

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 27 October 2022

Public Authority: Severn Trent plc
Address: 2 St John's Street
Coventry
CV1 2LZ

Decision (including any steps ordered)

1. The complainant has requested information relating to Lydney sewage treatment works.
2. The Commissioner's decision is that Severn Trent plc is entitled to rely on regulation 12(5)(b) – the course of justice, to withhold the requested information. He also finds that Severn Trent plc has breached regulation 5(2) EIR by exceeding the time allowed to respond.
3. The Commissioner does not require Severn Trent plc to take any steps as a result of this decision notice.

Request and response

4. On 11 November 2021, the complainant wrote to Severn Trent plc and requested information in the following terms:
 "...I would be grateful if you could provide the following information:
 - i. The current environmental permit for Lydney sewage treatment works.
 - ii. All data as may be held by Severn Trent Plc, relating to discharge of treated affluent from Lydney sewage treatment works, in so far as those data indicate quantity, determined concentration or timing of discharges.

- iii. Any event duration monitoring or other data as may be held by Severn Trent Plc identifying the dates, times and durations discharges in to the River Severn from combined sewer overflows or other emergency overflows from the sewer catchment serving Lydney sewage treatment works.

Please provide information covering the last three years to date.”

5. Severn Trent responded on 13 January 2022 and provided the information for part i of the request. However, it refused to provide the remainder citing regulation 12(5)(b) of EIR as its basis for doing so and stated that the Environment Agency and Ofwat were beginning an investigation relating to discharges.
6. In their request for internal review the complainant noted that their request pre-dated an investigation. Following an internal review Severn Trent plc wrote to the complainant on 3 March 2022 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 31 March 2022 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this investigation to be to determine if Severn Trent plc are entitled to rely on regulation 12(5)(b) to withhold the requested information.

Reasons for decision

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

9. Regulation 12(5)(b) of EIR provides 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.
10. The Commissioner acknowledges that at the time of the request there had not been any announcement relating to potential legal action against water companies.

11. However, on 18 November 2021, just seven days after the request, Ofwat made a public statement¹ that:

"The Environment Agency (EA) and Ofwat have launched a major investigation into sewage treatment works, after new checks led to water companies admitting that they could be releasing unpermitted sewage discharges into rivers and watercourses.

This will see an investigation involving more than 2000 sewage treatment works. Any company caught breaching their legal permits could face enforcement action, including fines and prosecutions. Fines can be up to 10% of annual turnover for civil cases, or unlimited in criminal proceedings."

12. As the statement had been made during the 20 working days' time allowed for Severn Trent plc to respond to the request, if it had been considering disclosing the requested information, this statement would have overridden that consideration.
13. A further statement was given by the Environment Agency on 16 February 2022 reiterating Ofwat's statement.
14. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

15. In this case it is clear to the Commissioner that the balance of the public interests lies in maintaining the exception, rather than being equally balanced. Where an investigation is on-going and, where that investigation could lead to criminal charges, it cannot be in the public interest to disclose information that is relevant to that investigation. Any data held that is within the scope of parts ii and iii of the request are likely to be relevant to the investigation.

¹ <https://www.ofwat.gov.uk/joint-ofwat-environment-agency-and-defra-announcement-november-2021/>

16. If this data were to be put into the public domain it could alert water companies as to what levels of pollution are deemed acceptable and enable them to take steps to ensure it avoids future prosecution. The consequence of this would be continued high levels of discharges into rivers and the sea without any penalty. The Commissioner considers this would be against the public interest.
17. It would be inappropriate for the Commissioner to order disclosure of the requested information in these circumstances and he has concluded that the Severn Trent plc are entitled to rely on regulation 12(5)(b) to withhold the requested information. The Commissioner also finds that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

Regulation 5(2) – time for compliance

18. Regulation 5(2) of EIR states: "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."
19. In this case the complainant initially requested information on 11 November 2021. Whilst Severn Trent plc advised the complainant that it needed to extend the time required to respond, it did not issue its refusal notice until 13 January 2022.
20. The Commissioner's guidance² states:

"You must consider all relevant public interest arguments within the normal time for compliance – no later than 20 working days after the date you receive the request.

Unlike the Freedom of Information Act, the Regulations do not permit any extension beyond this for you to specifically consider the public interest.

The only circumstance under which you can have more time is if the complexity and volume of the information make it impracticable for you to comply, or decide to refuse to do so, within the 20 working days."

21. In this case the Commissioner does not consider it was reasonable to take more than 20 working days to respond to the request, as Severn

² <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/>

Trent was relying on regulation 12(5)(b) to withhold the information in its entirety. He therefore finds that Severn Trent plc has breached regulation 5(2) EIR.

Right of appeal

22. 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

23. 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.
24. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF