

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

Decision notice

Date: 30 September 2019

Public Authority: Department for Environment, Food & Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The original applicant's father has brought this complaint to the Commissioner with his son's authority. The notice is served on the applicant/or son but much of the notice refers to the father, as the complainant.
2. The applicant requested information associated with Southern Water and the Water Industry Act. The Department for Environment, Food & Rural Affairs (Defra) has refused to comply with the request under regulation 12(4)(b) of the EIR (manifestly unreasonable request).
3. The Commissioner's decision is as follows:
 - Defra is entitled to rely on regulation 12(4)(b) as the request is manifestly unreasonable by virtue of being vexatious.
 - The public interest favours maintaining this exception.
4. The Commissioner does not require Defra to take any remedial steps.

Request and response

5. On 22 December 2018 the applicant wrote to Defra and requested information in the following terms:

"I require documents and information related to Southern Water disposal of property (Shoreham-by-Sea Water Supply Works, Steyning Road, Shoreham-by-Sea.) located in an ANOB. I require copies of the following information in relation to The Water Industry Act 1991 S.156 part C) a requirement that the company, before making a disposal in a case in which the land in question is situated in a National Park, in the Broads or in an area of outstanding natural beauty or special scientific interest, should do one or both of the following, that is to say— (i) consult with Natural England (as respects land in England) or the Countryside Council for Wales (as respects land in Wales); and (ii) enter into such management agreements or such covenants under subsection (6) below as the Secretary of State may determine;

1. I require confirmation from DEFRA as to whether or not Southern Water complied with this S.156 part C requirement (as above). Specifically, Is it believed by DEFRA that this requirement was complied with?

2. I require copies of any/all documents related to S.156 part C (ii) management agreements or such covenants under subsection (6) below as the Secretary of State may determine; Which are held by DEFRA for this property disposal.

3. I require confirmation as to whether nor not DEFRA is the regulator of compliance with S.156 C (as above)

It has been stated by DEFRA that by not complying with the requirements as set out in S.156 C (as above) the appointment holder may have breached the terms of their General Authorisation issued by the Secretary of State and therefore:

4. I require a copy of the terms and conditions of the General Authorisation and any/all information which relates to what constitutes as a breach of the General Authorisation

5. I require copies of any/all DEFRA documents which detail/outline the protocol/procedure for dealing with a) breaches of the terms of the General Authorisation and b) failure of appointment holders to comply with S.156 part C"

6. Defra responded on 24 January 2019 – its reference FOI2018/27390. It stated that it had written to the applicant on 11 December 2018 in

response to a separate request (its reference FOI2018/24459) explaining that it had taken the decision to declare his requests on: the Water Industry Act; consent notices served to water companies since 1991; and water supply works metering data to be manifestly unreasonable under regulation 12(4)(b) of the EIR. Defra confirmed that it would not enter into further correspondence with the applicant about the Water Industry Act.

7. The applicant requested an internal review on 25 January 2019. Defra did not initially provide a review.
8. As a result of the Commissioner's investigation Defra provided the applicant with an internal review on 6 September 2019. It maintained its position that the request is manifestly unreasonable under regulation 12(4)(b). This is because it is a request for information that Defra has previously advised the applicant that it does not hold.

Scope of the case

9. The complainant contacted the Commissioner on 19 February 2019 to complain about the way the applicant's request for information had been handled.
10. The Commissioner's investigation has focussed on whether Defra can categorise the applicant's request as manifestly unreasonable under regulation 12(4)(b) of the EIR.

Reasons for decision

11. Regulation 12(4)(b) of the EIR says that a public authority may refuse to disclose information to the extent that the request for information is 'manifestly unreasonable'. This exception can be used when a request is vexatious or when the cost of complying with a request would be too great. Defra has confirmed that its position is that the applicant's request is manifestly unreasonable on the grounds of vexatiousness.
12. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.

13. With regard to vexatiousness, in line with her published guidance on vexatious requests, the Commissioner considers whether the request itself is manifestly unreasonable rather than the individual submitting it. Sometimes, it will be patently obvious that a request is manifestly unreasonable. In cases where it is not so clear cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually be a matter of objectively judging the evidence of the impact on the authority and weighing this against any evidence about the purpose and value of the request. Public authorities may also take into account the context and history of the request where relevant.
14. In its submission to the Commissioner Defra said that, in its response of 11 December 2018 , it had advised the applicant that it had decided that that a previous request for information was manifestly unreasonable under regulation 12(4)(b) of the EIR. It had explained that the exception could be used if a request could be characterised as vexatious for any of the reasons below:
 - the burden (on the public authority and its staff)
 - the motive (of the requester)
 - the value or serious purpose (of the request), or
 - any harassment or distress (of and to staff).
15. Defra says its records showed that the current request is the fifth information request that the applicant had made to Defra between 6 August and 18 December 2018. (The Commissioner notes the current request was submitted on 22 December 2018.) In addition, there had been a similar number of follow up requests. These all concerned the same subject matter and Defra considered that these repeated requests on the same topic had created an unnecessary burden on the department and its staff. Defra therefore considered that the exception in regulation 12(4)(b) should be applied.
16. Defra considers the applicant's requests constitute a significant burden on the department in terms of both expense and distraction. It had responded to a previous request of 5 September 2018, which related to section 156 of the Water Industry Act, that the information was not held by Defra and was therefore excepted under regulation 12(4)(a). Defra says it had also provided the applicant with a link to the relevant Ofwat guidance. Likewise on 1 November 2018 Defra says it responded to a separate request, which asked about copies of consent notices served to water companies since 1991, under the same regulation and explained that to the best of its knowledge the information was not held by another public authority. Defra says it further responded to another request for water supply works metering data using the same exception and supplying contact details for the Environment Agency.

17. In assessing the level of costs that were incurred in responding to the applicant's requests, Defra says it found it helpful to use the rate of £25 per hour for any staff time involved. This is in line with the rate applicable to the "appropriate limit" under the Freedom of Information Act. Although Defra recognises that the FOIA limit of £600 does not apply to requests that fall under the EIRs, it considered that this figure was still informative for these purposes. Applying that rate to the 60 hours devoted to handling the applicant's requests on the water industry equated to £1500, which Defra says it considers to have been an unreasonable diversion of resources from the provision of public services.
18. Defra has told the Commissioner that, in addition, it considered whether FOI2019/24459 had any serious purpose or value. It says that as it explained in its response to the applicant of 11 December 2018, it had already replied to his previous requests to explain that information that is not held or does not exist cannot be disclosed. Despite this Defra says the applicant continued to make further information requests.
19. The applicant's current request is for: i) whether or not Southern Water complied with a particular section of the Water Industry Act; ii) related management agreements or covenants that Defra may hold; iii) confirmation as to whether Defra is the regulator of section 156 part C of the above Act; iv) the terms and conditions of the Secretary of State's general authorisation and what constitutes a breach of that authorisation; and v) Defra documents that deal with the procedure for dealing with the above breaches.
20. The applicant's correspondence with Defra about previous requests is published on the WhatDoTheyKnow website, and the Commissioner has reviewed the previous requests there.
21. Defra's response FOI2018/17128 in September 2018 was to a six part request for information relating to section 156 of the Water Industry Act – a special consent notice and a general authorisation notice – and information about the disposal of property. Defra advised the applicant that it does not hold the requested information. It explained the searches it had undertaken – using the search terms 'S156', 'general authorisations' and 'disposal of land'. Defra directed the applicant to published Ofwat guidance about General Authorisations.
22. Defra's response FOI2018/21016 in October 2018 was to a five part request for Southern Water water metering data. Defra advised the applicant that it does not hold the requested information and suggested he contact the Environment Agency for this information.

23. Defra's response FOI2018/18851 in November 2018 was to a four part request for information for special consent notices, General Authorisation notices and a specific General Authorisation notices issued to Southern Water. Defra advised the applicant that it does not hold the requested information. It went on to address supplementary queries the applicant had raised with regard to FOI2018/17128.
24. Defra's response FOI2018/24559 in December 2018 was to a three part request for information relating to the disposal of property under the Water Industry Act. As has been discussed, Defra relied on regulation 12(4)(b) with regard to this request and had explained that, as it had informed him in response to his previous requests, information that is not held or does not exist cannot be disclosed.
25. Because the complainant did not go on to submit complaints to her, the Commissioner must assume that the complainant and the applicant accepted that Defra does not hold the information requested in previous requests for information associated with the Water Industry Act and particular notices. Defra went on to rely on regulation 12(4)(b) with regard to the applicant's subsequent request reference FOI2018/24559 as it had advised the applicant it does not hold information on these matters, but it had then received this further request for similar information.
26. The current request is again for information associated with section 156 Compliance and Regulation (Water Industry Act). Having reviewed Defra's current and previous correspondence with the applicant the Commissioner finds that Defra is entitled to rely on regulation 12(4)(b) to refuse to comply with the request that is the subject of this notice. Defra's position is that it has previously advised the applicant, more than once, that it does not hold information of the type that he continues to request associated with section 156 of the Water Industry Act. Continuing to correspond with the applicant on this matter is therefore an unnecessary and disproportionate burden to Defra and the Commissioner is satisfied that the request can be categorised as manifestly unreasonable under regulation 12(4)(b).

Public interest test

Public interest in complying with the request

27. Regulation 12(4)(b) is subject to the public interest as set out at regulation 12(1)(b) of the EIR. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in responding to the request.

28. The Commissioner recognises that compliance and disclosure promotes openness, transparency and accountability. It would provide the complainant and the applicant with information they believe they need to continue to investigate and raise particular concerns she understands they have about discharge from the water supply work adjacent to the complainant's property. There is a public interest in understanding the decisions public authorities make and why, and disclosing information assists with that.
29. The Commissioner acknowledges that Defra has said that the applicant keeps requesting information and answers to questions that have already been addressed or provided; however, both the complainant and the applicant do appear to have genuine concerns. The complainant has directed the Commissioner to news articles that concern Southern Water, although these were published in June 2019, after the applicant submitted his request to Defra.

Public interest in not complying with the request

30. The public interest argument that Defra has provided is relevant to regulation 12(4)(a), which concerns information that is not held. Defra reasonably argues that if information is not held or does not exist, it cannot be disclosed. It therefore considers that examining related public interest arguments against maintaining the exception in regulation 12(4)(a) would be an empty exercise. However, Defra is relying on regulation 12(4)(b) by virtue of vexatiousness in this case; it is not relying on regulation 12(4)(a).

Balance of the public interest

31. Despite the lack of public interest arguments in relation to regulation 12(4)(b), the Commissioner notes that Defra has said that it has already spent a significant amount of time and resource addressing the applicant's complaints, requests and correspondence and to continue to do so will place a disproportionate and unjustified burden on it as a public authority.
32. Ultimately, Defra says that it does not hold the information requested. It therefore follows that there is greater public interest in Defra being able to focus its resources on its core business, rather than to be diverted by continuing to deal with requests for information it has previously advised the applicant that it does not hold.

Right of appeal

33. 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

34. 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.
35. 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
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