's estimate. A second search exercise was undertaken and Ofwat has provided the Commissioner with details of the search terms used for the queries and the attempts to run slightly amended queries over several different days, on some occasions with the queries failing and no results being returned. On other occasions on sampling some returned results it became apparent to Ofwat that the search parameters had failed as they should have limited results to outgoing emails from Ofwat mailboxes to recipients at Defra/EA but results contained emails purely internal to Ofwat.

31. When a query failed, Ofwat explained it had to be re-written and a further search run to trial the modified query.
32. As well as the time needed to develop and run the queries to locate potential relevant emails, Ofwat also considers it will need to factor in time to review the emails. It has estimate it would take 6.3 hours to review the emails for relevancy, based on a sample test determining 22 seconds per email would be needed. The fourth and final search resulted in 1,032 emails being returned therefore $1,032 \times 22 \text{ seconds} = 6 \text{ hours } 18 \text{ minutes}$.
33. A further 7.5 hours would be needed to consider if any exceptions apply to the information. This figure has been consistently cited by Ofwat and appears to be based on the time it took to consider applicable exceptions for Q1-4.
34. Overall Ofwat states it spent 20 hours 25 minutes running the bespoke searches, added to this is the 7 hours spent on Q1-4 and Ofwat concluded it had already spent 27 hours and 25 minutes responding to the request before considering the additional 13 hours 48 minutes it had estimated it would need to spend reviewing the 1,032 emails for relevancy and applicability of exception. Overall therefore Ofwat's estimate of the time needed to fully comply would be 41 hours 13 minutes.
35. The Commissioner accepts that Ofwat can include the 7 hours spent on the other requests (Q1-4) and that the estimate of 22 seconds to determine if each email contains information that might be subject to exceptions is a reasonable estimate based on an actual sampling exercise.
36. Ofwat has estimated 7.5 hours of time will be needed to consider if any exceptions apply to any of the information in the emails. Whilst the Commissioner is content to accept the estimate of 22 seconds per email it is difficult to accept that 7.5 hours can be a realistic estimate when it has not been established if all of the 1,032 emails are in scope of the request and need to be considered further.
37. The Commissioner also has some issues with the 20 hours 25 minutes Ofwat has stated it has spent building/modifying the search, searching and extracting emails. Ofwat can take into account staff time taken on activities to locate information, determine if it is relevant and extract it. This would extend to the time needed to build the search and modify it as this is time during which staff would have to be diverted from their other core activities in order to comply with the request. However, if a computer is processing a search and staff can resume their activities whilst it does so, this time cannot be counted.

38. Ofwat has provided a breakdown of each stage of its attempts to locate and retrieve relevant information and the 'Search time' is included separately from the other activities. This search time was stated to have been 3.5 hours for the first attempted search, 2.5 hours for the second attempted search, 1.5 hours for the third attempted search and 30 minutes for the final search that provided the final result of 1,032 emails. The Commissioner's understanding is that the search itself, once the query has been built and set to run, is not a process which requires manual intervention. Searches can be left to run in the background and the Commissioner is extremely doubtful a member of staff would need to sit for 3.5 hours to watch a search running and it would be difficult to argue this was 'staff time' that could be included in a cost estimate.
39. As a result the Commissioner's view is that this search time cannot be included in the cost estimate and it reduces Ofwat's overall estimate by 8 hours. This would take the total time incurred so far to 19 hours 25 minutes that can be included in the cost estimate. The time still required to review the emails would remain at 13 hours and 13 minutes, taking the Commissioner's own estimate to 32 hours 38 minutes. This is assuming that the estimated 7.5 hours are need to review the emails found to be in scope. As mentioned at paragraph 36, the Commissioner is sceptical that this will be the amount of time needed once the number of emails comes down.
40. The Commissioner has gone on to balance the more realistic time and cost burden to Ofwat that he's estimated, against the public value of the requested information.
41. There is importance in increasing the public understanding of the regulatory and enforcement framework regarding wastewater services provided by water companies, including the interpretation and enforcement of the UWWTR. The UWWTR aims to reduce the pollution of waters by domestic and industrial sewage and this is an area of increased interest and scrutiny. Ofwat, as the industry regulator, will be involved in high level conversations with Defra and the Environment Agency about enforcement of the UWWTR and the emails on this subject do have a public value.
42. The complainant pointed to a [letter sent by the Commissioner](#)¹ to water companies in July 2024 that set out the clear expectation that water

¹ [Information Commissioner calls for water companies to be crystal clear with public over sewage pollution | ICO](#)

companies need to be transparent and open. The complainant argues this applies equally to Ofwat as the industry's regulator.

43. The Commissioner considers there is a difference between data on sewage discharges by water companies and information on how the regulator interprets and enforces the provisions of the Regulations designed to reduce sewage discharges. That being said both are of value and both will provide greater understanding of what is being done to tackle pollution of waters. The request is not just asking about water companies' practices but also what the regulator, Ofwat, was doing about them.
44. The Commissioner appreciates that complying with this request will (and has) involved work for Ofwat staff. However, the principle behind the EIR is that giving the public access to environmental information will encourage greater awareness of issues that affect the environment. Greater awareness helps increase public participation in decision-making; it makes public bodies more accountable and transparent, and it builds public confidence and trust in them. A presumption in favour of disclosure is inherent in the EIR.
45. The cost estimate is seemingly over the 24 hour threshold that is the benchmark for Ofwat to refuse a request under the FOIA. However, under the EIR the presumption in favour of disclosure means this is not an automatic limit and the Commissioner would normally expect a public authority to incur a higher burden when dealing with a request for environmental information. The value of the request is also a factor when determining if it is reasonable to impose a burden of any extent on a public authority.
46. The Commissioner considers that, on balance in this case, the value of the requested information is sufficient to warrant what the Commissioner considers is the likely time it will take to comply with the request. The time required, whilst substantial, cannot be classified as grossly oppressive in terms of the burden when balanced against the value. As such, his decision is that the request isn't manifestly unreasonable and so Ofwat wasn't entitled to rely on regulation 12(4)(b) to refuse it
47. Because the Commissioner has found that regulation 12(4)(b) isn't engaged, it's not necessary to consider its associated public interest test.

Right of appeal

48. 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

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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