

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

Date: 24 November 2022

Public Authority: Southern Water Services Limited
Address: Southern House
Yeoman Road
Worthing
West Sussex
BN13 3NX

Decision (including any steps ordered)

1. The complainant has requested information about wastewater and sewage spills. The above public authority ("the public authority") relied on regulation 12(4)(e) – internal communications – and regulation 12(5)(d) of the EIR – confidentiality of proceedings – to withhold the information.
2. The Commissioner's decision is that none of the information falling within scope engages regulation 12(5)(d) and a small portion does not engage regulation 12(4)(e) either. The remainder does engage regulation 12(4)(e), but the balance of the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information identified in Confidential Annex A. Appropriate redactions may be made to protect personal data.
4. The public authority must take these steps within 35 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 27 November 2021, the complainant wrote to the public authority and requested information in the following terms:

“Copies of any (a) agendas (b) minutes (c) notes or other documents relating to Southern Water board meetings during 2020 and 2021 at which the issue of sewage spills or overflows was discussed.”
6. The public authority responded on 7 December 2021. It relied on regulation 12(4)(e) of the EIR in order to withhold the requested information.
7. Following an internal review the public authority wrote to the complainant on 20 January 2022. It upheld its original position, but now additionally relied on regulation 12(5)(d) of the EIR.

Reasons for decision

Preliminary matters

8. As the information falling within the scope of the request relates to spills of sewage into the natural environment (particularly water courses) and actions taken to reduce spillage, the Commissioner considers this information is environmental.
9. More particularly, the Commissioner considers that this information relates, not just to the elements of the environment, but to “emissions” affecting or likely to affect the elements of the environment.¹
10. Regulation 12(9) of the EIR gives special status to information relating to emissions. If the information relates to emissions, a public authority cannot rely on regulations 12(5)(d), (e), (f) or (g) to withhold it.
11. Consequently, as the Commissioner is satisfied that the information he has identified as falling within the scope of the request is related to emissions, it follows that regulation 12(5)(d) cannot be engaged.

¹ See the ICO guidance on emissions here: <https://ico.org.uk/media/for-organisations/documents/1616/information-on-emissions-eir-guidance.pdf>

12. The public authority identified 53 documents as falling wholly or partially within the scope of the request. Having examined each document, the Commissioner has identified four documents which appear to have insufficient connection to the request to fall within scope.
13. There are also a series of "Non-financial assurance" reports that, whilst containing a small number of references to wastewater spills, do so at a high level of generality and reference the other, more detailed, documents that have been withheld. The Commissioner explained this situation to the complainant, who agreed that these documents could be removed from the scope of the complaint entirely.
14. The Commissioner has set out, in the confidential annex to this decision notice, the information he considers to fall, or not fall, within the scope of the request.

Regulation 12(4)(e) – internal communications

15. Having reviewed the 53 documents, the Commissioner considers that a small number of them do not engage the exception at all.
16. For a communication to be considered "internal" it must have originated within the public authority and only have been circulated within that public authority.
17. Some of the reports have been produced by external auditors and then passed to the public authority. These cannot be regarded as "internal" for the purposes of the exception and thus do not engage the exception. These documents are identified in the confidential annex.
18. The remaining documents were presented either to the full Board or the audit committee of the public authority. It is not clear from the responses the public authority provided whether these papers have only been seen by staff of the public authority or whether they were in fact passed either to external auditors or to regulators. However, given his findings on public interest, the Commissioner did not consider it proportionate to seek further submissions on this point and has proceeded on the basis that, aside from the information referred to in paragraph 17, the remaining information within scope does engage the exception.
19. In its internal review, the public authority stated that, in its view, the balance of the public interest should favour maintaining the exception because of:

"the need to protect Southern Water's internal processes of deliberation and decision-making and with regard to the sensitivity of the information and the circumstances surrounding the request. In

particular, sewage spills or overflows in 2020-2021 are, as you are aware, live issues.”

20. The Commissioner recognises that this particular exception is designed to protect a public authority’s internal thinking space so that it can discuss controversial matters in private before arriving at a decision which can be presented to the public for scrutiny. He also recognises that the issue of sewage overflows was (and remains) a “live” issue at the time of the request.
21. However, the Commissioner is of the view that, on balance, the public interest should favour disclosing the information.
22. Firstly, the Commissioner has had regard to the importance of the issue at hand. As has been noted above, the EIR give enhanced status to information on emissions. Whilst this does not prevent a public authority from relying on this particular exception to withhold such information, the Commissioner considers that the weight to be afforded to disclosure will almost always be substantial – meaning that the public interest in favour of maintaining the exception must be even more substantial.
23. Specific to this case is the context of the information and the request. In July 2021, the public authority pleaded guilty to 51 individual offences of discharging sewage illegally. The court was told that the public authority had presented a picture of compliance to regulators that was deliberately misleading. The public authority was fined a record £90 million – the largest successful prosecution by the Environment Agency.²
24. Set against this backdrop, the Commissioner considers that there is a substantial and weighty public interest in understanding what measures the public authority was taking, during the period covered by the request to, improve its performance and put measures in place to prevent a recurrence of the offences. Given that the regulator Ofwat has insisted that the public authority’s Board sign documents:

“demonstrating it has discharged its responsibilities and takes accountability for its diligent enquiry into the principal risks facing the business, and most importantly in the context of the S19 Undertakings, the wastewater business.”³

² <https://www.gov.uk/government/news/record-90m-fine-for-southern-water-following-ea-prosecution>

³ https://www.southernwater.co.uk/media/6613/5854_finalassuranceplan_2022_23_v3.pdf

The Commissioner is of the view that the public interest in understanding what information has been presented to the Board and its audit committee is considerable.

25. The Commissioner accepts that this issue is "live" to a certain extent, but management of wastewater is ongoing – it will never be complete. However, the prosecution had been completed at the point the request was made. If the Commissioner was to accept the public authority's view, important information on sewage spills would never be disclosed – as there would always be some related process underway. In the Commissioner's view, by the point the request was made, the most important decisions would have already been taken, therefore the "safe space" needed to debate issues should be afforded minimal weight. Indeed the Commissioner notes that of the information presented, none presents alternative options: most is simply reporting, monitoring data and future plans – therefore there is nothing that would represent any process of deliberation going on within the public authority.
26. The public authority has a monopoly, within its area, on the disposal of wastewater. If customers are dissatisfied with the way wastewater is being handled, they do not have the right to ask another company to handle it instead – therefore consumers cannot use the power of free markets to hold the public authority accountable. One of the few powers consumers do have, is to make use of the EIR to seek environmental information such as this and use that information to hold the public authority to account. That is, of course what the EIR were intended to achieve.
27. The public authority has argued that the withheld information contains legally privileged information and financial information. Of the information falling within scope the Commissioner has only seen a single section that is marked as privileged – and he notes that the public authority has not applied regulation 12(5)(b) of the EIR (which covers privileged material) to any information. This short section contains largely factual information and, whilst "legal advice" is referred to, the only opinion expressed is that of the management. The Commissioner does not therefore consider that such material merits additional protection.
28. Whilst the Commissioner accepts that some financial information does fall within scope, he considers that the funding allocated to dealing with this issue is of significant public interest.
29. Finally, a cursory review of the material has already revealed at least one "withheld" document that is already in the public domain – and the Commissioner considers it likely that this is not the only one.

30. The Commissioner is therefore satisfied that the relatively weak public interest in maintaining the exception is easily outweighed by the substantial public interest in disclosure.
31. As none of the information falling within scope is excepted from disclosure, it follows that it must all be disclosed – however, the Commissioner considers it proportionate to allow the public authority to remove contact details and the names of junior employees as these do not assist the understanding of the information.

Confidential Annexes

32. In order to preserve a meaningful right of appeal for the public authority (should it wish to exercise it), the Commissioner has had to place certain matters within a confidential annex that will only be provided to the public authority.
33. The Commissioner considers it necessary to do this as it is impossible to identify the in-scope information within a larger document without making reference to the content of the information itself – information the public authority wishes to withhold.
34. The Confidential Annex B lists the various documents the public authority has provided to the Commissioner and sets out the extent to which each one falls within the scope of the request. Confidential Annex A lists the information which falls to be disclosed, by reference to Confidential Annex B.
35. There is no further reasoning for the decision within either confidential annex. The Commissioner's reasoning is set out in full in this decision notice.

Right of appeal

36. 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

37. 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.
38. 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

Roger Cawthorne
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