

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 12 May 2016

**Public Authority:** United Utilities  
**Address:** Haweswater House  
Lingley Mere Business Park  
Lingley Green Avenue  
Great Sankey  
Warrington  
WA5 3LP

**Decision (including any steps ordered)**

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1. The complainant made a request to United Utilities (UU) for information relating to the work being undertaken on behalf of United Utilities in Eccleston, St Helens. UU refused to comply with the request as it considers that some information is not held under regulation 12(4)(a) and that in any event the request is manifestly unreasonable under regulation 12(4)(b) EIR. It also applied regulation 12(4)(c) and 12(5)(f) EIR.
2. The Commissioner's decision is that on the balance of probabilities the information requested is held by UU under regulation 12(4)(a) EIR (apart from part 13 of the request in relation to which it would be manifestly unreasonable to determine what is held). UU has correctly applied regulation 12(4)(b) EIR to the request in its entirety.
3. The Commissioner requires no steps to be taken.

**Request and response**

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4. On 22 January 2015 the complainant made the following request for information:

"From my initial list of requested information I have now abstracted and

list below, documents which I consider being of an environmental nature but are unavailable on the planning portal:

Factual Ground Investigation Report

Interpretive Ground Investigation Report

Contractor's Method Statement for construction of the detention tank

Contractor's temporary works design for the detention tank including dewatering proposals

Contractor's proposals for monitoring water table levels

Location plans showing the works and any piezometers

Records of water table levels both pre-construction and during the works

Estimate of the volume of water abstracted

Documents showing approval of dewatering proposals

Discharge consents for temporary works

Environmental Impact Assessment (if any)

Contractor's Management Plan including proposed environmental management measures

Other documents which may help an expert determine geological and hydraulic conditions in the area"

5. UU responded on 6 May 2015. It said that the complainant's request was manifestly unreasonable under regulation 12(4)(b) EIR because of the time it would take to comply with it. UU said that if the complainant agreed to an extended deadline for a response, it would continue to endeavour to identify information it could provide to him free of charge. The complainant declined this offer.
6. UU provided an internal review on 7 June. It upheld its original position that the request is manifestly unreasonable.

### **Scope of the case**

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7. The complainant contacted the Commissioner 25 July 2015 to complain about the way his request for information had been handled.

8. During the course of the Commissioner's investigation UU also raised issues as to what information it actually held and also issues with it even being able to determine what it held within the cost limit because some information would be held by a third party contractor not necessarily on UU's behalf. It also applied regulation 12(4)(c) and 12(5)(f) EIR.
9. The Commissioner has considered what information UU holds and whether UU correctly applied any of the exceptions cited.

## **Background**

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10. UU has explained that it is a large commercial water and sewerage operator servicing most of the North West of England. In order to ensure its network remains serviceable, it invests in and executes both small and large scale capital projects. Often this can involve several contractors and subcontractors with detailed project documentation. It said that the information requested in this case is at the large end of its capital project spectrum, being a multimillion pound project involving in excess of 1600 documents.
11. The information relates to a partially submerged detention tank to store excess foul water, at least 20 meters internal diameter. As part of the construction works, parts of the land were subject to dewatering to ensure the stability of the land.
12. UU said that the project involved seeking independent expert advice to assess the ground conditions and to design a suitable system. It said that most of the requested information was created by external contracting agents and experts. Some of which was provided to UU, some was uploaded onto a project repository platform (which UU created and has access to) and some is held by external contractors.

## **Reasons for decision**

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### **Regulation 12(4)(a)**

13. Regulation 12(4)(a) provides that a public authority may refuse to comply with a request if the information is not held.
14. The Commissioner has asked UU to provide him with a copy of the terms of the contract which covers what access UU has to information created and/or held by external contractors.
15. UU explained that the independent nature of the contractor's obligations informs the way the contract operates. As there is a high degree of

independence, not all of the requested information would necessarily be known to be held, as some of it would have been created purely for the Contractor's own purposes.

16. It said that in spite of the existence of the repository document storage facility, the reality of the operation was that a proportion of the documents were kept on site by the Contractor (for its benefit). It said that this is borne out by the contractual obligations stated in Clauses 2, 10A, and 25 in the Contract Conditions (provided to the Commissioner) imposing an obligation to make them available for inspection, had UU chosen to do so. However it said where the existence of these documents are known, they would only be known to specific individuals correspondent to the issue within the UU team.
17. It went on however that the contract is unhelpful in providing any objective criteria on disclosure. It confirmed that it does not identify, address or distinguish documents which are held by the contractor for its own purposes and those required to be provided to UU. It said that due to the individual nature and large scale of this capital project, as well as the range of documents, and the disparate nature of their locations it does not consider it is realistic or feasible to capture or categorise all of the likely documents within the contract.
18. It said that some of the information specifically requested would have been the contractor's documents for its own benefit on site and not held by UU.
19. It said that due to the sheer volume, and disparate nature of the types of documents as part of the project, this makes it difficult to identify which of those documents are held on UU's behalf and which of them are purely for the contractor's benefit. It said that technically whilst it could require any document, if it was aware of its existence, it does not believe that this equates to those documents being held on UU's behalf.
20. The Commissioner considers that if a public authority has a right to see certain documents for its own purposes, and especially if it can require them in order to carry out verification and checking, then there is a good case for saying they are held on behalf of a public authority. This can be the case even if the public authority has not actually accessed or been provided with the documents; the fact that they could require them is enough.
21. The key phrase is 'reasonably requires'. If there is information held by the contractor that is not relevant to the purpose of verification and checking, then UU could not reasonably require it. The information which is held by the contractor and which UU could reasonably require access to for its own purposes under the terms of the contract is held on

behalf of UU for EIR purposes. The fact that UU may not know the location of these documents doesn't invalidate this approach, since presumably the Contractor will know where they are stored.

22. However the Commissioner notes that this is a capital project ie. a works contract rather than a services contract. It's not a case where a contractor is delivering a service that would otherwise be delivered by UU; rather, the contractor is delivering a specific (albeit large) capital project. It would be wrong to say that everything the Contractor holds about the contract is automatically held on behalf of UU.
23. The Commissioner considers that information provided to UU via the repository UU created is information held by UU for the purposes of EIR (UU has indicated that this includes the information requested at parts 1, 2, 4-6, 11, 12 and parts of 13 of the request). Of the information held by external bodies, some of the information will be held on behalf of UU and some will be held solely for the contractor's own purposes. (UU has argued that docs 7-10 are held by the contractor, doc 3 is held by the contractor but for its own purposes and the contractor may possibly hold information relevant to part 13 of the request either for its own purposes or on UU's behalf). UU has confirmed that it is able to request this information from the contractor. UU has however argued that it may not know of the existence of all information held by the contractor, not just that it is unaware of its location. It has argued that the information requested at part 3 of the request is held by the contractor for their own purposes.
24. The Commissioner does consider that it is likely, on the balance of probabilities, that the contractor does hold information relevant to parts 3 and 7-10 of the request. UU has only argued that part 3 is not held on behalf of UU. In relation to part 3 of the request, it said that the contractor may generate documents it requires for its own compliance (eg. Health and Safety). It confirmed that the contract is relatively general on these issues in that the contractor will have deemed to have satisfied itself in relation to its compliance obligations, and would continue to do so throughout the execution of the contract. It argued that this type of information would not be held by UU as it was held by the contractor for their own purposes to comply with the contract.
25. The Commissioner considers that this information would be held by the contractor to ensure it is undertaking works in accordance with its contractual obligations. However, it may be reasonable for UU to require access to this information if there were some concern over compliance with the contract and therefore based upon UU's arguments, the Commissioner is unable to find on the balance of probabilities that this information is not held by UU.

26. In relation to part 13 of the request, so far as information may be held by the contractor on its behalf, UU considers it would be manifestly unreasonable to even determine what may be held due to the open ended nature of this part of the request. The Commissioner is therefore unable to make a determination as to what may be held by the contractor on UU's behalf pertinent to part 13 of the request.
27. Therefore, based upon the arguments presented by UU, the Commissioner considers that on the balance of probabilities, UU holds all information requested either directly, via the repository or it is held by the contractor on UU's behalf (apart from part 13 of the request in relation to which he is unable to make a determination).

### **Regulation 12(4)(b)**

28. Under regulation 12(4)(b), a public authority may refuse to disclose information to the extent that - the request for information is manifestly unreasonable.
29. In this case, UU cited 12(4)(b) on the grounds that the cost of dealing with the request is too great both in terms of determining what it actually holds relevant to the scope of the request and collating information that is held.
30. The EIR differ from the FOIA in that no specific limit is set on the amount of work required by an authority to respond to a request as provided by section 12 of the FOIA. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR - the cost limit and hourly rate set by the fees regulations do not apply in relation to environmental information. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of complying with a request but they are not a determining factor in assessing whether the exception applies.
31. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
32. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the

DBERR case<sup>1</sup> where the tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

“We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be “to the widest extent possible”. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information.”

33. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner may take the following factors into account:

- Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
- The nature of the request and any wider value in the requested information being made publicly available.
- The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
- The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
- The presumption in favour of disclosure under regulation 12(2).

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<sup>1</sup> Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

- The requirement to interpret the exceptions restrictively.
34. UU explained it created the live document repository and does have access to the information contained here. It said that there are 1600 documents on the repository. To comply with parts 1, 2, 4-6 and 11-13 of the request, it would need to search all documents on this platform.
  35. It said that the way the documents are named on the repository may not be the same as the wording in the complainant's request. It therefore said that it would not be immediately obvious which documents would fall within the scope of the request. Furthermore it said that it was not clear whether a specific part of the complainant's request would be contained in one document or over several documents. Finally it pointed out that part 13 of the request was much more open ended and due to the volume of information on the repository it would be costly to determine what information would be relevant to this part. It therefore concluded that it wouldn't be able to electronically search the repository by document names alone to separate out the information relevant to the request.
  36. It went on that the documents on the live repository include drawings, plans, approvals, registers, plans of work, forecasts, letters and other forms of communications. These are contained in files and sub-files on the repository.
  37. Due to the volume of information on the repository, it argued that it would have taken considerable resource to determine what information fell within the scope of the request. It estimated that it would have taken 3 members of staff approximately 27 hours minimum in total just to identify, extract and retrieve the information from the repository falling within the scope of the request.
  38. UU has provided a more detailed breakdown to the Commissioner for each part of the request, in terms of searching the repository for information but also the time it would take to review in scope information for disclosure or redaction. The Commissioner's [guidance on 12\(4\)\(b\)](#) says:

*26. Under FOIA the cost of considering whether information is exempt cannot be taken into account under section 12 (the appropriate costs limit) but can be taken into account under section 14(1) (vexatious requests). This is because section 12 limits the activities that can be taken into account when deciding if the appropriate limit would be exceeded. This is not an issue under the EIR. The costs of considering if information is exempt can be taken into account as relevant arguments under regulation 12(4)(b).*



39. To take one example, for the first part of the request, for the Factual Ground Investigation Report, UU explained that it would need to search the repository for this report. UU explained that it is aware, through work undertaken with this request, that this is a 242 page document which would then need to be reviewed to determine what could then be disclosed. It said that this would take approximately 4 hours work. This provides some idea of the potential size of some of the documents within the 1600 contained on the repository.
40. In relation to part 13 of the request, as it is so open ended, UU has argued that it would have to consider all 1600 documents to determine what may be relevant to the request and then any documents identified as relevant would then need to be reviewed in detail for consideration for disclosure.
41. Due to the volume of documents held on the repository, the fact that the names of documents as given in the request will not necessarily correspond with the document titles on the repository it would therefore require detailed consideration of all documents to determine what falls within the scope of the request and all relevant documents would then need to be reviewed in detail to consider whether they could be disclosed, the Commissioner considers that the estimate given is extremely conservative at 27 hours.
42. The Commissioner is also aware that there could be further information held by third party contractors which has not been provided to UU either directly or via the repository. UU explained that this was the case with the information requested at parts 3, 7-10 and possibly some information relevant to part 13 of the request.
43. It summarised that it has explained the practical difficulty in trying to locate relevant information contained on the repository however the presence of other information off UU's site and with the contractors adds another level of complexity in being able to identify, locate, retrieve and collate information. Some of the information specifically requested would have been the contractor's documents for its own benefit on site and not held by UU however it argued that it would be manifestly unreasonable to determine what information was held on behalf of UU and what was held for contractors own benefit.
44. It said that due to the sheer volume, and disparate nature of the types of documents as part of the project, makes it difficult to identify which of those documents are held on UU's behalf and which of them are purely for the contractor's benefit.
45. As stated earlier, the Commissioner does consider that it is likely, on the balance of probabilities, that the contractor does hold information

relevant to parts 3 and 7-10 on behalf of UU. It may also hold information, on behalf of UU, relevant to part 13 of the request.

46. However given the volume of information held by the contractor and the particularly wide nature of part 13 of the request which would make any search conducted by the contractor more onerous for any further information potentially held on behalf of UU and the fact that documents would then need to be reviewed for disclosure, complying with these parts of the request is likely to impose an additional burden.
47. The Commissioner therefore considers that regulation 12(4)(b) EIR was correctly applied by UU. This is because of the burden of complying with parts 3, 7-10 and in particular in determining what is held in relation to part 13 of the request via the external contractor in addition to the work required in terms of searching the repository to comply with the other parts of the request
48. As the Commissioner has found that regulation 12(4)(b) was engaged in this case, he has gone on to consider the public interest test.

### **Public interest test**

#### **Public interest in favour of disclosure**

49. UU recognised that disclosure of information that concerns works methodology over an installation affecting a local area's ability to drain water will have a limited degree of interest to the local population.
50. In addition the Commissioner considers that public authorities should be prepared to accept a greater burden in providing environmental information than other information. UU is a large organisation with significant resources and an important role in relation to the environment.

#### **Public interest in favour of maintaining the exception**

51. UU considers that in this case the requested information is of interest to the complainant because of legal action he may wish to take against UU rather than being of interest to the public in general.
52. It argued that it would not be in the public interest to divert significant UU resources to disclose technical and voluminous information which it considers will be of limited value to the wider public and would only be of use to technical experts.

### **Balance of the public interest**

53. The Commissioner does consider that there is a public interest in disclosure of information which will provide greater understanding, openness and transparency in relation to this project, particularly in relation to members of the public within the locality community. Furthermore the Commissioner does not accept that because the information is technical and voluminous it will be of limited value to the wider public interest. However on balance, the Commissioner considers that in this case, the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception. This is because of the amount of information that would have to be searched through to comply with this request, the work this would involve and the burden this will impose.
54. As the Commissioner considers that regulation 12(4)(b) EIR was correctly applied in this case, he has not gone on to consider any of the other exceptions cited.

### **Regulation 9 – duty to provide advice and assistance**

55. UU did suggest to the complainant that it may be able to provide some information within the scope of the request but as far as the Commissioner is aware this was not explored any further and no indication was given as to how the request could be refined so that some information could be provided.
56. The Commissioner does not therefore consider that UU complied with its obligations under regulation 9 in this case. Bearing in mind the fact that the Commissioner considers that much of the requested information is either held by UU via the repository or can be obtained from the contractor, it should provide the complainant with appropriate advice and assistance as to what information could be provided without engaging regulation 12(4)(b).

## Right of appeal

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57. 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)

58. 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.

59. 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** .....

**Gemma Garvey**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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