

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

Date: 8 September 2020

Public Authority: Environment Agency
Address: Horizon House
Deanery Road
Bristol
BS1 5AH

Decision (including any steps ordered)

1. The complainant has requested information relating to a serious pollution incident which resulted in a large number of fish being killed on the River Sheppey in Somerset in August 2019. The Environment Agency (EA) provided the information requested in one part of the request. However it went on to advise the complainant that its investigation was still ongoing and refused the rest of the request under regulation 12(5)(b) – adverse affect to the course of justice. During the course of the Commissioner's investigation the EA also explained that it now considered the requested information was not held. This was on the basis that the specific details that had been requested were, in effect, the outcomes of the ongoing criminal investigation and therefore these details would not exist until the investigation was complete. It therefore also refused the request under regulation 12(4)(a).
2. The Commissioner's decision is that as the EA's investigation had not resolved the issues to which the outstanding elements of the request relate, the requested information was not held. The EA was entitled to refuse the request under regulation 12(4)(a).
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 13 September 2019 the complainant wrote to the EA concerning a pollution incident on the River Sheppey, Somerset and requested information of the following description:

“Pollution of River Sheppey, Somerset on or about 04/08/2019

Please supply the following information:

1. Location/source of pollution
 2. Pollutant
 3. How the pollution incident occurred
 4. Category of seriousness ascribed to this incident
 5. Action being proposed against those thought responsible for the pollution”
5. On 17 September 2019 the EA responded. It refused to provide the requested information and explained that disclosing the information would hinder the investigation it was conducting. However it did not cite any relevant exception under the EIR.
 6. The complainant requested an internal review on 26 September 2019. The EA sent him the outcome of the internal review on 13 November 2019. It provided the information he had asked for at part 4 of the request, i.e. the category of seriousness of the incident. However it went on to say that it was withholding the rest of the information under the exception provided by regulation 12(5)(b) - adverse affect on the course of justice, the ability of a person to receive a fair trial or the ability of the public authority to conduct an inquiry of a criminal or disciplinary nature.
 7. The EA also apologised for the standard of the initial response and sent the complainant a fresh refusal notice setting out its grounds for refusing the request under regulation 12(5)(b).
 8. During the course of the Commissioner’s investigation the EA also applied a fresh exception to the request. That exception is regulation 12(4)(a) which provides that a public authority may refuse a request if it does not hold the requested information. It wrote to the complainant and advised him of its new position.

Scope of the case

9. The complainant contacted the Commissioner 28 November 2019 to complain about the way his request for information had been handled.

10. The Commissioner considers that the matter to be decided is first whether the EA is entitled to refuse parts 1, 2, 3 and 5 of the request under regulation 12(4)(a) on the basis that it does not hold the information. If the Commissioner concludes that the EA does hold the requested information, she will go on to consider whether that information can be withheld under the exception provided by regulation 12(5)(b) – adverse affect on the course of justice.

Reasons for decision

Regulation 12(4)(a) – information not held

11. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information at the time the request was received.
12. 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 may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority held any information which fell within the scope of the request at the time the request was received.
13. However in this case the issue is not the thoroughness of any searches the EA conducted to locate the information, or whether the EA holds information relating to its investigation into the pollution incident. It has been very clear that it holds a large amount of information that's been generated in the course of the investigation. The question in this case is whether the EA holds information which would answer the very specific points raised by the remaining requests, i.e. does it hold information which identified the location and source of the pollution, does it hold information which identifies what the pollutant was or how the incident occurred and, finally, whether it holds information on the action which it proposes to take against those responsible.
14. In broad terms, the EA argues that at the time the request was received its investigation into the incident was ongoing. It has explained that the investigation is very complex owing to the number of bodies that had consent to discharge, treated, trade effluent into the River. As a consequence it had not yet established the answers to the questions sought in parts 1, 2 and 3 of the request. Without establishing those matters, it was clearly not in a position to determine what action it was proposing to take against whoever it ultimately established as the main culprit. It was therefore not in a position to provide the information requested at part 5. The Commissioner understands that this remained

the position in July 2020 when the EA responded to the Commissioner enquiries.

15. The Commissioner accepts the logic of the EA's argument; that the request seeks specific facts about the pollution incident and if those facts had not been established, the requested information will simply not exist.
16. In support of its position the EA has provided further details about the complexity of its investigation.
17. It explained that the investigation relates to one of the largest water pollution incidents that has occurred in the Wessex Area in which several thousands of fish were killed. Its investigation was complex due to the number of parties that were potentially responsible for pollution.
18. There are a number of industrial operations for both food and drink manufacturers along the River, as well as utility assets managed by Wessex Water, one of which at Shepton Mallet treats industrial effluent before its release into the River. Effluent is produced by these food and drink industrial operations and Wessex Water had granted a number of trade effluent discharge consents within the Shepton Mallet area. These permits specify that the effluent must satisfy certain ecological, chemical, physical and other parameters before it can be discharged into the sewers.
19. It is understood that a number of operators which had the benefit of these consents suffered separate events within their own sites that caused various chemicals and effluent to discharge into the sewer. The sewer carries the trade effluent to a water recycling centre managed by Wessex Water at Shepton Mallet from where it can then be lawfully discharged in to the River by Wessex Water once it has been treated. Wessex Water have their own discharge consent for this operation which is granted by the EA and under which Wessex Water also has to comply with specific conditions.
20. As a consequence the EA was investigating a number of operators which may have been the cause, or contributed to, the pollution incident. This investigation was ongoing at the time of the request and involved the consideration of many variables over the time period within which the incident took place, with a number of potential causes. This means it was a particularly wide investigation with many factors having to be taken into consideration in order to understand what happened and to ensure that the best evidence was collected to indicate who might have been responsible.
21. When responding to the Commissioner's enquiries the EA advised the Commissioner that it had taken a large number of witness statements and was still in the process of evaluating over a thousand pages of

evidence and material which it had collected. It also advised the Commissioner that it was still gathering further evidence. The EA said that owing to the scale of and complexity of the investigation the Agency is yet to firmly establish who the main suspects might be, which substances or pollutants were responsible for the incident and which sites, locations or operations contributed to the incident. As a consequence, the EA explained that it was not yet known what outcome of its investigation would be. It was therefore impossible to answer the questions raised by the requests or provide any of the specific information captured by requests 1, 2 and 3.

22. The EA went on to explain that without a full understanding of the likely suspects, or which site, source or location was responsible, or indeed the pollutants which caused the environmental damage, it was not possible to say what enforcement action it might ultimately decide was appropriate. It concluded by saying that,

"As a matter of policy and lawful decision making with regards to the taking of enforcement action, the Agency will apply its Enforcement and Sanctions Policy once an investigation is complete. Only then will it be able to lawfully determine the most appropriate enforcement response if one is in fact required and against whom."

23. The EA has also provided the Commissioner with an internal document which summarises the progress of the investigation as at October 2019. The Commissioner has considered the details in that document. It is apparent from the summary that the investigation was both complex and wide ranging as claimed by the EA. It is also very clear that the EA would not have been in a position to answer the questions posed by the request at that time. The Commissioner is therefore satisfied that, at the time of the request, the information was not held. The EA was entitled to refuse the request under regulation 12(4)(a).
24. As the Commissioner has found that regulation 12(4)(a) can be relied on she has not gone on to consider the application of regulation 12(5)(b).

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Rob Mechan
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Information Commissioner's Office
Wycliffe House
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