

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 July 2020

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

Decision (including any steps ordered)

1. The complainant has requested information from Southern Water ("SW") relating to Ofwat's notice of its proposal to impose a penalty on the public authority. SW refused to provide the requested information citing Regulations 12(5)(a), 12(5)(b), 12(5)(e), 12(4)(e), 12(5)(d), 12(4)(c) and 13(1).
2. The Commissioner's decision is that Regulation 12(5)(a) is not engaged with regard to the list of wastewater sites and that the information has been inappropriately withheld. However, she has found that SW has correctly cited Regulations 12(5)(b) and 12(4)(c) and that it is not in the public interest to release this information. The Commissioner has determined that SW does not hold any further information within the scope of this request and did not breach Regulation 5(1). However, she has determined that SW breached Regulations 5(2) and 9(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the list of SW's 365 wastewater treatment works.

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.

Background

5. SW has provided the Commissioner with a detailed background which provides some context. She is unable to refer to part of the information provided for reasons of confidentiality:

"As a water and sewerage undertaker for the purposes of the Water Industry Act 1991, Southern Water is regulated by both Ofwat and the Environment Agency. Ofwat is an economic regulator, and its primary duties are to protect consumers by ensuring financial health and resilience of undertakers and generally promote economy and efficiency. The Environment Agency, as its name suggests, is tasked with protecting the environment and in particular regulating waste water quality."

6. Ofwat opened its investigation into the management and performance of all SW's wastewater treatment works in early 2017. In 2017, Ofwat issued a Notice putting SW on notice that it was suspected of having contravened various licence conditions and statutory duties. That Notice, issued under section 203 of the Water Industry Act 1991, required SW to provide information and documentation to Ofwat pursuant to its statutory duty to assist Ofwat with its investigation.
7. The Commissioner is aware of the following from Ofwat's final decision to impose a penalty on SW on 10 October 2019 where it stated the following -

"Southern Water is also subject to criminal investigations by the Environment Agency in relation to non-compliance with environmental permits and in relation to Southern Water's own findings that there were deliberate measures taken within the company to prevent samples of wastewater from being taken at treatment works."

For the avoidance of doubt, Ofwat's findings...are purely about regulatory obligations in respect of which Ofwat has jurisdiction. We have not made findings about site specific environmental permit failures, actual environmental impact from any

permit failures, or whether the acts of Southern Water were criminal in nature. These matters are currently being dealt with by the Environment Agency, as the environmental regulator.”¹

Request and response

8. On 2 July 2019 the complainant made the following request for information to Southern Water (“SW”) under the EIR:

“I attach a copy of Ofwat’s notice of its proposal to impose a penalty on yourselves from June 2019.

Pursuant to the Environmental Information Regulations 2004, I would be grateful if you could now provide the following information:

- 1) a list of the 365 wastewater treatment works referred to in paragraph 2.2 of that report.*
- 2) information on any and all of the sewage treatment works on that list, to which the failings identified in the Ofwat report refer.*
- 3) information on any breaches ongoing at any of the above sewage treatment works, where works continue to breach relevant standards, licences or permits.*
- 4) the Sampling Compliance Report provided to Ofwat on 26th March 2018 together with any subsequent updates of that report.*
- 5) the Action Plan referred to in the fourth bullet point of paragraph 3.28. together with any subsequent updates of that Plan.*

Finally, I refer to paragraph 5.39 at page 66 in which Ofwat states that it considers that some of the breaches are continuing and will only be fully resolved through the implementation of the undertakings provided by Southern Water. Reference is also made to prioritisation upon highest risk in paragraph 3.31.

¹ <https://www.ofwat.gov.uk/wp-content/uploads/2019/10/Ofwat’s-final-FERdecision-to-impose-a-financial-penalty-on-Southern-Water-S....pdf>

In that context, please could you identify which of the sewage treatment works operated by Southern Water Services have been identified as potential compliance issues, but do not meet full compliance, or are not expected by Southern Water Services to meet full compliance by the end of 2019, with an indication of when Southern Water expects to end those breaches."

9. SW responded on 21 August 2019 stating that it held the requested information and providing some information in an attachment. Further clarity was requested for requests two, three and six. SW withheld information as follows –

- 1) Regulation 12(5)(a) – international relations, defence, national security or public safety;
- 2) Formulated in too general a manner (did not specify exception) and asked for clarification or Regulation 12(4)(b) - providing it would be manifestly unreasonable;
- 3) Formulated in too general a manner (did not specify exception);
- 4) Regulations 12(5)(b) – course of justice, 12(5)(e) – confidentiality of commercial or industrial information, 12(3)/13 – personal information, 12(4)(e) – internal communications;
- 5) Regulations 12(5)(b) – course of justice, 12(5)(e) – confidentiality of commercial or industrial information,
- 6) Formulated in too general a manner (did not specify exception), Regulations 12(5)(b) – course of justice and 12(5)(e) - confidentiality of commercial or industrial information.

10. On 23 August 2019 the complainant made another request as follows –

"Pursuant to your duty to advise and assist, I wonder if you would be able to send me a copy of the two documents referred to in your refusal under 1), namely;

*i. Control of Sensitive Water Company Information – Advice
ii. Guidance to Water Companies on the release of security sensitive information (Defra May 2012)."*

11. It would appear that this second request was not the subject of a refusal notice but was alluded to in the internal review regarding request one where it was suggested to the complainant that he ask the Department for the Environment, Food & Rural Affairs for this information.
12. The complainant made a request for a review on 2 September 2019 and included clarification of request points 2) and 6). He did not wish to clarify request three further, though he did make observations about the wording.

13. SW provided an internal review on 25 October 2019 in which it maintained its original position but, after clarification, applied additional exceptions. At review SW cited the following for each part of the request –
- 1) Regulation 12(5)(a);
 - 2) After clarification, Regulation 12(5)(b);
 - 3) SW made it clear that it needed clarification and cited Regulation 12(5)(b);
 - 4) Regulations 12(4)(e), 12(5)(b),(d) and (e), 13(1);
 - 5) Regulations 12(5)(b) and 12(5)(e);
 - 6) After clarification, Regulations 12(5)(b) and (e).
14. Within the review SW referred to the later request set out in paragraph 10 of this decision notice. SW explained that the requested information required security clearance and that the complainant would need to request it from Defra. In SW's response to the Commissioner's investigation letter the exceptions at Regulation 12(5)(d) and 12(5)(a) were cited regarding this information but they had not been cited when the request was mentioned at review.
15. On 13 July 2020, SW confirmed that it was continuing to rely on the exception at Regulation 12(5)(a) regarding the list of wastewater sites. During this telephone conversation SW explained that it was only able to view the information requested in the complainant's second request via Defra's portal which could only be accessed by a small number of individuals at the public authority. Additionally, these documents were no longer the same as had been requested and it was SW's understanding that they had been superseded by one document.
16. The Commissioner had continuing correspondence and telephone conversations with SW regarding this matter and also over the fact that the Environment Agency had released a list of 320 permitted wastewater sites.
17. On 14 July 2020, having discussed a previous release of the names of waterwater sites by SW itself in 2016 as detailed in [FER0631104](#), which the public authority states was released erroneously, it confirmed that it wished to maintain its position as it did not consider the release to be publication to the world at large.

Scope of the case

18. The complainant contacted the Commissioner on 20 November 2019 to complain about the way his request for information had been handled.
19. The Commissioner considers that the scope of the case concerns whether SW cited Regulations 12(5)(a), 12(5)(b), 12(5)(e), 12(4)(b), 12(4)(e) and 13(1). She will also consider whether any procedural breaches occurred.

Reasons for decision

Regulation 12(5)(a) – international relations, defence, national security or public safety

20. Regulation 12(5) states:

*'For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
(a) international relations, defence, national security or public safety'.*

21. The information withheld under this regulation comes under request one. In other words, a list of the wastewater treatment works. Although SW also cited this exception in relation to the two documents referred to in the complainant's request made on 23 August 2019, the Commissioner has considered this matter in paragraphs 64-71 and does not propose to consider them here.
22. SW refused to disclose the information regarding request one because it believed that disclosure would adversely affect national security and/or public safety. The Commissioner has been provided with the information that has been withheld.

The complainant's view

23. Firstly, the complainant asked the Commissioner to note that the request did not ask for geographical/location information (addresses or National Grid References ("NGRs")) for the sites. He stated that SW had itself disclosed lists of sewage works in the recent past as shown in the decision of the Information Commissioner FER0631104², where SW

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013505/fer0631104.pdf>

provided a list of names of the wastewater treatment works requested, together with their postal towns, but withheld more specific location information such as NGRs, on the basis of the exception under Regulation 12(5)(a) that it is seeking to apply to this request. He states that, in its review, SW has not attempted to counter the argument put forward by him on the basis of FER0631104, that a list of works, but without NGRs, should be disclosed.

24. He contends that SW incorrectly stated in its review response, that he takes issue with FER0631104. He says that, on the contrary, in that case SW provided *"a list of names of WTW's and their postal towns but withheld the more specific location information on the basis of regulation 12(5)(a)"*. He accepts that this is a reasonable position for the public authority to have taken in that case and should be repeated for this request.
25. The Commissioner was also asked to note that he was aware that a request for information made to the Environment Agency, had provided a list of 320 sewage works in its Southern Region inspected by Environment Agency officers. The information provided *"details all Southern Water Services Wastewater Treatment works located in our Solent & South Downs (SSD), Wessex (WSX) and Kent, South London & East Sussex (KSLES) areas"*. This has also been seen by the Commissioner.
26. The complainant argues that it is noteworthy that the Environment Agency sees no national security or other such implications in publishing this list, which contains works' names, but no NGRs or address details or specific location information.
27. Therefore, given the amount of information already in the public domain, put there by SW itself and by other public authorities, together with that freely available online it is not plausible that the publication of the list of works covered by the Ofwat Notice would carry with it the extra security risks that SWS suggests.
28. He considers it to be far more likely that SW merely does not wish a list of sewage works at which, using Ofwat's own words,
"deliberate measures...were taken by employees, including at senior management levels, to prevent samples of wastewater from being taken at treatment works to check compliance with environmental permit conditions".
29. He added that there is no exception for the avoidance of embarrassment provided for under the EIRs.

Southern Water's view

30. SW argued that wastewater treatment works are a critical part of the national water infrastructure and that the public relies on these facilities to provide essential utility services safely, reliably and securely. It points to the need being self-evident during the Covid-19 pandemic. SW contends that the consequences of sabotage or interference could be catastrophic and almost certainly result in harm to the environment, particularly waterways. SW underpins its argument by referring to the 2017 National Risk Register of Civil Emergencies issued by the Cabinet Office which highlights the importance of infrastructure generally, and specifically addresses the risk of attacks on such infrastructure and the consequential disruption to essential services.³ Successive governments have put in place measures to ensure the continuity of these services, including mitigating the risk of deliberate disruption.
31. SW goes on to refer to Section 208 of the Water Industry Act 1991 and quotes from it as follows –

"Directions in the interests of national security', reflects the critical status of the water infrastructure and the need to protect it. Subsection (5) underlines the public interest in keeping matters of this nature out of the public domain: "A person shall not disclose, or be required by virtue of any enactment or otherwise to disclose, anything done by virtue of this section if the Secretary of State has notified him that the Secretary of State is of the opinion that disclosure of that thing is against the interests of national security."

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644968/UK_National_Risk_Register_2017.pdf

32. SW directs the Commissioner to her own guidance⁴ on this regulation where she has stated that "*relatively mundane information about primarily civil infrastructure could also be of use to terrorists*" (paragraph 36). SW points to two Tribunal decisions where this idea was also accepted, one example being *Transport for London v the Information Commissioner EA/2012/0127, 28 February 2013* where the information (train speed limits) was "anodyne" but the increased risk of attack was recognised. SW provided some examples of recent incidents that cannot be detailed here.
33. SW also provided the example of *Ofcom v (1) the Information Commissioner and (2) T-Mobile (UK) Ltd, EA/2006/0078, 4 September 2007* which concerned the location of base stations where it was held that low level crime engaged the exception. SW explained that wastewater treatment works are also frequently targeted by low level and organised criminals.
34. SW concludes that national security and public safety would be adversely affected by the release of the list and/or addresses requested (the names of sites are almost always their geographical location). To provide an aggregated list about the location of wastewater treatment works would assist terrorists, saboteurs, vandals, burglars and other criminals to target sites which are particularly vulnerable or where disruption would be most impactful. If combined with publicly available information, such a list could be particularly useful to wrong-doers. SW acknowledges that there has been a list of similar information released which should not have occurred.
35. The public authority maintained its position that the release of an aggregated or compendium list of wastewater sites is not appropriate. SW considers the release of information by SW in 2016 to have been in error and it was unaware of the release of the names of 320 wastewater sites by the Environment Agency. It believes that the former has not been released more widely and does not consider it to have been to the world at large. SW is unaware of how many names were released. The release by the Environment Agency was without the knowledge of SW.

⁴ https://ico.org.uk/media/for-organisations/documents/1633/eir_international_relations_defence_national_security_public_safety.pdf

Furthermore, SW contends that the Commissioner supported the non-release of detailed locational information in relation to wastewater sites in FER0631104 where the public interest was found to be in favour of maintaining the exception at Regulation 12(5)(a).

The Commissioner's view

36. However, the Commissioner notes that the decision in FER0631104 did not look at the release of the names of the wastewater sites because they had already been released. The Commissioner also recognises the complainant's argument that he has not asked for anything more than the list of wastewater sites, not the specific location. Set against this is SW's argument that the names of these sites is almost always their geographical location. An entire list of wastewater sites does not appear to have been released, though it is unclear what was released in 2016.
37. SW's view that its own 2016 release was in error and does not appear to have been placed in the wider public domain, does not alter the fact that it was released under applicant-blind legislation which makes it accessible to any individual requesting it. Then there is the release of the majority of these wastewater sites by the Environment Agency which makes SW's position less persuasive. The Commissioner agrees that whilst such a list might appear to be innocuous, especially in view of the disclosures that have already taken place, disclosure could adversely affect national security and public safety and be utilised as a useful reference for those intent on committing crime. However, she has concluded that, given what is already in the public domain, it is no longer tenable that disclosing this list would be the security risk argued by SW. The exception is therefore not engaged.
38. The Commissioner has therefore not gone on to consider the public interest in this matter.

Regulation 12(4)(c) of the EIR – Formulated in too general a manner

39. Regulation 12(4)(c) of the EIR states that:

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-
(c) the request for information is formulated in too general a manner and the public authority has complied with regulation.

40. In order for regulation 12(4)(c) to be engaged, a public authority must also comply with regulation 9 (advice and assistance) of the EIR.

41. SW applied this exception to requests two, three and six -

"2) information on any and all of the sewage treatment works on that list, to which the failings identified in the Ofwat report refer.

3) information on any breaches ongoing at any of the above sewage treatment works, where works continue to breach relevant standards, licences or permits."

[not numbered by the complainant but referred to as 6) by SW]

Finally, I refer to paragraph 5.39 at page 66 in which Ofwat states that it considers that some of the breaches are continuing and will only be fully resolved through the implementation of the undertakings provided by Southern Water. Reference is also made to prioritisation upon highest risk in paragraph 3.31.

In that context, please could you identify which of the sewage treatment works operated by Southern Water Services have been identified as potential compliance issues, but do not meet full compliance, or are not expected by Southern Water Services to meet full compliance by the end of 2019, with an indication of when Southern Water expects to end those breaches."

42. SW explained that it believed requests two, three and six to be general and lacking in clarity. When it responded to the complainant on 21 August 2019 it explained that it was not clear what information was being sought or what "failings" he was referring to. SW concluded that it would be manifestly unreasonable to provide all information on sewage treatment works.

43. The complainant replied on 2 September 2019 with some clarification as follows -

"I would ask you to identify those works which have breached relevant discharge consents or environmental permits designed to prevent water pollution as a result of the issues and behaviour identified by OFWAT."

44. SW explained that the complainant is confused because Ofwat is an economic regulator and oversight for environmental regulation and oversight is provided by the Environment Agency. It stated that the matters referred to in the Ofwat Notice are outside the scope of request two. Ofwat did not make findings about site-specific environmental permit failures, actual environmental impact from any permit failures or whether these acts were criminal in nature. Ofwat did not and could not

make findings about any works breaching discharge consents or environmental permits because these matters are dealt with by the Environment Agency.

45. SW states therefore that even the more focussed request remains too general. The "issues and behaviour identified by Ofwat"

"...is a broad range, particularly taking into account that the Report referred to sampling and 'no-flow' issues and central failings of corporate culture and governance, lack of timely investment, failings relating to the management, operation and performance of wastewater treatment works, deliberately misreporting data to Ofwat about the performance of wastewater treatment works, failing to have adequate systems of planning, governance and internal controls in place to be able to manage wastewater treatment works, failing to accurately report information about the performance of these works, failing to properly carry out the general statutory duties as a sewerage undertaker and failing to make provision for effectually dealing with and treating wastewater, none of which relate to 'discharge consents' or 'water pollutions'.

46. SW's view in its submission to the Commissioner is that even this more focussed request, despite efforts to provide advice and assistance under Regulation 9, remains too general. Findings have not yet been made as to environmental breaches of the type identified in the clarification. SW explains that it is adopting the same stance taken by Ofwat in its Final Penalty Notice, which is not to discuss matters it considers would fall under Regulation 12(5)(b) – the course of justice and are the responsibility of the Environment Agency. In any case, SW contends that the information may or may not exist depending on the scope of the request, and consequently it would be manifestly unreasonable (Regulation 12(4)(b)) and also involve a colossal undertaking.
47. Request three was also identified as too general. SW states that the complainant has not defined what he means by "breaches" or which "standards, licences and permits" are relevant. The public authority's view is that it is difficult to know what "breaches" he is referring to in circumstances where non-compliance continues to be investigated in respect of the coastal discharges already being prosecuted. Standards, licences and permits in relation to wastewater treatment works are vast in scope and type and are not all related to environmental matters. They vary from site to site and there are 365 sites. SW asked for clarification in line with Regulation 9(2) because it stated that the request appeared to relate to breaches that may occur in the future and it could not provide information before it was created.

48. Request six was similarly refused by SW in the first instance because it was not clear what was meant by "*potential compliance issues*" and "*full compliance*" either time the latter phrase was used. SW did not know how to quantify its "*expect[ations]*" on either occasion that expectations were referred to. SW explained that the syntax of the request was also confusing, in that there was a "*but*" between two apparently similar descriptors, suggesting that something may have gone awry in the drafting of the question. It was therefore impossible to understand what was within the scope of the request.
49. In its response to the complainant on 21 August 2019 SW requested clarification of this request in line with Regulation 9(2). SW explains that, in his request for an internal review, he expressly refused to provide clarification except to say that the request referred directly back to "*issues identified in the Ofwat Report*". SW argues that the issues mentioned in the Ofwat report are vast in scope and do not always relate to wastewater treatment works. The findings of Ofwat were purely about regulatory obligations in respect of which Ofwat has jurisdiction. Ofwat did not make findings about site-specific environmental permit failures (ie non-compliances), actual environmental impact from any permit failures, or whether the acts of SW were criminal in nature. Therefore the request remained too general and the exception under Regulation 12(4)(c) applies. Again SW suggested that even if the request did not prove to be manifestly unreasonable, depending on the scope, it was likely to also be subject to the exceptions at Regulation 12(5)(b) and 12(5)(e).
50. The Commissioner agrees that these three requests are too broad and therefore the exception is engaged. All three are in the context of Ofwat's findings but potentially encompass matters beyond those findings and are formulated in too general a manner. Indeed, the complainant has confirmed that SW had tried to limit the scope of request two to what had fallen under the jurisdiction of Ofwat. In relation to request three, the complainant said that he was not prepared to provide any further clarification but he did stress that the request could only refer to information held and that the term "*breach...was widely used in the context of pollution control indicating a failure to comply with environmental permit or licence conditions*". The Commissioner's view, nonetheless, is that this request is also too general. As the Commissioner accepts requests two, three and six are too general and the exception is engaged, she cannot consider whether it falls under any other regulation as, unsurprisingly, information falling within scope has not been identified by SW.

Public interest test

51. Like all EIR exceptions, regulation 12(4)(c) is subject to the public interest test. As the Commissioner points out in her guidance⁵ it is difficult to see how an authority might apply the public interest test, or to see how it could be in the public interest to provide information without first clarifying what the request is actually for. Generally, if an authority is unsure about the meaning of a request, it is highly likely that the public interest in maintaining the regulation 12(4)(c) exception will outweigh the public interest in disclosing what could easily be the wrong information.
52. As the Commissioner agrees that requests two, three and six were formulated in too general a manner it would not be in the public interest to provide information that might be out of the scope of the request and not the information actually sought by the complainant.

Regulation 9 – Advice and assistance

53. Regulation 9 states that:

(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall—

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

54. SW did not respond to the request made on 2 July 2019 until beyond the statutory timeframe for a response under the EIR which, in effect, meant that clarification was requested too late. Therefore SW breached Regulation 9(2)(a).

⁵ https://ico.org.uk/media/for-organisations/documents/1619/requests_formulated_in_too_general_a_manner_eir_guidance.pdf

Regulation 12(5)(b) – the course of justice

55. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

"the course of justice, 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."

56. There is no definitive list which covers circumstances when a public authority may consider applying the exception. In *Rudd v The Information Commissioner & the Verderers of the New Forest* (EA/2008/0020, 29 September 2008), the Information Tribunal commented that *"the course of justice"* does not refer to a specific course of action but is *"a more generic concept somewhat akin to the 'smooth running of the wheels of justice'"*.

57. The public authority must be able to demonstrate that the following three conditions are met:

- the withheld information relates to one or more of the factors described in the exception,
- disclosure would have an adverse effect on one or more of the factors cited, and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

58. SW cited this regulation to withhold information under requests four and five -

4) the Sampling Compliance Report provided to Ofwat on 26th March 2018 together with any subsequent updates of that report.

5) the Action Plan referred to in the fourth bullet point of paragraph 3.28. together with any subsequent updates of that Plan.

59. SW consulted with the Environment Agency and included correspondence from the latter to the Commissioner which added its voice in support of the application of this exception to these two requests.

60. The Commissioner has seen the information and she is satisfied that it applies to the requested information. Given the nature of the information, she is only able to provide limited analysis.
61. In its refusal notice, SW stated that the disclosure of this information could adversely affect the course of justice. At the time it was explained that the Ofwat Notice made it clear that the sanction it proposed may result in criminal action taken by the Environment Agency. At review, SW emphasised that the Action Plan and the Sampling Compliance Report were specifically prepared by SW for the purpose of the Ofwat investigation under statutory powers and carried a duty of confidentiality. The Action Plan itself is frank and detailed about the underlying potential causes of the failings that Ofwat was investigating and will be a relevant factor in the respective outcomes. Consequently it would adversely affect the ability of SW to protect itself by due process and natural justice to release the Action Plan to the public.
62. The complainant contends that the Commissioner's decision FER0655597 which SW referred to in support of withholding the requested information, contains paragraph 21 where the Commissioner emphasises the decision of the Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner [EA/2005/0026 and 0030]* that the interpretation of the word "would" needs to be "more probable than not". He argues that it is unreasonable and unsupported by SW's arguments to suggest that any prejudice could occur where information has already been shared with all parties to any likely legal action that may be envisaged.
63. However, having seen the information, the Commissioner agrees that the exception is engaged as it relates to one or more factors outlined in the exception and would have an adverse effect on one or more of these factors, if released.

The public interest

64. The Commissioner is still required to consider the public interest as this may outweigh the maintenance of the exception.

Public interest in favour of disclosing the information

65. The complainant contends that the public interest in withholding the information,

'...there is very clear and obvious public interest in what SWS is promising to do to stop what OFWAT has described as SWS' "widespread and deliberate measures...taken by employees, including at senior management levels, to prevent samples of

wastewater from being taken at treatment works to check compliance with environmental permit conditions”.

Public interest in favour of maintaining the exception

66. SW cites ICO decision notice [FER0655597](#) in support of its position. SW's view is that it would be contrary to the public interest to disclose this information. SW provided other relevant information to the Commissioner in support of the public interest under this exception which cannot be alluded to here.
67. Given the importance of water facilities and the need for effective regulation of the industry it is in the public interest to allow these inquiries to run their course unimpeded and ensure accountability through the appropriate channel in accordance with due process.

Public interest in favour of disclosing the information

68. The complainant's view is mainly in relation to the prejudice that would or would not occur, as set out previously. The complainant has stated that SW has given a false picture to regulators about the level of pollution discharged into the environment which inevitably resulted in a false picture being given of both treated and untreated sewage to the wider aquatic environment by the public authority. He does not consider the balance of the public interest to lie in non-disclosure because of the ongoing proceedings. He suggests that all parties to proceedings or potential criminal prosecutions would already have access to the information.

The balance of the public interest

69. The Commissioner does not accept the complainant's argument that parties to proceedings have already seen this information and therefore there is no harm in its release. This view is based on surmise and it does not take account of the fact that release under the FOIA is release to the world at large which could impinge on those proceedings.
70. The Commissioner's view is that the public interest clearly lies in not undermining ongoing proceedings in this context. This becomes even more persuasive when it is clear that the Regulator, Ofwat, and the Environment Agency have used their powers of investigation, and that the outcome of the investigations that have been completed have resulted in a fine by the former and ongoing proceedings by the latter. It is not in the public interest to jeopardise that process in light of the action that is clearly being taken to safeguard the public.
71. As the Commissioner has decided that neither the Sampling Compliance Report nor the Action Plan should be disclosed under Regulation

12(5)(b), she does not intend to consider the other exceptions cited by SW, namely Regulations 12(5)(e), 12(4)(e), 12(5)(d) or 13(1) in relation to this information.

Regulation 5 – Duty to make environmental information available on request

72. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
73. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
74. As the Commissioner has already determined that information requested under requests two, three and six was formulated in too general a manner she has not considered what information may or may not be held in relation to these.
75. The only information under consideration here is that which was requested by the complainant as follows –

"Pursuant to your duty to advise and assist, I wonder if you would be able to send me a copy of the two documents referred to in your refusal under 1), namely;

i. Control of Sensitive Water Company Information – Advice

ii. Guidance to Water Companies on the release of security sensitive information (Defra May 2012)."
76. The Commissioner has had several emails and telephone conversations with SW regarding this matter. The position is that SW has access to Defra's portal where this information was apparently held at the time of the request. This information can only be accessed by a limited number of individuals at SW with the necessary permission to do so. At first, it was suggested that the complainant ask Defra for this information as SW did not consider it to be its own. Subsequently, Defra provided permission for the Commissioner to see this information via SW but, in the event, she has not done so. The reason for this is that the requested information was superseded on 1 April 2020 by a new guidance note.
77. SW has stated in its response to the Commissioner that it considered this information would be exempt under Regulations 12(5)(a) and (d).

As SW did not download the requested information at the time of the request, or subsequently, the Commissioner does not consider that SW holds this information. Clearly, SW did not consider that it held this information for the reasons given and indicated as much to the complainant when it suggested he contact Defra. In the event, SW does not hold the information. Whilst it would normally be considered a breach that a public authority no longer holds information it held at the time of a request, the circumstances are unusual in this instance and the Commissioner has decided not to record a breach.

Regulation 5(2)

78. Regulation 5(2) of the EIR states that –

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

79. SW breached Regulation 5(2) by not responding to the complainant's first request within the statutory timeframe.

Right of appeal

80. 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@justice.gov.uk

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

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.

81. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF