

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 21 October 2013

**Public Authority:** Department for Environment, Food and Rural Affairs ("Defra")

**Address:** Area 2A Ergon House  
Horseferry Road  
London  
SW1P 2AL

#### **Decision (including any steps ordered)**

---

1. The complainant made a request to Defra concerning the design and operation of the Whitburn sewage collection system. Specifically he requested information demonstrating how certain calculations –  $4.5 \times \text{DWF} = 129 \text{ l/s}$  – were arrived at.
2. The Commissioner's decision is that Defra does not hold further information with respect to the complainant's request.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

---

4. On 20 September 2012, the complainant wrote to Defra and requested information in the following terms:

*"A copy of the calculations showing how  $4.5 \times \text{DWF} = 129 \text{ l/s}$ "*

5. Defra responded on 17 October 2012 and informed the complainant it was handling his request under the Environmental Information Regulations 2004 (EIRs). Defra enclosed a copy of its response to a "very similar" request he made on 18 April 2012 and declared it had nothing to add. Defra stated that it would reconsider his request after the European Court of Justice (the "ECJ") published its judgment on infraction proceedings taken against the UK. This was due to be published on 18 October 2012.

6. On 18 October 2012 the complainant requested an internal.
7. This was acknowledged by Defra on 25 October 2012.
8. Following the publication of the ECJ judgement in the infraction proceedings, on 20 December 2012 Defra disclosed information that it had used in the UK's defence (where it related to Whitburn) during those proceedings.
9. Following further correspondence, on 9 January 2013 Defra informed the complainant that information regarding the design of the collecting system in Whitburn was contained in the UK Defence document dated 13 September 2010, which had now been provided to him. It also stated that, *"4.5xDWF is used to describe the performance of the system as a whole; there are a number of different multiples of DWF at different points in the system."*
10. On 21 January 2013 the complainant asked Defra again to provide the requested information. On the same day Defra informed him that it had released the information to him under the EIR request, and that it was the subject of previous correspondence from Defra. It added that it was not withholding the information.
11. On 25 March 2013 the complainant made a complaint to the ICO about Defra's response to his information request.

### **Scope of the case**

---

12. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He does not consider he has been provided with all the information he has requested.
13. The scope of this case is to consider whether Defra handled the complainant's request in accordance with the EIR. The Commissioner will therefore consider whether Defra is correct when it says that it does not hold further information which it can provide in response to the request.

### **Background - The Infraction Proceedings**

14. There has been concern at a European Union level as to whether or not the UK is in compliance with its obligations under the Directive 91/271/EEC relating to Urban Waste Water. In 2010 Infraction Proceedings were launched. The complainant was aware of these proceedings.

## **Regulation 5(1)**

15. Regulation 5(1) requires a public authority to make information that it holds available on request, and regulation 12(4)(a) provides an exception for information not held at the time the request is received. A public authority should therefore determine whether environmental information is held at the time of the request.
16. 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 might be held, the Commissioner, in accordance with a number of Information Tribunal decisions, will apply the normal civil standard of proof in determining the case. He will decide on the balance of probabilities whether a public authority holds any information which falls within the scope of the request and was held at the time of the request.
17. Defra have explained that it has provided the following relevant information to the complainant by:
  - A response of 17 October 2012 to the complainant's EIR request of 20 September 2012. Some information was disclosed but some was withheld as it related to Defra's defence of infraction proceedings which were on going at that time. Defra stated that it would reconsider this once the European Court of Justice (ECJ) judgment was published. The Commissioner upheld Defra's decision not to disclose this information in decision notice of 30 July 2012 (ref FER0439690).
  - Once the ECJ had published its judgment on 18 October 2012, Defra reconsidered its decision not to disclose certain information used in its defence (which included information on the performance of the Whitburn system). Defra subsequently disclosed this information on 20 December, although this was handled as a separate EIR request. The information disclosed included all the pleadings relating to Whitburn and supporting material, but of particular relevance to the complainant's query regarding DWFs was a study carried out in 2010 on behalf of the UK by MWH UK Ltd investigating the performance of the Whitburn sewerage system and paragraphs 63-67 of the UK defence document of September 2010.
  - A letter to the complainant of 9 January 2013 responding to his e-mail of 7 January contained information relating to the design of the collection system at Whitburn and associated modelling on pass forward flow from Whitburn was contained in the United

Kingdom's defence document and was provided to the complainant in response to the EIR request.

- A response stating the information had been released and that information was not being withheld. This was in response to the complainant's email dated 21 January 2013 asking once more for the information requested 20 September 2012. The complainant referred to Defra's commitment to reconsider his request after the Court of Justice judgment in October. The complainant stated that although he had received a large amount of information from Defra he did not receive the information he had requested.
  - Details on the design of the Whitburn sewerage system with regards to multiples of DWF. This included a letter dated 20 February 2012 explaining that the figure of 4.5 times DWF is the average performance of the system but is not the legal basis for assessing compliance with the relevant permit conditions which are expressed in litres per second. Another letter was sent to the complainant on 10 May 2012 confirming that Defra had already set out for him its understanding of the design of the system.
  - Advice to the complainant to contact the Environment Agency if his query relates to the technical detail of the design of the system.
  - Advice to the complainant that Defra had provided him with all the information it holds on the design and performance of the Whitburn sewerage system.
18. Defra has categorically stated to the Commissioner that there is no further information held on this issue that has not been disclosed to the complainant.
19. The complainant is unhappy with the response from Defra and he has concerns about the calculations. Defra has explained that it can illustrate its inconsistencies and the complainant had received assurance from the UK Government that the error the Advocate-General had made had been promptly corrected. This error relates to the explanation of the figure of 10,800 m<sup>3</sup> by the Advocate General.
20. The Commissioner is aware that the complainant considers that the withheld information is inaccurate. Defra has confirmed that it does not consider that the withheld information is inaccurate and that if it were, any future decisions made once the ECJ has handed down its judgement could be subject to judicial review. The Commissioner has not been presented with any further evidence to suggest that the withheld documents contain inaccurate information and has not therefore given

any significant weight to this argument. The Commissioner's concern is not the quality of the content but whether there is more information held concerning the request. Whether or not the complainant feels information is inaccurate or of poor quality is not something the Commissioner can look at.

## **Conclusion**

21. The overall conclusion of the Commissioner is that Defra has now provided to the complainant all the information it holds on the design and performance of the Whitburn sewage system. Defra had consistently advised the complainant that if his query relates to the technical detail of the design of the system that he should contact the Environment Agency. Defra reiterated that there is no further information held by it on the issue which has not been disclosed to the complainant.
22. Therefore, on the balance of probabilities, the Commissioner is satisfied that Defra does not hold any further information concerning the complainant's request. In support of this on 4 September 2013 a decision was made by the First-Tier Tribunal regarding the complainant's request for information dated 10 September 2012<sup>1</sup>. The request was detailed and included correspondence that the complainant had had with the Environment Agency over the years relating to "*the dry weather flows and spills rates from the Whitburn system*". It explored issues relating to the underlying engineering calculations relating to the sewage system and the consents under which it was allowed to discharge into the sea.
23. The First-Tier Tribunal upheld this decision notice dated 11 April 2013 and dismissed the appeal. On this previous case the complainant had requested information which was similar to this request. In this the complainant disputes the explanations from Defra as to how the calculations had been performed. In considering this matter the Tribunal had revisited the analysis of the request by the Commissioner using the evidence submitted by the complainant. The appeal was dismissed and the decision was unanimous.
24. The Commissioner is satisfied that no further action in relation to this request is required.

---

1

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1075/Latimer,%20Robert%20EA.2013.0101%20\(04.09.13\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1075/Latimer,%20Robert%20EA.2013.0101%20(04.09.13).pdf)

## Right of appeal

---

25. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

26. 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.
27. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**