Neutral Citation Number: [2024] UKFTT 00343 (GRC)

Case Reference: EA/2023/0315

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on: 17 April 2024
Decision given on: 26 April 2024

Before

TRIBUNAL JUDGE HEALD
TRIBUNAL MEMBER TATAM
TRIBUNAL MEMBER GRIMLEY EVANS

Between

STEPHEN LAVELLE

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) NORTHUMBRIAN WATER GROUP LIMITED
(3) NORTHUMBRIAN WATER LIMITED

Respondents

The appeal was decided without a hearing as agreed by the parties and allowed by the Tribunal by rule 32(1) of the Tribunal Procedure (First -Tier Tribunal) (General Regulatory Chamber) Rules 2009 ("2009 Rules").

Decision:

1 Northumbrian Water Limited is hereby added as a party to this Appeal pursuant to rule 9(1) 2009 Rules and the 2nd Respondent shall provide a copy of this Decision to the 3rd Respondent

2 The Appeal is allowed.

Substituted Decision Notice:

The 2nd and/or 3rd Respondent in responding to the Appellant's Request for environmental information dated 30 January 2023 has (1) not correctly relied upon the exception found at regulation 12(5)(b) Environmental Information Regulations 2004 and that the public interest favours disclosure and (2) has not correctly relied upon the exception found at regulation12(4)(a) EIR.

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The 2nd and/or 3rd Respondent shall, within 35 days of being sent this Decision, provide to the Appellant the information requested by him on 30 January 2023.

REASONS

1. This appeal is brought by Mr Lavelle by reg 18 Environmental Information Regulations 2004 ("EIR") and section 57 Freedom of Information Act 2000 ("FOIA"). It relates to a Decision Notice ("the DN") issued by the Information Commissioner ("the IC") on 5 June 2023 and it concerns a request for information ("the Request") made by Mr Lavelle on 30 January 2023. References to page numbers are to the Open Bundle provided for this Appeal.

2. The IC in the DN (page 2) considered whether the Request was for environmental information as defined. For the reasons set out by the IC we agree that it is.

The Appellant

3. Mr Lavelle (page 90) is the Vice Chair of the Whitburn Neighbourhood Forum. The purpose of the forum is to prepare a neighbourhood plan and he says:-

   "... my remit was to investigate if there exists sufficient sewage collection and treatment infrastructure to support new development. Sewage collection and treatment capacity is a material planning consideration"

The Respondent ("NWL")

4. On 26 July 2023 (page 24) Directions were given including that Northumbrian Water Group Limited was to be added as 2nd Respondent. We note that when responding to the Appeal they referred to themselves as Northumbrian Water Limited. Our understanding is that Northumbrian Water Limited is a subsidiary of Northumbrian Water Group Limited, the holder of the relevant licence and the public authority for these purposes. Accordingly as appears above, and having considered the overriding objective in rule 2 2009 Rules, Northumbrian Water Limited has been added as a party to this Appeal by rule 9(1) 2009 Rules.

The EIR

5. The relevant part of reg 5 EIR says as follows:-

   5.—(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request

6. The EIR treats information about emissions as a special category of information. Additionally reg 12(2) EIR provides that a public authority is to apply a presumption in favour of disclosure.

The Tribunal's Role

7. The Appeal is by reg 18 EIR and section 57(1) FOIA which provides that:-

“Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.”

8. By section 58 FOIA the Tribunal’s role is to consider whether the DN is not in accordance with the law or if the IC should have exercised his discretion differently. If the Tribunal determines the DN was not in accordance with the law or that a discretion should have been exercised differently it can allow the appeal and/or substitute a different Notice that could have been served by the IC. Unless these apply the Tribunal shall dismiss the Appeal.

Background

9. Mr Lavelle seeks information from NWL for 2022 regarding discharges from its Whitburn Steel Pumping Station through a long sea outfall into the North Sea and copies of the return flow records.

10. There is considerable and long standing public interest about the performance of the water sector generally. This clearly extends to the Whitburn Steel Pumping Station as can be seen in just one example in the Bundle namely the petition to the European Parliament (130).

11. NWL says (160) that the information requested is directly relevant to an inquiry launched in 2021 by the Environment Agency (EA) and Ofwat (the Regulator for the water sector in England & Wales) (“the Inquiry”) and refuses to provide it in reliance on the exception at reg 12(5)(b) EIR. We noted that on 18 November 2021 Ofwat issued a statement which starts:-

“The Environment Agency (EA) and Ofwat have launched a major investigation into sewage treatment works, after new checks led to water companies admitting that they could be releasing unpermitted sewage discharges into rivers and watercourses. This will see an investigation involving more than 2000 sewage treatment works. Any company caught breaching their legal permits could face enforcement action, including fines and prosecutions. Fines can be up to 10% of annual turnover for civil cases, or unlimited in criminal proceedings.”

Evidence and Procedure

12. For this Appeal the Tribunal was provided with an open bundle consisting of 175 pages and a closed bundle which contained the information (in part) requested by Mr Lavelle. Following the commencement of the Appeal:-

NWL was joined as a party on 26 July 2023
the IC provided a response on 23 August 2023
Mr Lavelle wrote to the Tribunal on 12 September 2023
NWL provided a response on 20 September 2023
Mr Lavelle Replied on 21 September 2023
Mr Lavelle provided a 2nd Reply on 22 September 2023
Mr Lavelle provided a 3rd Reply on 5 October 2023

The Appeal hearing was adjourned on 27 November 2023 to enable the Tribunal to see the disputed information.

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Relevant Legal considerations.

13. The rights in reg 5(1) EIR are subject to a number of exceptions including by reg 12(5)(b) EIR which states that a public authority may refuse to disclose environmental information to the extent that its disclosure would adversely (and not "would be likely to...") affect:-

    (b)the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

14. The IC's guidance ("the Guidance ") is not binding on us but we found it to be a helpful summary of the legal position. It states that:-

    "*….'adverse effect' is equivalent to 'prejudice' in FOIA. There are similarities between the exceptions in regulation 12(5) and the 'prejudice-based' exemptions in FOIA. However, the threshold for what constitutes adverse effect in EIR is different to that for prejudice in FOIA."*

15. The Guidance refers to (and we were assisted by) the Decision in *Benjamin Archer v the Information Commissioner and Salisbury District Council EA/2006/0037(9 May 2007).* which concluded that:-

    - disclosure must effect the interests in the exception and the effect must be adverse
    - the public authority can only refuse to disclosure to the extent of the adverse effect
    - it is necessary to show that disclosure would have the adverse effect not just that it might or could do so

16. If engaged the exception is subject to the Public Interest Balance Test ("PIBT") in reg 12(1)(b) EIR namely that:-

    "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."

17. The Guidance sets out how a public authority should assess the PIBT. It says for example:-

    "In the context of EIR, there is a public interest in a sustainable environment. There is also a public interest in transparency and accountability, to promote public understanding and safeguard democratic processes."

18. The Guidance calls for a consideration of the arguments for and against disclosure:-

    "*In carrying out the public interest test, you should consider arguments in favour of either disclosing the information or maintaining the exception. You should try to do this objectively, recognising that you can make arguments on both sides. You may find it helpful to draw up a list showing the arguments you are considering on both sides. This helps you to assess the relative weight of the arguments."*

    and says that only public interest arguments that are relevant in support of the exception should be considered.

19. As regard attaching weight to the arguments for and against the Guidance says:-

"*Once you identify the relevant arguments for maintaining the exception and for disclosure, you must then assess the relative weight of these arguments. This is to decide where the balance of public interest lies. This is not an exact process, but you should try to approach it as objectively as possible. If the Commissioner is considering the case, we will consider these arguments, or other public interest arguments that you did not include, and may reach a different conclusion.*"

20. The Guidance also sets out its test for the "likelihood of adverse effect"

"To engage an exception in regulation 12(5), you must show that it is more probable than not that the adverse effect would occur. This means a strong causal link between the disclosure and the adverse effect, or that the adverse effect could happen frequently. So 'adverse effect more probable than not' is the minimum requirement for engaging a regulation 12(5) exception. It does not mean that the public interest in maintaining the exception necessarily outweighs disclosure. It is the starting point for considering the public interest test for these exceptions. A conclusion that the adverse effect is 'more probable than not' cannot decide the issue alone, because of the presumption in favour of disclosure in regulation 12(2)."

21. The Guidance calls for a public authority, having listed the arguments for and against disclosure and attached weight to them, to carry out a balancing exercise.

22. This process for an EIR case is reflected in the Upper Tribunal ("UT") decision in *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560* (para 149) which said that when assessing competing public interests (but under FOIA in that case) the correct approach is:-

"...to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This equates to the approach now taken in PII claims and requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

23. Reg 12(1)(b) EIR refers to *"all the circumstances of the case"*. The Guidance while accepting that from an administrative point of view a public authority may have a general approach to releasing certain types of information states that:-

"...this should not prevent you from considering the balance of public interest in the circumstances of a particular request."

24. On this the Guidance refers to *Hogan (para 57) (*which while a FOIA case it says it considers equally applicable under the EIR) in which it was held as follows:-

"The public interest in maintaining the exemption is to be assessed in all the circumstances of the case. This means that the public authority is not permitted to maintain a blanket refusal to disclose all information of a particular type or nature. The question to be asked is not; is the balance of public interest in favour of maintaining the exemption in relation to this type of information? The question to be asked is; is the balance of public interest in favour of maintaining the exemption in relation to this information, and in the

circumstances of this case? The public authority may well have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information. However such a policy must not be inflexibly applied and the authority must always be willing to consider whether the circumstances of the case justify a departure from the policy."

25. As regards the PIBT we noted that the UT in *Department of Health -v- the Information Commissioner and Lewis [2015] UKUT 159 ACC* held (at 19)

"iii) a contents assessment of the public interest against (and for) disclosure of information can and generally will include an assertion and assessment of those public interests by reference to a class that describes that information ..."

26. The relevant date for considering the PIBT was considered by the UT in *Montague v ICO and Department for Business and Trade* [*2022] UKUT 104 (AAC*). At para 56 of *Montague* the UT referred to the question raised in *APPGER (para 44)*

"The issue of principle that arises here is the date at which the public interest balancing test is to be applied (we call this the "public interest timing point"). The question is whether the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review) or rather by reference to the circumstances as they exist at the time of the tribunal hearing (in this instance the Upper Tribunal reconsideration hearing). In the present case, all parties before the F-tT had proceeded on the basis that the applications of the exemptions and the public interest balance were to be considered at or around the time of (at the latest) the date of the FCO's internal review (in June 2009). This shared understanding was in accord with the prevailing orthodoxy."

27. In *Montague* (58 -60) the UT concluded that the correct time for determining the PIBT is the date the public authority makes its decision on the request which has been made to it and that this does not include any later decision made by the public authority reviewing the refusal decision.

28. As regards the presumption in reg 12(2) EIR it was held in *Vesco -v- the Information Commissioner & the Government Legal Department [2019] UKUT 247 ACC* that that this was a third stage in the process of consideration.

"19.The third stage. If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was "common ground" in the case of Export Credits Guarantee Department v Friends of the Earth [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

29. Reg 12(4)(a) EIR provides that:-

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—(a) it does not hold that information when an applicant's request is received;"

The Request (page 157)

30. On 30 January 2023 Mr Lavelle wrote to NWL and asked for two things:-

"Under the EIR I request that I be provided with the following environmental information:

A detailed description of all of the discharges records for the year 2022 for discharges that were made from the Whitburn Steel pumping station situated at Whitburn, South Tyneside discharging through the long sea outfall and into the North Sea at that location. Among the records I request the times of discharges and the volumes of discharges.

I also request that you provide me with copies of the Whitburn return flow records for 2022. (detailed description)"

Response (159-161)

31. On 23 February 2023 NWL replied. It refused to provide the information pursuant to reg 12(5)(b) EIR. In its Response it made reference to a different decision notice issued by the IC on 30 January 2023 (ref IC-206971-F0G9) which involved South West Water ("SWW") in which the IC decided:-
"[10] The investigations into sewage treatment works launched by the Environment Agency and Ofwat are also still ongoing. The Commissioner is therefore satisfied that ... [South West Water] ... is entitled to withhold the information requested in this case under 12(5)(b) of the EIR ...

32. When considering the PIBT in respect of Mr Lavelle's request NWL referred (160) to the analysis of the IC in the SWW case.

Internal review

33. Mr Lavelle requested an internal review (162). His challenge (again in summary) was that:-

1) NWL had misconstrued the SWW Decision.

2) the Whitburn Steel Long Sea Outfall being a combined sewer overflow that discharges directly to sea is not directly relevant to the Inquiry.

3) he had already received some information from the EA in February 2023 with data for the Whitburn Steel Long Sea Outfall and the EA would not have provided it if they had thought in doing so that would have adversely impacted NWL's rights "to a fair trial. "

The Review (165 - 169)

34. NWL in its Review (167) said that it agreed that The Whitburn Steel Long Sea Outfall did not directly form part of water treatment works but that its data was relevant to the Inquiry:-

"During this internal review, we have re-examined the scope of the joint EA and Ofwat investigation. The scope of the investigation is focussed upon FFT which is a measure of how much wastewater a treatment works must be able to treat at any time. By its very nature, the investigation is examining flows arriving at wastewater treatment works. This must involve consideration of what is happening in the network as a whole as that determines FFT. In addition, the scope of the investigation is subject to change and

additional areas of enquiry have been added by the Regulators as the investigation has progressed. Discharge data from the wider sewage network is therefore relevant to the scope of the Ofwat/EA investigation."

35. As regards the provision of information to Mr Lavelle by the EA they said they were aware of it but that:-

"...This does not go into the level of detail you are requesting which is "a detailed description of all of the discharges records"; "the times of discharges and the volumes of discharges" and "copies of the Whitburn return flow records" all in a spreadsheet format. The data you are requesting is therefore far more detailed than that published by the EA."

36. NWL in the review also referred to the SWW Decision:-

"As confirmed in ICO decision IC-206971-F9G9 dated 30 January 2023, the ICO accepted that it is important that the investigations are protected against the risk of any undue influence from outside sources that might be caused by releasing relevant information into the public domain. The release of the data could result in third parties carrying out their own analysis of whether NWL has complied with its permits in respect of the use of storm overflows. Such analyses could, for example, be the subject of media attention and/or political attention through lobbying MPs. This might lead to pressure being applied, directly or indirectly, by the public, interested parties, politicians and media outlets to the independent Regulators undertaking the ongoing investigation, who are responsible for enforcing compliance with environmental permits and regulation. This could result in an adverse effect on the course of justice with public opinion unduly influencing the outcome of a regulatory investigation.

37. NWL also provided the outcome of its review regarding the PIBT. At this stage they simply recorded what the IC had said in the SWW decision:-

"The Information Commissioner has explained this test further as follows [IC-206971-F9G9]:

12.The Commissioner has considered the complainant's arguments for disclosure, which broadly concern transparency and reassurance for the public about when it is safe to swim in the sea. The concern about the state of seawater around England and Wales is a legitimate concern. However, as in the previous case, it is clear to the Commissioner that the balance of the public interests lies in maintaining the exception. Where an investigation is ongoing and where that investigation could lead to criminal charges, it cannot be in the public interest to potentially undermine that investigation by disclosing information that is relevant to it.

The public interest is therefore in favour of maintaining the exception."

<u>Complaint and DN (1-5)</u>

38. On 2 May 2023 (170) Mr Lavelle made a complaint to the IC. The IC issued its DN on 5 June 2023. The conclusion of the DN was:-

"The complainant has requested flow data relating to sewage systems. The above public authority ("the public authority") relied on regulation 12(5)(b) of the EIR to withhold the requested information.

The Commissioner's decision is that the public authority has correctly relied on regulation 12(5)(b) and that the public interest favours maintaining the exception.

The Commissioner does not require further steps to be taken."

39. As set out by the IC (page 3 para 9) the DN noted the existence of the Inquiry and referred back to the IC's previous decisions. As regards the dispute as to whether the information requested was or was not the focus of the Inquiry the IC said (para 11)

"As the Commissioner understands it, the public authority accepts that the data being requested may not be precisely what the inquiries are most closely focussed on, but that it is nevertheless indirectly relevant to their work. The conditions at any individual wastewater treatment works are affected by the wider conditions around the sewage network and should not (in the public authority's view) be looked at in isolation."

40. As regards the right of NWL to use the exception the IC said (para 12-14)

"In the Commissioner's view, the exception is engaged. The implication of the public authority's argument is that this data is likely to form part of its defence as to why it considers that it has complied with the law and with the terms of its licence

If the complainant is correct in his assessment, then such a defence may not be persuasive – but that is beside the point. The public authority has a right to be able to explain to the inquiry why it believes it has complied with its obligations. It is also entitled to put forward any evidence it considers provides a defence to an assessment of non-compliance.

Disclosing the information would remove the right of the public authority to adduce evidence to the inquiries at a time of its choosing. Doing so would harm the public authority's ability to defend itself and would thus adversely affect the course of justice. Regulation 12(5)(b) is therefore engaged."

41. In considering the PIBT the IC accepted that (para 15 page 4):-

"...the issue of sewage discharges is one that is particularly topical at the present time. He also considers that the information is information on emissions – which has special status under EIR. There is thus a strong public interest in disclosure"

42. In summary however the IC concluded that there was a stronger public interest in allowing the Inquiry *"to go about their business free from undue influence."*.

43. The DN says:-

"It is for an inquiry to decide what material it does and does not consider relevant. It must have the freedom to go about its work and reach a sound conclusion without having its actions second-guessed by those who only have partial access to the necessary information.

The Commissioner has taken into account the presumption in favour of disclosure – but does not consider that it should make a difference to the outcome.

The Appeal

44. On 29 June 2023 Mr Lavelle lodged the Appeal by reg 18 EIR and section 57 FOIA. The outcome he seeks is (page 11)

    "I request that NWL supply me with the data I request either in part or in full The ICO appears to have paid scant regard to the part of my request regarding the data of the return flows from the interceptor tunnel to the main foul sewer. These flows do not enter the environment but have not been commented on in the decision."

45. The Grounds of Appeal state (page 9):-

    "*Para 2 The Commissioner's decision is that the public authority has correctly relied on regulation 12(5)(b) and that the public interest favours maintaining the exception. ommissioner's I disagree with this decision as I believe that the commissioner has not taken due regard of the evidence I supplied as the commissioner bases his decision on the following grounds.*

    Paras 11 and 12 As the Commissioner understands it, the public authority accepts that the data being requested may not be precisely what the inquiries are most closely focussed on, but that it is nevertheless indirectly relevant to their work. The conditions at any individual wastewater treatment works are affected by the wider conditions around the sewage network and should not (in the public authority's view) be looked at in isolation.

    12 In the Commissioner's view, the exception is engaged. The implication of the public authority's argument is that this data is likely to form part of its defence as to why it considers that it has complied with the law and with the terms of its licence.

    The data I requested is neither directly or indirectly relevant to the work of the EA in their investigation of NWLs Waste Water Treatment Works. The Hendon WWTW treats a max of 1856 litres per second of waste water. It is this full flow that is part of the EAs investigation. It is of no consequence how great the flows are arriving at the WWTW as any flows greater than 1856 l/s are discharged without treatment. The max capacity (Full flow) that the WWTW can deal with is not affected by the wider conditions around the sewage network. It is an absolute figure

    The EA have previously supplied me with this exact data for Whitburn, albeit not for the full year (attached), and they are the investigating authority. This supports my assertion that the data I request forms no part of the EA inquiry.

    The public authority can not say that the data requested is likely to form part of its defence as the inquiries are soley focussed upon waste water treatment works full flow to treatment. The EA is investigating the flows that arrive at the treatment works that go for treatment only and the inquiry is not regarding any flows that do not arrive at the treatment works (normally discharged into the environment by way of permit via CSOs).

    The data I request relates to the permit for the Whitburn Steel Long Sea Outfall and the return flows from the storm interceptor tunnel into the main sewer whereas the EA inquiry is focussed solely on the FFTT data of the Hendon Sewage Treatment Works discharge permit.

    The Whitburn permit is a stand alone bespoke permit which prescribes that it is for the CSOs to govern when they can flow (internally) into the storm tunnel. This permit is not

related to the Hendon WWT permit and does not form any part of the relevant EA inquiry either directly or indirectly.

I disagree, in this instance, with the Commissioner's limited view that the conditions at any individual wastewater treatment works are affected by the wider conditions around the sewage network. The maximum capacity to treat waste water at Hendon is an unalterable figure of 1856l/s and is being looked at in isolation. The general conditions of the WWTW are not being investigated by the EA.

The EA inquiry is not involving itself with the multiple number of CSOs that discharge waster water into the environment long before they reach the works, including the flows discharged by the Whitburn LSO. The EA's inquiry is very much looking at the performance of the WWT works treatment to full flow data in isolation.

To suggest that the wider conditions around the sewage network forms part of the EA inquiry is absurd and does not stand up to scrutiny when the terms of the EA inquiry are considered. Similarly, to suggest that the data I request is likely to form part of the defence with respect to the EA inquiry is nonsense. If anything, the data I have requested is more likely to be an aggravating factor that further condemns the behaviour of the public authority irrespective of how they operate the waste water treatment centre. The public authority has already alerted the EA that wrt Hendon WWTW it has failed to comply with the law and the terms of its permit. The EA investigations were launched after companies revealed to the EA that they may be in breach of their permit conditions"

46. Mr Lavelle provided in support of his Appeal three items including certain information the EA had previously provided to him which relates to "*this exact data* for "Whitburn "*albeit not for the full year"*. We noted in particular page 14 which is a table headed *Whitburn Steel Pumping Station - Long Sea outfall discharges 2022 Jan - 9 Sept 2022.* The table provided shows this information starting on 25 July 2022 and ending on 9 September 2022..

Date on	Time on	Date off	Time off	Duration	No. of events	Volume m3

<u>IC's Response to the Appeal (28-38)</u>

47. The IC in Response (from 37) while standing by the DN acknowledges that there is a fundamental difference of view between Mr Lavelle and NWL as to whether the Request touches upon matters being dealt with in the Inquiry and suggests that NWL is best placed to add submissions or evidence and to deal with technical issues raised.

<u>Mr Lavelle's letter of 12 September 2023 (page 39)</u>

48. By this letter Mr Lavelle drew attention to a statement made by The Office of Environmental Protection ("the OEP") on 12 September 2023 regarding *possible failures to comply with environmental law by….the Environment Agency and Ofwat in relation to the regulation of combined sewer overflows.*

<u>NWL's Response to the Appeal (43- 74)</u>

49. NWL's Response sets out in greater detail the background and basis of the Inquiries. They explain that:-

- NWL became formally involved following the service by Ofwat of a Statutory Notice on 8 March 2022 pursuant to section 203 Water Industry Act 1991 which shows that:-

  "the Investigation at this stage was not limited to an investigation into simply what was happening at NWL's WWTW in Hendon ("the Hendon Works"), or indeed even to NWL's WWTWs more generally. Instead, the documents clearly reveal that Ofwat was investigating the issue of NWL's handling of the contents of its sewerage system across the board, for the purposes of assessing whether there had been non-compliance with NWL's general statutory duty to effectually deal with the contents of its sewerage system to the requisite standard"

- in their view Mr Lavelle is simply wrong to say that the Inquiry is only narrowly *"concerned with what happens at the Hendon Works, and was not concerned with discharges/spillages being effected within the wider network"* and that the investigation to which NWL is subject has been "*of the broadest ambit*"

50. NWL refer to three interactions with the EA and Ofwat to demonstrate their case. The first pre dates their refusal but the second and third came later. They were:-

    2 February 2023 (prior to refusal) when the EA posed a number of question which in NWL's view *"demonstrate that the Investigation was not narrowly concerned simply with what happened at NWL's WWTWs and instead was concerned with NWL's discharge assets more generally, including the Whitburn LSO."*

    29 June 2023 and 14 August 2023 (after refusal) in which first Ofwat asked for information about the Whitburn wastewater system *"as part of [its] ongoing enforcement case against Northumbrian Water"* and then in which *Ofwat requested specific data regarding "flows discharging into the Whitburn interceptor sewer"*..

51. As to the Grounds of Appeal NWL say that they are *"not tenable"* due to the factual background regarding the actual extent of the Inquiry.

52. NWL also say that Mr Lavelle's reference to an announcement made by the OEP on 12 September 2023 does not impact its case because the OEP is a separate body that does not dictate terms to EA and Ofwat regarding the Inquiry.

53. In response to the Grounds of Appeal relating to the provision of information by EA to Mr Lavelle NWL say (page 49) that this does not undermine their case because it is different in nature and scope:-
    "This high-level information does not compare with the "detailed descriptions" sought by Mr Lavelle, including as to the times and volumes of all discharges from the Whitburn LSO together with copies of return flow records. Not least the EDM data would not enable recipients to conduct their own analysis of whether NWL has complied with its permits in respect of the use of storm overflows, which is no doubt why Mr Lavelle has not been content with the EDM data disclosed by the EA and has instead pressed for the different, detailed data alluded to in his request. It is that detailed analysis which would, if enabled through a disclosure under the EIR, adversely affect the course of the Investigation, by creating a situation in which those who may have a particular political agenda so far as the underlying issues are concerned are able to develop and lobby for their own analyses in a manner that unfairly skews the Investigation (bearing in mind that a disclosure under the EIR is a disclosure to all the world)."

54. NWL make it clear they do not say that Mr Lavelle would personally engage in such activities.

55. Other arguments raised in response by NWL are (para 16 page 50):-

"In the context of the Investigation, NWL is required to defend its position in respect of spillages in its network generally, and not just in the siloed context of what happens at the Hendon Works. The Disputed Information is directly relevant to that issue.

The fact of the matter is that the Disputed Information could be used by a third party to develop their own subjective, politically driven analysis of network flows with a view to challenging whatever position NWL adopts in response to the Investigation. This is simply not appropriate in the context of a regulatory investigation, all the more so where, as here, that investigation could in principle result in the laying of criminal charge"

56. NWL provide its formal answer to the part of the original request to provide data relating to discharge volumes. They say that at the time of the request NWL did not hold any information revealing the volumes of relevant discharges and that there is no obligation to do so as follows (51/52):-

"NWL invites the Tribunal to conclude that it was and is in any event exempted from the duty to provide Mr Lavelle with information as to the volumes of discharges emitted from Whitburn LSO as this information is not held, meaning that NML is exempted from the disclosure duty under r. 12(4)(a) EIR"

Mr Lavelle's Replies

57. Mr Lavelle replied on 21 September 2023 (75 – 94 plus enclosures), on 22 September 2022 (126) and on 5 October 2023 (153).

58. In the Reply of 21 September 2023 he sets out his view on the public interest in these matters. He also seeks to show he is right about the nature of the connection between the Inquiry and the Request. He provides information from Ofwat's website. He refers to information for example, from Ofwat which he says bolsters his view that the Request is not too closely linked to or relevant to the Inquiry. For example he refers to the section 203 Notice and says:-

"I suggest that this section 203 notice confirms my assertion that the data I have requested is not relevant to the investigation into NWL being conducted by the Environment Agency and Ofwat into Waste Water Treatment Works referred to in paragraph 9 of the Decision Notice"

59. Mr Lavelle says (90) that:-

"... I have demonstrated that the disputed information is not directly relevant to the investigation and so can not be regarded as useful to any line of defence.

The information that I have requested relates to discharges from a storm overflow -the Whitburn Long Sea Outfall - which is subject to the storm overflows discharge reduction plan. The EA confirm that the plan does not impact on the Environment Agency's ongoing criminal investigation"

60. At para 15 (91) he says that NWL have made an important concession when saying

"NWL is content to agree with Mr Lavelle that discharges from Whitburn are not themselves directly relevant to the question of whether NWL is acting in compliance with its FFT obligations at the Hendon Works"

61. Mr Lavelle also at this stage also provided data concerning Whitburn from page 111 of the Bundle (which is a repeat of the data provided with the Appeal) to 122. It shows data in very similar formats for the 3 pumps for 2019,2020 and 2021.
62. The Reply of 22 September 2023 draws attention to a Judgment in an action between the European Commission and the UK from October 2012 which referred to the Whitburn site. In this Reply Mr Lavelle also says that NWL are wrong to say that the data relating to the Request does not exist and there is no obligation to collect it by reference to a copy of a Discharge permit attached.

63. Mr Lavelle Replied again on 5 October 2023. The focus here was a review of NWL's Response and in particular the various items of communication it had received from EA and Ofwat.

Our Review

64. In our deliberations we considered the information provided in the Bundle and the matters set out above. In reviewing the closed bundle we noted the information provided was raw factual data. This data was presented in an excel spreadsheet format. It provided data in 5 tabs relevant to pump 1, pump 2, pump 3 then a summary of the three pumps and the daily "return flows" relating to the second part of the Request.

Is Regulation 12(5)(b) EIR engaged?

65. NWL refers to and appears to rely upon to the IC's Decision in the SWW case of the 30 January 2023. This Decision supported SWW's use of reg 12(5)(b) due to the existence of the Inquiry. The IC in the relevant DN (hyperlink page 3) also refers to:-

- a Decision relating to Severn Trent Water (IC-163737-D3Q3) dated 27 October 2022 where it had supported the use of reg 12(5)(b) EIR due to the existence of the Inquiry

- a Decision relating to Severn Trent Water dated 5 April 2023 (IC-218612-B1J7) in which the IC supported the use of reg 12(5)(b) EIR due again to the existence of the Inquiry.

66. We do not consider it was appropriate when considering the Request made by Mr Lavelle for NWL to have relied, to the apparent extent it did, on the existence and outcomes of the SWW Decision and others. Their existence was at most background information only.

67. There has been much said on the question of whether the evidence supports NWL or Mr Lavalle's case as to whether the focus of the Request is directly relevant to the Inquiry. We concluded that there is overlap between the focus of the Request and the ambit of the Inquiry. However, while the closeness of a EIR request to the ambit of the Inquiry might indicate that reg 2(5)(b) is engaged, it would not be conclusive. It would in our view be possible for a request to match exactly the terms of an inquiry but not necessarily engage this "adverse effect" exception as a result.
68. We do not agree with NWL in its response to the Request when it said "*As the information requested is directly relevant to the ongoing EA/Ofwat investigations, the adverse effect test*

under regulation 12(5)(b) is satisfied". This is because it indicates a generalised approach and suggests that in effect reg 12(5)(b) EIR will always be engaged whenever information requested pursuant to the EIR is considered to be directly relevant to the Inquiry and we do not accept this proposition.

69. We noted that NWL agreed with Mr Lavelle that the EA had made information available themselves. We do not know the EA's or Ofwat's view (if they have one) of these matters but Mr Lavelle's argument was that in doing so the EA had demonstrated that they were not concerned about the release of the data requested. NWL's answer was to refer to the different level of detail between that provided by the EA and that requested.

70. We reviewed the information in the closed bundle and compared it to the information at page 14 While it is not identical and in a different format and layout we noted the similarity as regards the data being provided. In our view the differences between the data at page 14 and the disputed material is not significant enough to undermine the submissions made by Mr Lavelle. Additionally the information at 112- 132 of the Bundle while not identical to that provided in the closed bundle is very similar.

71. NWL has not, in our view, shown that the disclosures requested they seek to withhold if made would have an adverse effect on

    "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

72. Examples of this in our view are NWL's desire to:-

    - protect against undue influence from some "outside sources"
    - prevent others carrying out their own analysis
    - avoid media or political attention
    - avoid lobbying MP's
    - protect against *"those who may have a particular political agenda so far as the underlying issues are concerned…."*
    - prevent third parties developing *"their own subjective, politically driven analysis of network flows with a view to challenging whatever position NWL adopts in response to the Investigation."*

    and when they say:-

    - *"This might lead to pressure being applied, directly or indirectly, by the public, interested parties, politicians and media outlets to the independent Regulators"*
    - the risk of "*public opinion unduly influencing the outcome of a regulatory investigation"*
    - that the Investigation could be skewed by "*those who may have a particular political agenda so far as the underlying issues are concerned..."*

73. We do not accept that release of this data in response to this Request would prevent or inhibit NWL:-

- from using the same material if called upon to do so as part of its involvement to the Inquiry
- if called upon in any future proceedings to put in a Defence or to "*put forward any evidence it considers provides a defence to an assessment of non-compliance*"
- from exercising its right to "*explain to the inquiry why it believes it has complied with its obligations*".

74. We do accept that as a matter of fact responding to the Request could prevent NWL from being able adduce evidence to the Inquiry at a time of its choosing. However even if already in the public domain NWL would still be able to produce the data for the Inquiry if and when asked for it. We do not agree that this inability to control the timing would cause NWL to be unable to defend itself and thereby "*adversely affect the course of justice.*"

75. NWL refers to the possibility that it may face criminal charges. While we accept this we do not accept that the release of the factual raw data that exists and we have seen in the closed bundle would prevent NWL from having a fair trial.

76. Having considered the evidence we are not satisfied that NWL has demonstrated that the exception relied upon by them is properly engaged.

The Public Interest Test

77. We have gone on to consider the PIBT as if we had found the exception was engaged. There is general acceptance that at the time of the response to the Request these issues generated considerable public interest. The IC says (page 4):-

"The Commissioner recognises that the issue of sewage discharges is one that is particularly topical at the present time. He also considers that the information is information on emissions – which has special status under EIR. There is thus a strong public interest in disclosure."

78. Reg 12(1)(b) EIR requires the Public Authority, if deploying the exception, while noting the assumption in reg 12(2) EIR, to consider whether:-

"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."

79. Reference is made by NWL to the PIBT for example in its reply to the request (160) as follows:-

"The Commissioner then considered the public interest test in the South West Water case cited above and held:

[12] ... it is clear to the Commissioner that the balance of the public interests lies in maintaining the exception. Where an investigation is ongoing and where that investigation could lead to criminal charges, it cannot be in the public interest to potentially undermine that investigation by disclosing information that is relevant to it.

Your request is therefore refused on the basis of Regulation 12(5)(b)."

80. NWL also says this in the Review (168)

"This exception is subject to the public interest test, which is explained more fully below.

Public interest test

In addition to engaging an exception, information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information: The starting point is that a public authority should apply a presumption in favour of disclosure: Regulation 12(2).

The Information Commissioner has explained this test further as follows [IC-206971-F9G9]:

12.The Commissioner has considered the complainant's arguments for disclosure, which broadly concern transparency and reassurance for the public about when it is safe to swim in the sea. The concern about the state of seawater around England and Wales is a legitimate concern. However, as in the previous case, it is clear to the Commissioner that the balance of the public interests lies in maintaining the exception. Where an investigation is ongoing and where that investigation could lead to criminal charges, it cannot be in the public interest to potentially undermine that investigation by disclosing information that is relevant to it.

The public interest is therefore in favour of maintaining the exception"

81. In this mater NWL appear to have placed considerable reliance upon the IC's other (we assume) unchallenged Decisions in the SWW and other cases rather than carrying out their own assessment of the PIBT on the Request before them. In our view it was not appropriate for NWL, when considering the PIBT on this Request, to have the level of regard to the outcome of other different requests dealt with by different water companies on different dates.

82. Even if we accepted that disclosure could potentially undermine an investigation in our view the passages referred to above suggests the approach taken in considering the PIBT was not focused on the Request.

83. We were also concerned that the process adopted by NWL ran counter to the decision in *Hogan* to avoid an inflexible "blanket" approach and to *Montague* relating to the date for assessment of the PIBT.

84. Reg 12(1)(b) refers to *"..all the circumstances of the case"*. It appears to us that there had not been an adequate consideration of arguments for disclosure and against disclosure nor that NWL had then gone on to carry out an assessment of how it balanced or weighed the two competing elements before reaching its conclusion.

85. The PIBT in relation to this Request was considered independently of previous decisions to some extent. We noted for example that in the DN the IC accepted there was a strong public interest in disclosure – noting it was about emissions. (page 4). The IC balanced this against what it saw as a stronger public interest in allowing the Inquiry to go about their business free from *"undue influence."* but without saying what that was or how and why

this was connected to the PIBT. The IC went on to say (as regards the PIBT) that in their view:-

" It is for an inquiry to decide what material it does and does not consider relevant. It must have the freedom to go about its work and reach a sound conclusion without having its actions second-guessed by those who only have partial access to the necessary information."

86. We accept that in reviewing the balance between disclosure and withholding information a public authority might consider the existence of an inquiry and any overlapping scope and include this when reaching a conclusion. However, in our view too much of a blanket approach appears to have been taken in this case.

87. We cannot see that NWL adequately considered the positive reasons for disclosure especially in light of the presumption in the EIR and the status of emissions. In addition to the general desirability for transparency these positive reasons include that (1) it is important that the public have access to environmental information (2) in enables comparisons to be made between this information and datasets with other information provided by NWL or others (3) it better enables others to carry out their own analysis and (4) it enables there to be better informed debate on water and sewerage issues and environmental matters generally.

88. We do not accept the public interest arguments against disclosure provided by NWL and the IC outweigh the arguments in favour of disclosure especially when considered with the presumption in reg 12(2) EIR.

The Presumption-reg 12 (2) EIR

89. Having concluded the exception is engaged and the public interest favoured withholding the information we could not see that NWL had gone on to the third stage and adequately considered the impact of the presumption as set out in *Vesco.*

Reg 12(4)(a) EIR

90. NWL in its Response raises reg 12(4)(a). The late addition of the use of this exception was not an issue for the Tribunal (see 28 *Birkett -v- DEFRA [2011] EWCA civ 1606*). NWL says (para 18 page 51):-
"Further and in any event, at the time of the request, NWL did not hold any information revealing the volumes of discharges emitted from the Whitburn LSO, or indeed any other discharge asset within the network. There is no statutory requirement to do so. That remains the case today. Accordingly, insofar as may be necessary, NWL invites the Tribunal to conclude that it was and is in any event exempted from the duty to provide Mr Lavelle with information as to the volumes of discharges emitted from Whitburn LSO as this information is not held, meaning that NML is exempted from the disclosure duty under r. 12(4)(a) EIR"

91. It is our view that the data as currently structured might not at first sight provide an answer to all elements of the Request and there may be no statutory obligation to measure the volume of discharges however (1) calculating the information requested would be a straightforward arithmetical exercise from the data supplied and the capacity of each pump (2) this is data that is supplied by NWL to the EA as a condition of its "Permit to discharge licence" and (3) providing this information appears to have been done in the years 2019,2020 and 2021 as appears at pages 112 and following.

92. Thus our view is that the information requested could be provided with very limited extra work in terms of time or cost and to do so would also be in compliance with the provisions of regs 9 and 4(1)(a) EIR.

Decision

93. For the reasons set out above we do not consider that NWL were entitled to rely on reg 12(5)(b) EIR and that the public interest favours disclosure. We also do not consider that NWL was entitled to rely on reg 12(4)(a) EIR. Accordingly we do not consider the DN to be in accordance with the law. The Appeal is therefore allowed. The following Decision is substituted:-

"NWL in responding to the Appellant's Request for environmental information dated 30 January 2023 has (1) not correctly relied upon the exceptions found at regulation 12(5)(b) EIR and that the public interest favours disclosure and (2) has not correctly relied upon the exception found at regulation12(4)(a) EIR. The 2nd and/or 3rd Respondent shall, within 35 days of being sent this Decision, provide to the Appellant the information requested by him on 30 January 2023."

Signed Tribunal Judge Heald **Date: 26 April 2024**

Promulgated on: 26 April 2024