

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

Decision notice

Date: 12 March 2012

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

Decision (including any steps ordered)

1. The complainant has requested information relating to NI Water's sewer upgrade project within the Stranmillis Road/Richmond Park area of Belfast.
2. The Commissioner's decision is that Northern Ireland Water (NI Water) has correctly applied the exception under regulation 12(5)(b) of the EIR (adverse effect on the course of justice) and requires no steps to be taken.

Request and response

3. The complainant wrote to NI Water and requested the following information relating to NI Water's sewer upgrade within the Stranmillis Road/Richmond Park area of Belfast: -
 1. The exact locations of the ground vibration monitors - placed on a scale drawing of the entire area being excavated
-at the point of impact
-5.0 M away from point of impact
 2. The method of measurement for the vibration readings as taken by your accredited ground vibration experts - F R Mark

3. The geology reports of the area made by NI Water's accredited experts.
 4. The number of vibrometers used.
 5. The types of vibrometer.
 6. When was each vibrometer last calibrated and copy certificate?
 7. Copy of vibration trace from each vibrometer - signature monitor.
 8. Method of securing vibrometer heads.
 9. Were the vibrometers used for a single 'pile drive' or the continuous 'pile drive' for all sheeting - of how many sheets?
 10. Were the vibrometers capable of continuous measurements?
4. NI Water responded on 10 June 2011. It stated that it was withholding the requested information under the exception set out in regulation 12(5)(b) of the EIR (disclosure would adversely affect the course of justice).
 5. Following an internal review NI Water wrote to the complainant on 15 July 2011. It stated that the reviewer was upholding the original decision to withhold the requested information under the above exemption.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner has considered NI Water's application of the exception under regulation 12(5)(b) to the requested information.

Reasons for decision

Regulation 12(5)(b) of the EIR

8. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “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”.
9. In the decision of *Archer v Information Commissioner and Salisbury District Council*¹ the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must not simply be an effect, but a definite “adverse” effect resulting from disclosure of the information as indicated by the wording of the exception.
10. The Commissioner took into account, when considering whether disclosure of the requested information would have had an adverse effect, that the threshold to justify non-disclosure is a high one and that it is necessary to show that disclosure “would” have had an adverse effect, not that it could or might have had an adverse effect. NI Water applied the exception as a basis for withholding the requested information as it stated that disclosure would adversely affect the course of justice.
11. The Tribunal in the case of *Kirkaldie v Information Commissioner and Thanet District Council*² expressed the view that the purpose of this exception was reasonably clear, stating that it “exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial.” It continued that to do this, the exception “covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation. ”

¹ EA/2006/0037

² EA/2006/001

Does the requested information attract legal professional privilege?

12. NI Water is cognisant of the fact that legal professional privilege can attach to communications between clients and third parties, as well as lawyers and clients, if such communications come into being for the purpose of preparing for litigation. NI Water has informed the Commissioner that the requested information is contained in a report which was commissioned by NI Water from external contractors in response to an ongoing dispute with the complainant, during which litigation was threatened. NI Water considers that legal professional privilege attaches to the information as litigation was contemplated when the information was obtained and had begun and was ongoing at the time of the request.
13. It is the Commissioner's view that legal professional privilege can only apply to information created with the intention of seeking advice or for use in litigation. Legal professional privilege will not attach to documents which existed before litigation was contemplated. In this case, the information contained in the external contractors' report was in existence prior to litigation being contemplated, therefore it cannot be subject to legal professional privilege. However, the exception under regulation 12(5)(b) in the Commissioner's view does not apply only to information subject to legal professional privilege – the wording of the exception has a broad remit which encompasses any adverse effect on the course of justice generally. The Tribunal affirmed this view in the case of *Surrey Heath Borough Council v McCullen*³. The Commissioner has therefore considered whether the exception under regulation 12(5)(b) could still be engaged in relation to the requested information.
14. NI Water considers that the requested information would be required for current ongoing litigation as its legal advisers have stated that the information would be considered as expert evidence in court proceedings. Its premature disclosure would materially affect proceedings, thereby affecting the course of justice.
15. The Commissioner, having viewed the requested information, accepts that it constitutes expert evidence which would be used in litigation proceedings, in this case an insurance claim. Disclosure of the information would reveal to the opposing party evidence intended for use in court to defend such a claim. This would obviously be extremely

³ EA/2010/0034

prejudicial to NI Water's legal position as it would affect its ability to defend itself fairly, as the opposing party would be on notice as to the evidence and NI Water would not enjoy the same privilege in relation to evidence being used by the opposing party in support of the claim. This would place NI Water at an unfair disadvantage in proceedings.

16. The Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice as premature disclosure would prejudice litigation proceedings. This prejudice would be particularly strong in this case as NI Water informs the Commissioner that the information constitutes expert evidence which would go to the heart of any litigation proceedings. The Commissioner is therefore satisfied that the exception under regulation 12(5)(b) of the EIR is engaged and has gone on to consider whether the public interest in maintaining the exception outweighs that in disclosure of the requested information.

Public interest arguments in favour of disclosing the requested information

17. The EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help increase public understanding and participation in decisions taken by public authorities. This is a strong argument in favour of disclosure, which NI Water recognises in respect of demonstrating to the public that it follows sound industry practice in undertaking sewer replacement work and takes due care in respect of built structures which may be affected by that work.
18. In addition to the general considerations, the Commissioner also appreciates that there is a strong public interest in being as transparent as possible in relation to anything which has a significant impact upon the environment. NI Water is cognisant of the fact that the sewer replacement works were undertaken in a residential area and that members of the public may wish to be informed of issues which may affect their property. However, while the works were taking place, there was a person on site who was able to answer and act upon queries from the local public. The Commissioner considers that this would have gone a considerable way towards keeping the public informed of such issues and that disclosure of the withheld information would not necessarily add anything to the information which they have already received.

19. NI Water also recognises that fact that there is a public interest in public authorities demonstrating that its practices achieve best value for public money and that public funds are being allocated and spent in an appropriate manner.

Public interest arguments in favour of maintaining the exception

20. NI Water is mindful of the presumption in favour of disclosure within the EIR and of the importance of public authorities being transparent and accountable. However, it does not consider that these public interest factors outweigh the strong public interest in legal professional privilege itself and in the course of justice being able to run smoothly.
21. NI Water considers that the requested information would be required for current ongoing litigation as its legal advisers have stated that the information would be considered as expert evidence in court proceedings. Its premature disclosure would materially affect proceedings, which the Commissioner accepts would not be in the public interest.
22. NI Water also argues that the premature disclosure of the information may have brought the sewer replacement project to a halt, which would not be in the public interest as financial penalties could be sustained, which would impact negatively upon the public purse.

Balance of the public interest arguments

23. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to decisions that affect the environment and concern public money. However, having regard to the circumstances of this case, it is the Commissioner's view that the public interest in disclosure does not equal or outweigh the strong public interest in maintaining the smooth running of the wheels of justice.
24. In coming to this conclusion, the Commissioner has considered the timing of the request, the nature of the information and whether it is otherwise accessible to the public.
25. NI Water informs the Commissioner that litigious proceedings are ongoing and that disclosure would adversely affect those proceedings. If a request is made when litigation is ongoing, the public interest in preserving the course of justice, by avoiding prejudice to an ongoing case, will usually be paramount. The Commissioner is satisfied that litigation was ongoing at the time of the request (and is still ongoing) and that therefore the public interest in avoiding prejudice is paramount.

26. It is in the public interest that public authorities involved in litigation are able to protect their legal position by withholding information which is being used in litigation proceedings. The Commissioner is satisfied in this case that the information is of a technical nature and would constitute expert evidence in such proceedings. Disclosure of such information to the public would diminish the reliance which NI Water could place on that evidence. This would weaken its legal position, which would not be in the public interest as NI Water is using public funds. The public purse would be protected by not disclosing the information and thereby protecting NI Water's ability to defend itself in such proceedings.

27. The Commissioner appreciates that the nature of the information is such that it would satisfy the private interests of the complainant and possibly those in the affected residential area, however it would not necessarily be of specific interest to the wider public, save for the general considerations of transparency and accountability in public authorities. The public interest in disclosure is not sufficiently strong to outweigh the public interest in maintaining the exception and thereby protecting NI Water's legal position in ongoing proceedings. The Commissioner is therefore satisfied that the public interest in maintaining the exception outweighs any public interest in disclosure of the information withheld under regulation 12(5)(b) of the EIR.

Right of appeal

28. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
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