

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

Date: 11 March 2015

Public Authority: Department for Environment, Food and Rural Affairs (DEFRA)

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested background information to two quotes made in a letter dating back to 2001 in which ongoing sewage issues relating to the Whitburn area are discussed. DEFRA responded stating that it does not hold the requested information and therefore regulation 12(4)(a) of the EIR applies to the complainant's request.
2. The complainant remained dissatisfied and so approached the Commissioner. The Commissioner has reviewed the matter in detail and made enquiries to DEFRA. He is satisfied that on the balance of probabilities DEFRA does not hold the requested information. He is therefore satisfied that DEFRA was correct to apply regulation 12(4)(a) of the EIR in this case.
3. The Commissioner requires no further action to be taken.

Request and response

4. On 27 January 2014, the complainant wrote to DEFRA and requested information in the following terms:

"I enclose a page from a letter from the EC to my MEP, if [sic] I refer to item 6 where it states, I quote: - "The UK authorities explained that each pumping station is capable of pumping forward 6XDWF" Under the

EIR please would you provide a copy of this correspondence showing when and where the UK authorities supplied this information to the EC?

"I also would like to refer to item 12 where it states: - "Accordingly to the UK authorities, the operational storage capacity of the storm sewage interceptor tunnel is set at 155m³ (of a total capacity of 14000m³)" - under the EIR please could you provide a copy of the correspondence showing when and where the UK authorities informed the EC of this?"

5. DEFRA responded on 24 February 2014. It stated that it does not hold the requested information and so was relying on regulation 12(4)(a) of the EIR.
6. The complainant requested an internal review on 25 February and 3 March 2014.
7. DEFRA carried out an internal review and notified the complainant of its findings on 5 August 2014. It stated that it remained of the opinion that it does not hold the requested information and that regulation 12(4)(a) of the EIR applied.

Scope of the case

8. The complainant contacted the Commissioner on 17 September 2014 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether DEFRA applied regulation 12(4)(a) of the EIR appropriately and whether on the balance of probabilities the requested information is held by DEFRA or not.

Reasons for decision

Regulation 12(4)(a) – does DEFRA hold the requested information?

10. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
11. The Commissioner discussed the case with DEFRA at length. It maintains that it does not hold the requested information.
12. DEFRA referred the Commissioner to the First-tier Tribunal decision of EA/2013/0252 and confirmed that it considers the complainant's request of 27 January 2014 is essentially trying to obtain very similar

information to that already considered by the tribunal. DEFRA explained it considers the Environment Agency is the most likely public authority to hold this information and it has tried to inform the complainant of this several times. It also referred to the tribunal hearing again and stated that this view was supported by them.

13. DEFRA stated that it has also informed the complainant several times that DEFRA was created in 2001 and any work done on Whitburn and the sewage issues there would have been carried out by its predecessor DETR. DEFRA confirmed that some material was transferred over from DETR to DEFRA in 2001 and this material was held in six files relating to Whitburn. However, DEFRA explained that these files were destroyed in accordance with DETR's record retention policy in 2010/2011 after a period of 10 years had expired.
14. DEFRA confirmed that all electronic and paper files it does hold have been thoroughly searched for any information falling within the scope of this request. It stated that it has checked shared drives, email accounts and contacted all officers within DEFRA who may hold such information. DEFRA explained that it has also made enquiries to DETR itself to see if it still holds records that were not transferred over. DEFRA stated that it felt that there is nothing further that can be done or checked and every possible avenue has been explored more than once. It still maintains that it does not hold the requested information.
15. The Commissioner wrote to the complainant on 17 November 2014 to inform him of his preliminary view. The Commissioner explained that he has made enquiries to DEFRA and had reached the view that on the balance of probabilities the requested information is not held. The Commissioner asked the complainant to consider withdrawing his complaint as a result.
16. The complainant responded and confirmed that he was unwilling to withdraw his complaint and did not agree DEFRA does not hold the requested information. He believes the requested information must be held by DEFRA and DEFRA is deliberately obstructing him from obtaining it. The complainant supplied numerous further emails containing further information and documentation for the Commissioner to consider.
17. The Commissioner has reviewed the additional information provided by the complainant. Much of this information relates to the complainant's ongoing dispute with DEFRA relating to the sewage issues at Whitburn which has been ongoing for a number of years. There has been extensive correspondence between DEFRA and the complainant on this matter, various complaints and other information requests. The Commissioner considers the following issues to be of further relevance to this case.

18. Firstly, the complainant referred to a defence document dated September 2010 and this being the most important evidence put before the Advocate General. He stated that this document quoted at paragraph 62 that "...a full account of the design and operation of the collecting system serving the Whitburn area was given in the UK's reply of 23 January 2001".
19. The complainant confirmed that he found it hard to believe that this statement and the letter from 2001 was referred to and used as evidence as late as 2010 yet DEFRA do not have the correspondence/information behind the 2001 letter from which the statements quoted in the wording of his request were made. The complainant believes the correspondence is "missing" because it spells out the design of the system and that it was designed to spill at 4.5XDWF.
20. The complainant stated that this letter was presented in 2010 and considering it was written in 2001 it was well within the 10 year record retention policy. It was evidence presented to a court of law by DEFRA not the DETR so he believes DEFRA must hold it. The complainant confirmed that he cannot accept that evidence placed before a court less than three years ago could have been destroyed. The complainant drew attention to the fact that this matter is still ongoing. He therefore considers the case is still live and all records including those requested should have been retained.
21. Secondly, the complainant referred to another document as evidence to demonstrate the requested information must be held. He referred to the UK defence document dated 4 June 2003 and more specifically paragraph 26, page 538, which he states refers to 6XDWF. The complainant advised that if DEFRA was formed in 2001 it was clearly in operation at the time this document was written in 2003. He stated that this document is clearly written by DEFRA and so it must have held the requested information at this time.
22. The complainant said that "one has to ask why does this document refers to the same dry weather flow as that being stated in 2001 "when exceeded by between 5.9 and 6.8 times" not 4.5XDWF."
23. The Commissioner put this further information to DEFRA and requested it to provide a further response to the complainant's concerns.
24. DEFRA stated that it had assumed that the document dated September 2010 referred to by the complainant is the UK defence document responding to the European Commission's application to the Court of Justice of the European Union. DEFRA confirmed that the letter dated 23 January 2001 was presented to the Court by the Commission (forming Annex A-3 to their application). It explained that the UK

defence document cross referred to it, in a paragraph describing the correspondence between the parties in the run up to the court case where the design and operation of the Whitburn sewerage system had been set out.

25. However, DEFRA confirmed that it has explained to the complainant that it does not hold any further background papers relating to the drafting of the 2001 letter. DEFRA stated that it disagreed with the complainant's statement that this supports the complainant's view that evidence placed before the court has been destroyed. It reiterated again as it has done many times already to the complainant; DEFRA simply does not have any supporting documentation.
26. In relation to the complainant's reference to the 'UK defence document dated 4 June 2003', DEFRA stated that it wished to clarify that this is a letter to the European Commission from the United Kingdom Permanent Representation to the European Union and (as with the letter of 23 January 2001) was presented to the court by the European Commission, as Annex A-10 to their application to the court. It explained that the UK defence document cross referred to this letter, at paragraph 62, as part of the correspondence between the parties describing the design and operation of the Whitburn sewerage system. DEFRA stated that it is likely that this letter was drafted by DEFRA, with assistance by the Environment Agency. It stated that the complainant's submissions that DEFRA 'must have held the requested information at this time' are not clear. DEFRA confirmed that it holds a copy of the letter dated 4 June 2003. However, DEFRA does not hold any drafts of the letter or any further background papers relating to the drafting of the letter (which did not form evidence put before the court).
27. DEFRA explained that it has no further information to disclose to answer the complainant's question concerning DWF figures referred to in the 2001 and 2003 letters but can only confirm that all of this correspondence (along with more recent assessments of measurements of Dry Weather Flow, summarised at paragraph 63 of the UK defence) was put before the Commission for them to assess in their representations to the court and for the court to consider in reaching its judgment on UK compliance with the Directive.
28. The Commissioner has given this matter detailed consideration. He is satisfied that DEFRA has carried detailed and thorough searches of all records to see whether it holds the requested information. It has repeatedly stated that it does not hold the requested information and has made many attempts to explain why to the complainant. For these reasons, the Commissioner has concluded that on the balance of probabilities DEFRA does not hold the requested information and

therefore DEFRA was correct to apply regulation 12(4)(a) of the EIR in this case.

29. Technically, regulation 12(4)(a) of the EIR is subject to the public interest test. However, the Commissioner considers this is a pointless exercise where it is clear that a public authority did not hold the requested information at the time of the request. The Commissioner cannot consider the public interest factors for and against disclosure when there is no recorded information held for potential disclosure.

Right of appeal

30. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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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Wycliffe House
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