

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

### **Decision notice**

**Date:** 14 October 2015

**Public Authority:** Northumbrian Water Limited  
**Address:** Northumbria House  
Abbey Road  
Pity Me  
Durham  
DH1 5FJ

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

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1. The complainant has requested access to databases listing properties at risk of low water pressure (DG2) and properties at risk of internal sewer flooding (DG5). Northumbrian Water Ltd applied the exceptions at regulations 13(1), 12(4)(b), 12(5)(c) and 12(5)(f) of the EIR to the DG5 database and said that the DG2 database does not constitute environmental information but if the Commissioner decides that it does, the same exceptions apply. The Commissioner's decision is that the DG2 database does constitute environmental information and that Northumbrian Water Ltd has correctly withheld the requested information under the exception for personal data at regulation 13. He does not require any steps to be taken.

#### **Request and response**

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2. On 5 March 2015, the complainant made the following request via the website of Northumbrian Water Ltd ('NWL'):  

"Would like to come in to an office to review the DG2 register also the DG5 register free of charge to assisting [sic] whether [specific address redacted] is at risk of receiving low water pressure or flow and/or is at risk of internal flooding due to sewers."
3. NWL responded on 31 March and informed the complainant that the property is not recorded on the low pressure register (DG2) or the flooding risk register (DG5).

4. The complainant replied on 1 April 2015 stating that his request was to visit the office to view the DG2 and DG5 registers and said that if it causes issues for him to do so, he would be happy to receive copies of the registers by email. He explained that since his initial request he needs to check the registers for additional properties and will need to do so for future properties.
5. On 27 April 2015, NWL responded. It treated the complainant's email of 1 April 2015 as a new request and stated the following:

"Property addresses logged against DG2 and DG5 constitute personal data for the purposes of the Data Protection Act 1998. Northumbrian Water is not permitted to disclose personal data (other than where the applicant is the data subject) where this would contravene any of the Data Protection Principles. Disclosure of the DG2/5 address data would be a breach of the First Data Protection Principle in that it could be unwarrantedly prejudicial to the property owner/occupier.

If you have a specific legitimate interest in a property (such as an intent to purchase), we have a formal route for disclosure under those circumstances. You can find information concerning this on our website here: <https://www.nwpropertiesolutions.co.uk/index.aspx?>"

6. The complainant requested an internal review of that decision on 29 April 2015.
7. NWL provided an internal review on 19 June 2015. It said that information on the DG2 database is not disclosable as it is not environmental information and said that the exceptions at regulations 13 and 12(4)(b) apply to the request. It also said that disclosure would adversely affect its intellectual property rights.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 24 June 2015 to complain about the way his request for information had been handled.
9. In its response to the Commissioner, NWL maintained that information in the DG2 database is not environmental information. It said that the following exceptions apply to the request for the DG5 database and also apply to the DG2 database should the Commissioner decide that such information is environmental:
  - Regulation 13 – personal data exception

- Regulation 12(5)(f) – adverse affect on the provider of information
  - Regulation 12(4)(b) – manifestly unreasonable
  - Regulation 12(5)(c) – intellectual property rights
10. The Commissioner has considered whether the information in the DG2 database is environmental.
11. As the Commissioner has decided that the information in the DG2 database is environmental, he has considered whether regulation 13 applies to both the DG2 and DG5 databases.
12. As the Commissioner has decided that regulation 13 applies to all of the requested information, he has not deemed it necessary to consider the exceptions at regulation 12(4)(b), 12(5)(c) or 12(5)(f).

## **Reasons for decision**

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### **Does the DG2 database constitute environmental information?**

13. The first matter for the Commissioner to decide is whether the information in the DG2 database is environmental information under the EIR.
14. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:
- “namely any information in written, visual, aural, electronic or any other material form on –
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

15. NWL submitted the following:

"Water companies abstract (extract) water from the environment, for example from boreholes and reservoirs...

...Once water has been abstracted it is pumped to treatment works where it is treated to make it fit for human consumption. This treated water is then transported to properties via the mains distribution network. A communication pipe transports water from the mains distribution pipe to the boundary of each property. Within the boundary of each property there is an internal service pipe (the responsibility of the property owner) that delivers the water into the property itself.

Our view is that once water has been abstracted it is no longer an element of the environment. This is because it is no longer free to interact with the natural environment. It is restricted by being contained within the infrastructure that abstracted it. In cases where water has been abstracted by Companies it will typically be pumped through pipes to a water treating plant. Once the water has been treated – to make it safe for human consumption – it is distributed through the mains distribution networks to households and businesses...

...Information about water within the Company's abstraction, treatment and distribution systems may become environmental information if that water is likely to affect elements of the environment. For example, if treated water escapes from a burst pipe into a nearby river, and the level of chlorine in the treated water is likely to affect organisms living there, information about the escape would be environmental information. However, as long as the water is contained within the abstraction and distribution infrastructure maintained by Northumbrian Water or household systems, information about it is not environmental information as it is neither "an element of the environment" nor a factor likely to affect elements of the environment...

... The information in the DG2 database is about the pressure of treated water in the distribution main, the estimated pressure of treated water on the ground floor of a household and steps taken to remedy low pressure.

This information is not environmental information as it is about the state (pressure) of treated water after it has been abstracted and treated and as it enters a household's system. Such water is not an "element of the environment" so information about it is not environmental information under part (a) of the definition. It does not qualify as environmental information under any of the other parts of the definition."

16. The base of NWL's argument is that because the information relates to water which has been restricted, and not therefore interacting with the natural environment, it is no longer an element of the environment and therefore does not constitute environmental information.
17. The Commissioner has taken into consideration his guidance on 'What is Environmental Information'<sup>1</sup> which refers to water as an element of the environment as follows:

**"Water** –This will include water in all its forms – vapour, ice, liquid - and is not limited by scale as long as it can still be said to be an element of the environment. It includes water underground or on the surface and water in natural settings and in man-made systems."

The above is a broad definition and the Commissioner considers that, taking into account the wide application of the EIR, information about water in pipes is information about the state (in this case the pressure) of water and water is clearly an element of the environment.

18. As stated in the aforementioned guidance, the Commissioner also notes that there are two parts to the definition of regulation 2(1)(a):
  - the state of the elements of the environment; and
  - the interaction among the elements of the environment.

He does not consider, as NWL seems to suggest, that an element of the environment must interact with another element of the environment in order for it to be classed as environmental information.

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<sup>1</sup>[https://ico.org.uk/media/for-organisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf)

19. The Commissioner therefore considers that the requested information is environmental within the meaning of the EIR by virtue of regulation 2(1)(a).

### **Regulation 13(1) – Third party personal data**

20. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ('DPA').

#### **Is the withheld information personal data?**

21. Personal data is defined by the DPA as any information relating to a living and identifiable individual. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
22. The withheld information in the DG2 database is information on the risk of low water pressure at specific addresses.
23. The withheld information in the DG5 database is information on the risk of internal sewer flooding at specific addresses.
24. The complainant has said that the DPA relates to people not property and buildings and that he is requesting a copy of, or to view, a list of environmental information relating to addresses only, rather than requesting any personal information or data. He said:

"Please feel free to redact any personal information or data contained within your lists, of which I believe there is none."

He also said that if the information he is requesting was personal data NWL would not be able to sell it in the form of a Con29DW Search.

25. NWL has explained that the primary purpose of the DG2 and DG5 databases is to identify properties at risk so that it can offer remedial services or preventative measures for low pressure and internal sewer flooding to customers living at the properties in the databases. NWL quoted the following section of the Commissioner's guidance 'Determining what is personal data'<sup>2</sup>:

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

"Information about a house is often linked to an owner or resident and consequently the data about the house will be personal data about that individual."

26. It further explained that although the name of the person paying the bill is not included in DG5, the Property Reference Number (PRN) is a reference number which identifies individual properties and can be linked to individual customer accounts from which individuals can be identified and therefore where the PRN links to the account of an individual the information in DG5 is personal data of customers in the hands of Northumbrian Water. It also informed the Commissioner that the DG2 database contains an open comments field which contains information in which a customer might be named.
27. The Commissioner is satisfied that the withheld information is personal data as defined in the DPA as it is generally possible to link an address to the identifiable occupants of that property and the information informs or influences actions or decisions which affect an individual.

### **Would disclosure breach the Data Protection Principles?**

28. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subject, the potential consequences of disclosure and balanced the rights and freedoms of the data subject with the legitimate public interest in disclosing the information.

### **Nature of the information and reasonable expectations**

29. NWL said that in considering whether or not to disclose the requested information under the EIR, it took into account of the fact that answers to the question about sewer flooding and low water pressure are routinely given in official CON29DW reports (the drainage and water enquiry which forms part of a standard property search). It explained that applicants for CON29DW information pay a fee for it and while applicants do not need to justify the reasons for obtaining an official search report, the existence of a fee deters speculative accessing of the data and there would be no such deterrent if this information was effectively released to the public under the EIRs. It took into account that the disclosure would be to the general public rather than a particular individual and that the request is asking for all of the information in the databases rather than just the 'yes' or 'no' answers that are required for the CON29DW.

30. NWL said that its customers have no expectation that it will publicly disclose personal data about them. It makes clear to its customers how it will protect their privacy and their personal data in its online privacy statement<sup>3</sup>, and its paper privacy statement 'Your privacy matters' which is sent to its customers annually. It explained that people do not have a choice over their water and wastewater service provider and therefore its customers' expectations of privacy and security are high.
31. It was explained that the requested information is used to plan and carry out remedial work for NWL customers, and to support the conveyancing process. NWL said that these uses of personal data have been established for a significant period of time and are what its customers expect. It said that customers have never been informed of or asked to agree to publication of this information to the public and that given the volume of information on the databases, and the frequency with which information can be added and removed, it is impractical to seek consent for the processing from those individuals affected.
32. NWL said that its customers would object if they discovered that their personal data would be made public and exploited by others for commercial purposes. It infers this from the fact that a significant number of customers already opt out of their data being used beyond administering their account (marketing purposes) – approximately 120,000 registered property accounts opt out in the Northumbrian Water region, 64,000 in the Essex region and 11,000 in the Suffolk area. It said that there is a meaningful difference between limited information about customers' property being disclosed once to a potential buyer upon a conveyancing request (the CON29DW report) and the same information being publically disclosed and generally accessible.
33. The Commissioner notes that NWL's privacy statements do not make any reference to customer's personal data being shared with property search companies but do state that information may be shared where there a legal duty or statutory obligation to do so.
34. In this case, the Commissioner is satisfied that the data subjects would have a reasonable expectation of confidentiality and privacy in relation to the requested information.

### **Consequences of disclosure**

35. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether

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<sup>3</sup> <https://www.nwl.co.uk/your-home/privacy-policy.aspx>



disclosure of the information would cause unwarranted damage or distress to the data subjects

36. NWL said that if the DG5 database is made public it is likely that it will be used by third parties in ways that affect its customers and gave the example that insurance companies are likely to use the information to help set higher insurance premiums in affected areas and provided links to articles to illustrate the point<sup>4</sup>. It also said that other organisations that provide goods or services to minimise the effects of sewer flooding are likely to use the information to create targeted lists for direct marketing.
37. It was also explained by NWL that because the databases contains live information, which is constantly updated and changed (for example, a property is removed from the database when a known issue is remedied, and a property newly considered at risk will be added), once the information is published it will soon become out of date. It said that use of out of date information by others, such as search companies to inform their own search reports which they make available to customers for a commercial fee, could be damaging to its customers, if a property is reported as being at risk of low pressure/flooding when it no longer is, or third parties, if they are wrongly informed that a property newly added to one of the databases is not at risk of low pressure or flooding).
38. The Commissioner considers that disclosure in this case has the potential to cause damage and distress which could take the form of increased insurance premiums, possible denial of insurance or rejected claims, possible reduced house prices and unwanted marketing.

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<http://www.telegraph.co.uk/finance/personalfinance/insurance/buildingsandcontent/10577919/How-flooding-claims-will-affect-your-insurance-costs.html>

<http://www.gocompare.com/home-insurance/flooding-and-home-insurance/>

<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&cad=rja&uact=8&ved=0CHsQFjAJahUKEwj90qfG2qXHAhVDwBQKHas1ADA&url=http%3A%2F%2Fresearchbriefings.files.parliament.uk%2Fdocuments%2FSN06613%2FSN06613.pdf&ei=OI7MVf3NBcOAU6vrgIAD&usg=AFQjCNErxGpAJTAVi0N02SK8pjeQbhhzYg&bvm=bv.99804247,d.d24>

### **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

39. In considering 'legitimate interests in disclosure', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
40. The complainant has said he requires this information to produce Con29DW searches on behalf of the public who wish to purchase properties and that NWL's formal route for the supply of this information, its property search route, is not a viable alternative to access to the information as it charges for the information which is a barrier to obtaining the information.
41. He said that its instructions come from persons with a legitimate reason to request the information. He explained that NWL provide the requested information in their Con29DW with the excuse that it is "legitimised by the mutuality of interest" and that this also applies to his request as he requires the information for the same purpose. He said that NWL cannot sell the information then claim it is data protected to avoid providing it to him.
42. NWL has said that rather than there being a compelling public interest in disclosure, there is a public interest in withholding this information. It explained that it is largely reliant upon its customers to report sewer flooding and knows that many are reluctant to report flooding incidents, due to the fear of increased insurance premiums or the denial of property insurance or a potential reduction to the market value of their property, and that the number of properties it estimates to be at risk of sewer flooding is already significantly greater than the number of properties where sewer flooding has been reported. It said that publishing the DG5 database may further discourage reporting by its customers resulting in a reduction of planned maintenance and remedial action and the allocation of funds from Ofwat to undertake such work. It said that having inaccurate data, that being under-reporting which masks or distorts its understanding of an issue, is harmful for all.
43. NWL further submitted that it does not consider that disclosure of the databases would contribute significantly to public debate and involvement in decision-making on environmental issues and that the interest pursued by the request is a private and commercial, rather than a public interest.
44. The Commissioner considers that there is a significant difference in providing information in response to a specific enquiry relating to a specific address and providing complete databases as requested in this case. He agrees with NWL that the interest in obtaining the complete

databases in this case is a private and commercial interest of the complainant and considers that the interest in obtaining information to complete the CON29DW enquiry is met by the property search offered by NWL. The Commissioner does not consider it necessary to release personal data that could cause damage and distress in the form of increased insurance premiums, possible denial of insurance or rejected claims along with possible reduced house prices and unwanted marketing.

### **Conclusion on analysis of fairness**

45. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release their personal data. Disclosure would not have been within the reasonable expectations of the individuals and the loss of privacy could cause unwarranted damage and distress. He acknowledges that there is a legitimate interest in obtaining information in order to complete the CON29DW enquiry but this interest is met by NWL's property search. Therefore he does not consider that any legitimate interests in disclosure outweigh the individuals' reasonable expectations and right to privacy.
46. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question. The Commissioner has therefore decided that NWL was entitled to withhold the information under the exception at regulation 13(1).

## Right of appeal

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47. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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