



Neutral citation number: [2024] UKFTT 00382 (GRC)

Case Reference: EA/2023/0443

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Decided without a hearing

**On: 24 April 2024
Decision given on: 16 May 2024**

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER STEPHEN SHAW
TRIBUNAL MEMBER EMMA YATES**

Between

ANDREW TYERMAN

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) SOUTH WEST WATER**

Respondents

Decision: The appeal is Allowed

Substituted Decision Notice:

South West Water was not entitled to rely on regulation 12(5)(b) of the Environmental Information Regulations 2004 to withhold the information requested by the Appellant on 15 March 2023. South West Water is to disclose this information to the Appellant within 35 days from the date when this decision is sent to the parties.

Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules, and may be dealt with as a contempt of court.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 18 September 2023 (IC-246925-B5D5, the “Decision Notice”). The appeal relates to the application of the Environmental Information Regulations 2004 (“EIR”). It concerns information about the start and finish time of a combined sewer overflow discharge on a specific date and any other spills that occurred at the same time in the Exmouth area, requested from South West Water (“SWW”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 15 March 2023, the Appellant wrote to SWW and requested the following information about combined sewer outflow (“CSO”) discharges in the Exmouth area (the “Request”):

“Thanks for the offer to raise an EIR on the discharge 8 March from Maer Road CSO [combined sewer overflow] permit 200126. Please can you advise the start and finish time? Could you also advise any other CSO that triggered a spill at this time in the Exmouth area?”

4. SWW responded on 26 April 2023 and withheld the information under regulation 12(5)(b) EIR (the course of justice). The Appellant requested an internal review on 25 May 2023. SWW responded on 25 July 2023 and maintained its position.

5. The Appellant complained to the Commissioner on 22 July 2023. The Commissioner decided that SWW was entitled to rely on regulation 12(5)(b) to withhold the information. The exception was engaged due to ongoing inquiries by Ofwat (the water regulator) and the Environment Agency into the performance of water companies, including SWW, and the balance of the public interest favours maintaining the exception. The Commissioner referred to a number of his previous decisions on similar issues.

The Appeal and Responses

6. The Appellant appealed on 14 October 2023. His grounds of appeal are:

- a. SWW has not shown that disclosure would affect the course of justice. He references the WaterFit Live web service, which launched in March 2023 and shows the same type of real-time unvalidated information as he requested. He also argues that some connection with the subject matter of a prosecution is not sufficient justification for non-disclosure.
- b. The Commissioner has been inconsistent with his own guidance on the presumption in favour of disclosure.
- c. There are inconsistencies between water companies, and two of the companies under investigation do share spill start/stop data. SWW has also been inconsistent as it has provided spill start/stop times on a number of occasions after being added to the investigations in June 2022.

7. The Commissioner's response maintains that the Decision Notice was correct.
 - a. SWW made clear that there are ongoing inquiries, by both the water regulator Ofwat and the Environment Agency into the performance of water companies and he remains of the view that disclosure of the data requested in this case, which is relevant to those inquiries, would adversely affect their ability to reach a swift, thorough and fair conclusion.
 - b. The public interest test carried out was not inconsistent with guidance, and real time data made public by SWW can be differentiated from past unvalidated data relating to spills which are no longer ongoing.
 - c. His decision was based upon the submissions presented to him and disclosure by other water companies does not necessitate that SWW's reliance on the exception in this case was incorrect. The example of SWW disclosure of spill data seems to be real time information rather than unvalidated past data.
8. The Appellant submitted a reply which provides further information in support of his arguments.
9. SWW was joined as a party to the proceedings by directions dated 20 December 2023. SWW's response maintains its position.
 - a. An example of the effects of BBC coverage in September 2023 shows how media coverage can affect the ongoing investigation. The information falls squarely within the scope of investigations being carried out. SWW maintains there is a clear causal relationship between the disclosure of the information and the adverse effect this may cause, and these concerns are real and considerable and are based on previous experience where media reporting of this issue has driven a particular nuanced narrative.
 - b. The Appellant's request is narrow in scope but is for raw, unvalidated CSO operational data which is not yet in the public domain. Disclosure would adversely impact the Environment Agency and Ofwat's ability to make their own unbiased assessment following their investigations, and harm SWW's ability to defend itself.
 - c. The public interest in the information being disclosed whilst the investigations are ongoing does not outweigh the need to ensure a fair investigation and to protect the course of justice that stands to be adversely affected in the event the information sought is disclosed at this stage.
 - d. SWW's position is supported by four previous decisions of the Commissioner.
 - e. The investigations are time limited, but are on-going, and once they have concluded SWW will revisit their stance and seek to revert to our previous position of releasing this type of information.
10. The Appellant has submitted a reply to SWW's response, and SWW has made final submissions. These arguments are addressed to the extent needed in the discussion below.

Applicable law

13. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

2(1) ...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

.....

5(1) ...a public authority that holds environmental information shall make it available on request.

.....

12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) An exception to disclosure applies under paragraphs (4) or (5); and

(b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) A public authority shall apply a presumption in favour of disclosure.

.....

12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely 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. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

15. The test under Regulation 12(5) is that disclosure “would” have an adverse effect. This means that it needs to be more likely than not. The Commissioner’s detailed guidance on the EIR explains this as follows – “For you to apply an EIR exception, you must show that disclosure is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect... The fact that EIR uses only “would” and not “would be likely” means that the test for engaging these exceptions is more stringent than FOIA prejudice-based exemptions. A public authority cannot engage an exception if they cannot show that the adverse effect is more likely to happen than not (ie if there is a less than 50% chance).”

Issues and evidence

16. The issues are:

- a. Is section 12(5)(b) engaged by the withheld information?
- b. If so, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

17. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A reply to SWW's response from the Appellant together with an appendix.
- c. Final submissions from SWW.

18. On 27 April 2024 the Appellant sent us another recent decision of the First-Tier Tribunal which he says is similar, and he asked this to be considered when hearing the appeal. This deals with a similar request relating to a different water company, and the appeal was upheld. This email was received after we had met to consider our decision, and the decision is also not binding on us. Therefore, we have not taken this other decision into account. Similarly, we have not taken account of other decisions of the Commissioner on similar issues which were cited to us by SWW. We have decided this appeal on its own facts and arguments, and in all the circumstances of this case.

Discussion and Conclusions

19. ***Is section 12(5)(b) engaged by the withheld information?*** The Appellant disputes this for a number of reasons. We start with the issue of whether this or similar information is in the public domain.

20. The Appellant says that raw, unvalidated data on spills of the type he requested is in the public domain. He refers to the online service WaterFit live, which reports start and stop times of all combined sewer overflows that affect bathing waters in the SWW region. He says in his reply to the Commissioner's response (page A33) that this was about to be extended to all storm overflows in the region. WaterFit Live was first in operation in March 2023 (although not at the time of the spill in question). The Appellant also explains (in his reply to SWW's response) that the relevant spill was reported at the time through BeachLive – "*Maer Road CSO is part of the BeachLive (now WaterFit Live) reporting system as it is 'associated' with a designated bathing water. When the EDM was triggered on the 8 March 2023 an alert with the start time was sent to the EA, the local authority Beach Supervisor and Surfers Against Sewage (SAS) to raise an alert on the Safer Rivers and Seas app. A second email notified the stop time. The email to SAS is solely to make the information available in the public domain through the Safer Seas and Rivers website. SWW shared this data with the local authority and SAS at the time of the spill with the intention that it was shared with the public. It cannot therefore argue it was not yet in the public domain*".

21. The Appellant therefore says that disclosure would not impact the Environment Agency investigation – the start and stop times had already been alerted to the Environment Agency

through BeachLive, and disclosure under EIR would not harm SWW's ability to defend itself as the information was already in the public domain.

22. The Commissioner's response deals with this issue by drawing a distinction between raw unvalidated data as requested by the Appellant, and validated data reported to the Environment Agency (paragraph 15). However, the Appellant makes the point that the real-time data reported on BeachLive and WaterFit Live is also raw and unvalidated – the only verified data is the annual report to the Environment Agency. We accept the Appellant's point and do not agree with the distinction made by the Commissioner.

23. SWW says that the requested raw data is not yet in the public domain. SWW does not address the issue of real-time reporting in its response to the appeal or final submissions. The point being made by the Appellant was clear, but nevertheless SWW has provided no reply to this point.

24. We have considered the position at the time of the relevant spill. It appears that the system of real-time reporting through the WaterFit Live website was not yet in operation. Instead, there was the BeachLive reporting system. As described by the Appellant, this would have generated an alert with the start time of the spill, and an email giving the stop time. These alerts went to Surfers Against Sewage with the intention that the information would be shared with the public. Although this may not have been exactly the same information as has been requested by the Appellant, it appears that very similar information was being publicly reported at the time, and this was raw unvalidated data. SWW has not responded to this point or explained why disclosure of the requested information would adversely affect the course of justice in these circumstances.

25. In addition, the WaterFit Live website provides real-time data on spill start and stop times, and has been operating since the end of March 2023. This reporting system overlaps with and continues alongside the ongoing Environment Agency investigation. SWW says that disclosure of raw data on spill start and stop times would adversely affect this investigation. However, it appears that they have been reporting publicly exactly this information for a considerable period of time. This undermines SWW's argument that disclosure in response to the Request would have adversely affected the course of justice. Again, SWW has not addressed this point in their response or final submissions.

26. We have considered whether disclosure would adversely affect the course of justice under regulation 12(5)(b). We find that the threshold of "would" is not met, bearing in mind that this needs to be more probable than not. Similar information to that requested had been alerted publicly at the time of the Request, and identical information is now made available on WaterFit Live despite the fact that the same Environment Agency investigation is ongoing. We do not accept SWW's position that disclosure of the requested information would be damaging to the investigation in these circumstances. SWW argues that disclosure would adversely impact the Environment Agency and Ofwat's ability to make their own unbiased assessment following their investigations, and harm SWW's ability to defend itself. SWW has not, however, explained how this would be the case when similar or identical real-time information is regularly published.

27. We therefore find that regulation 12(5)(b) is not engaged by the withheld information. This is sufficient to conclude the appeal and it is not necessary for us to consider the parties' other arguments in any detail. We do note that SWW appears to take a blanket approach to

non-disclosure and has not provided us with any detailed evidence on how disclosure in this particular case would harm its ability to defend itself and hamper the ongoing investigation. We remind the parties that each EIR request must be considered on its own merits.

28. *If so, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?* It is not necessary for us to consider this issue as we have found that the relevant exception was not engaged.

29. We allow the appeal and issue the Substituted Decision Notice set out at the start of this decision.

Signed: Judge Hazel Oliver
2024

Date: 14 May