

**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 DEFRA to disclose its correspondence to the European Commission in respect of the judgement made by the Court of Justice of the European Union in case C301/10 regarding the Whitburn sewage system.
2. DEFRA responded to this request refusing to disclose the requested information under regulations 12(5)(a) and 12(5)(b) of the EIR.
3. The Commissioner's decision in this case is that DEFRA correctly applied regulation 12(5)(a) of the EIR and that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
4. The Commissioner requires no further action to be taken.

Request and response

5. On 10 April 2014, the complainant wrote to DEFRA and requested information in the following terms:
6. "I understand DEFRA have provided an update regarding the ECJ Court on the Whitburn case to the EC, under the EIR please could you provide a copy of the update provided to the EC?"

7. DEFRA responded on 13 May 2014. It stated that it considered the requested information was exempt from disclosure under regulations 12(5)(a) and 12(5)(b) of the EIR.
8. The complainant requested an internal review on 26 May 2014.
9. DEFRA carried out an internal review and notified the complainant of its findings on 5 August 2014. It confirmed that it remained of the opinion that the requested information was exempt from disclosure under regulations 12(5)(a) and 12(5)(b) of the EIR.

Scope of the case

10. The complainant contacted the Commissioner on 17 September 2014 to complain about the way his request for information had been handled. Specifically, the complainant was unhappy with DEFRA's application of regulations 12(5)(a) and 12(5)(b) of the EIR and stated that he believes the public interest warrants the disclosure of this information.
11. The Commissioner will first consider the application of regulation 12(5)(a) of the EIR. He will only go on to consider regulation 12(5)(b) if he finds that regulation 12(5)(a) of the EIR does not apply.

Background

12. The Commissioner understands that the complainant lives and carries on a business in Whitburn, Northumbria. The complainant has had concerns over the operation of the Whitburn Steel storm sewage pumping station near his property for some years and has lodged numerous complaints about this and made several requests to various authorities trying to access information under the EIR in relation to this issue.
13. The Commissioner understands that there was a public enquiry in 2001. In 2003 the European Commission issued written warnings to the UK Government as to possible violations of the EU Urban Waste Water Treatment Directive (91/271/EEC), which included Whitburn. Infraction proceedings ensued.
14. It is understood that proceedings were protracted. The UK contested the Commission's case and lodged a defence in 2010. The Commission then applied to the Court of Justice of the European Union in June 2010 for a judgment against the UK. The Judgment of the Court was issued on 18 October 2012 finding the UK in breach of the Directive and therefore in the Commission's favour.

15. The UK Permanent Representation to the European Union wrote to the European Commission on 31 March 2014 outlining the UK's proposals to comply with the 2012 judgment in Whitburn. It is this letter which is the subject of this request and therefore the Commissioner's investigation.
16. The Commissioner has already considered similar requests to the one being considered here. Case reference FER0219897 against DEFRA considered very similar information to the information being considered here in relation to the same infraction proceedings; just at a different stage in these proceedings. The Commissioner concluded in this case that regulation 12(5)(a) of the EIR applied and the public interest rested in maintaining this exception. A decision notice was served on 20 October 2009.
17. Case reference FER0439690 again dealt with a very similar request for information to the one being considered here. This case dealt with a request for all information DEFRA used to defend "the Whitburn case". The Commissioner issued a decision notice on 30 July 2012 upholding DEFRA's application of regulation 12(5)(a) of the EIR and concluded that the public interest rested in maintaining this exception.
18. The Commissioner has also considered a number of cases relating to the Environment Agency. Again these cases dealt with requests for very similar information to that being considered here and often in relation to the Whitburn sewage system specifically.

Reasons for decision

19. Regulation 12(5)(a) of EIR states that information is exempt from disclosure if its disclosure would adversely affect international relations, defence, national security or public safety.
20. Regulation 12(5)(a) of the EIR is also subject to the public interest test and under the EIR a presumption in favour of disclosure should always be the starting point.
21. In this case DEFRA has argued that disclosure of the requested information would adversely affect international relations. It explained that the exception applies to material relating to the UK's compliance with the judgement of the Court of Justice of the European Union in Case C-301/10 in 2012, where the UK was found to be in breach of the Urban Waste Water Treatment Directive in Whitburn (and London). DEFRA confirmed that at the time of the request it was still in dialogue with the Commission on proposals to remedy this breach. DEFRA confirmed that the requested information discusses the UK's measures to comply with the judgement of the court and disclosure of this

information at this stage would adversely affect the UK's relations with the European Commission and this ongoing case.

22. DEFRA explained that the UK's remedial measures are the UK's suggestions for putting right the breach identified. They are subject to further discussion with the Commission and possibly revisions. The matter is therefore very much still ongoing and live. It considers the disclosure of this information at this stage to the world at large would adversely affect the ongoing discussions and the UK's relations with the Commission itself.
23. DEFRA also explained that the Commission has powers to act against a member state that does not comply with a judgment of the Court of Justice and can apply to the court to impose financial penalties on the member state concerned. DEFRA confirmed that the requested information may become part of DEFRA's defence should the Commission feel that the UK proposals are not sufficient to remedy the breach and so pursue a fines judgment against the UK in the Court of Justice; known as section 260 proceedings.
24. The Commissioner has given the matter careful consideration. He is satisfied that disclosure of the requested information would adversely affect international relations and therefore that regulation 12(5)(a) of the EIR is engaged. He will now explain why.
25. Although the judgement of the Court of Justice of the European Union has now been issued and the UK has been found to be in breach of the Urban Waste Water Treatment Directive in Whitburn, it is evident that matters are still ongoing and were very much live at the time of the request. As DEFRA has explained, at the time of the request the UK had written to the Commission to outline its suggestions to remedy the breach. The remedy to the breach identified was therefore still open to discussion, further considerations by both parties and potentially revisions. It was still very much 'work in progress' and therefore live.
26. Premature disclosure of the UK's suggestions would adversely affect international relations between the UK and the European Commission. At such a stage in proceedings there is a clear need for both parties to have the safe and private space to consider options and frankly discuss and debate the options between themselves. The Commissioner considers the UK's ability to carry out this further function and bring this matter to an end would be adversely affected by the disclosure of this information at the time of the request.
27. As the Commissioner is satisfied that regulation 12(5)(a) of the EIR applies, he will now go on to consider the public interest.

28. DEFRA stated that it recognises there is a strong public interest in transparency and accountability and in the environmental impacts of untreated waste water in Whitburn.
29. However, DEFRA confirmed that it considers there are stronger public interest arguments in this case in maintaining the exception. It confirmed that discussions with the Commission on proposals to remedy the breach of the Urban Waste Water Treatment Directive have not yet concluded and disclosure would adversely affect the UK's ability to hold open and frank discussions with the Commission in respect of these proposals. DEFRA referred to another decision notice the Commissioner had issued concerning Whitburn (reference FER0439690 dated 30 July 2012) and quoted:

"...the Commissioner considers that there is a very strong public interest in the UK having a good working relationship with the European Commission..."

DEFRA stated that although this decision referred to information provided by the UK to the Court of Justice, it considered the general principle outlined in this decision applied here as well. DEFRA considers there is a strong public interest in ensuring that the UK is able to defend itself properly in the Court of Justice in the event of any future action.

30. The Commissioner has considered the arguments for and against disclosure. The Commissioner accepts there is a public interest in transparency and accountability, particularly where environmental information is concerned. He understands that the complainant has strong and valid cause for concern over the Whitburn sewage system and notes that he has been pursuing this matter for a number of years. The Commissioner accepts disclosure of the UK's proposals to remedy the breach would inform the public of the UK's intended course of action and promote public debate on this issue.
31. However, in this case, due to the fact that the matter is still ongoing and subject to further discussion and debate between the UK and the European Commission, the Commissioner considers the public interest is best served by maintaining this exception. DEFRA has explained that the requested information contains the UK's submissions to the Commission and its proposals to remedy the breach identified. These submissions and proposals are still very much up for discussion, further debate and potentially revisions. The Commissioner considers there is a strong public interest in ensuring the UK's working relationship with the European Commission is a good one and both parties should have the private space to deliberate on the options available in a free and frank manner.

32. The Commissioner considers disclosure would adversely affect international relations between the UK and the Commission and would hinder the ongoing discussions that are now required for this breach to be rectified. Such consequences are not in the public interest.
33. In the First-tier Tribunal hearing of Robert Latimer v Information Commissioner (EA/2013/0101) the tribunal stated:

“Although he believed that he would be the person who would solve the problem for the people of Whitburn; the clear reality is that changes to the sewerage system will come about through discussions between the European Commission and the UK Government in the light of the decision of the European Court. Any information the Commission needs from the UK Government will be supplied by the UK Government. Mr Latimer's multiple detailed requests will not facilitate this, they do not in any significant way improve public understanding and they are a severe distraction to the Environment Agency from its proper work. The Commissioner in his decision notice came to the only possible conclusion in this case. Accordingly this appeal is dismissed.”
34. Although this hearing concerned the Environment Agency and a different information request, the Commissioner considers the same applies here. The Commissioner agrees that the reality of the situation is that changes will come about to the sewage system at Whitburn via discussions and deliberations between the UK and the European Commission. This process will not be facilitated by the disclosure of this information or from further information requests on the matter. Numerous requests are simply diverting the public authorities concerned away from furthering this matter and carrying out their overall statutory function and again this is not in the public interest.

Procedural breaches

35. The Commissioner considers DEFRA breached regulation 11 of the EIR in this case. This is because DEFRA failed to respond to the complainant's request for internal review within the maximum timeframe of 40 working days prescribed by the EIR. DEFRA stated that it received the request for internal review on 27 May 2014 but failed to respond until 5 August 2014.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

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