

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

Date: 14 July 2022

Public Authority: United Utilities
Address: Haweswater House
Lingley Mere Business Park
Warrington
WA5 3LP

Decision (including any steps ordered)

1. The complainant has requested information about a sewer connection application associated with a housing development. United Utilities has withheld the information under regulation 12(5)(d) and regulation 13 of the EIR which concern confidentiality of proceedings and personal data respectively.
2. The Commissioner's decision is as follows:
 - United Utilities is entitled to withhold the requested information under regulation 12(5)(d) of the EIR and the public interest favours maintaining this exception.
3. The Commissioner does not require United Utilities to take any corrective steps.

Request and response

4. On 30 August 2021 the complainant requested information in the following terms:

"After much discussion we would like to see the copy of this application under the Freedom Of Information request."

5. On 1 September 2021 United Utilities (UU) responded. It advised that it could not disclose to a third party the section 106 sewer connection application being requested as to do so would breach the Data Protection Act 2018.
6. UU provided an internal review on 25 October 2021. It confirmed that it is withholding the requested information under EIR regulation 12(5)(d) (confidentiality of proceedings) and regulation 13 (personal data).

Scope of the case

7. The complainant contacted the Commissioner on 2 September 2021 to complain about the way their request for information had been handled.
8. The Commissioner's investigation has focussed on whether UU is entitled to withhold the requested information under regulation 12(5)(d) and/or regulation 13 of the EIR, and the balance of the public interest.

Reasons for decision

Regulation 12(5)(d) – confidentiality of proceedings

9. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
10. The Commissioner interprets 'proceedings' in regulation 12(5)(d) as possessing a certain level of formality. For example, legal proceedings, formal meetings at which deliberations take place on matters within a public authority's jurisdiction or where a public authority exercises its statutory decision making powers. In the Commissioner's view proceedings are unlikely to encompass every meeting or procedure carried out by a public authority.
11. In correspondence to the Commissioner the complainant has said that they consider that the developer in question has not completed a section 106 application form and so, in fact, UU does not hold that information. However, UU has provided the Commissioner with a copy of the information it is withholding under regulation 12(5)(d) – it is a completed section 106 application.
12. In its submission to the Commissioner, UU has explained that when it assesses an application under section 106 of the Water Industry Act 1991 (WIA), it has a statutory duty under section 106(4) to approve or refuse the application. UU must assess the mode of construction to

ensure that it satisfies the required standards. It must also ensure that the 'communication' [ie the connection] with the public sewer would not prejudice the sewerage system. As UU has to deliberate on how to exercise this power, it believes this constitutes 'proceedings'.

13. UU has next addressed the basis on which it believes that these proceedings are covered by confidence provided for by law. UU has confirmed that the above proceedings are covered by section 206 of the WIA and that it is unable to disclose information that it has obtained by virtue of a provision of the WIA and which relates to the affairs of any individual or any particular business. The section 106 application is a requirement necessary under the WIA and the application itself contains data that is sensitive to the affairs of the individuals who have completed it. UU has told the Commissioner that it has written twice to the individuals concerned requesting consent to disclose the application and has set deadlines for a response. However, it has not received a response from the individuals, confirming (or otherwise) that they consent to UU disclosing the section 106 application that they submitted.
14. UU has finally discussed how disclosing the withheld information would adversely affect the confidentiality of the proceedings. UU has referred to the Attorney General v Guardian Newspapers Limited HL case, in which it was stated that "...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."
15. UU says that disclosing the requested information would breach this expectation of confidentiality. It would increase the risk of complainants and third parties withholding or curtailing essential information to protect them from exposure in future EIR requests. UU considers it is also likely that the prospect that such information could be disclosed would prevent or dissuade applicants from engaging with the section 106 process. This would diminish the strong element of accountability and scrutiny which is currently in place. Any actual or perceived impact on a sewerage undertaker's ability to receive and deal with information in confidence may therefore adversely affect sewerage undertakers' ability to process applications in the future. This would be to the detriment of the general public. Not engaging with the section 106 process could increase the risk of illegal sewer connections, which brings a significant risk of environmental harm.

The Commissioner's conclusion

16. The Commissioner accepts that there is a sufficient degree of formality to the process of assessing an application to connect to the public sewer network under section 106 of the WIA such that that process can be

considered to be a United Utilities' 'proceeding' for the purposes of regulation 12(5)(d).

17. The Commissioner has next considered whether the confidentiality of the proceedings in question has to be protected by law. He has reviewed section 206 of the WIA¹, which concerns restriction on disclosure of information. As UU has noted, section 206(1) states that no information about any particular business which has been obtained by virtue of any of the provisions of the WIA and which relates to the affairs of any individual or to any particular business shall be disclosed during the lifetime of the individual, or so long as the business continues to be carried on.
18. None of the provisions elsewhere under section 206 provide a gateway for disclosing the information under the EIR. However, regulation 5(6) of the EIR states that

“any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply”.

In that sense, the EIR take precedence over other legislation. So a public authority must consider whether information can be released under EIR, even if that information would usually be exempt from disclosure under other legislation; section 206(1) of the WIA in this case.

19. However, the Commissioner recognises that those that make section 106 applications do so with an expectation that the information they provide as part of those proceedings will be treated in confidence – an expectation that would be reinforced by the prohibition on disclosure. Were that prohibition to be routinely overridden, it would undermine the trust applicants have in the process and hence the confidentiality of the proceedings.
20. In this this case, the Commissioner is satisfied that disclosure would adversely affect the confidentiality of one of UU's proceedings - confidentiality provided under section 206(1) of the WIA. He therefore finds that regulation 12(5)(d) is engaged. But, as noted, the EIR exceptions are subject to the public interest test and so the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

¹ <https://www.legislation.gov.uk/ukpga/1991/56/section/206>

21. The Commissioner has noted that in their complaint to him, the complainant has said that the development with which this section 106 application is associated is “also with Local Council and Environment agency” and so it is in the public domain. It may be the case that certain information about the planning application for the development in question is (or was) in the public domain. However, the Commissioner understands that the specific section 106 application was not in the public domain at the time of the request – if it were, the complainant would not have had to request it from UU under the EIR.

Public interest test

Public interest in disclosing the information

22. In its submission to the Commissioner, UU has acknowledged the following:
- There is a public interest in the public being aware of decision making powers relating to environmental issues.
 - There is public interest in being transparent about the way sewerage undertakers make statutory decisions.
 - There is public interest in being open about how sewerage undertakers generally, and in relation to this case, carry out their functions.
 - Disclosure may increase the public’s understanding and trust in sewerage undertakers’ decision making processes, both in the specifics of this case and generally.
23. From their complaint to the Commissioner, the complainant appears to have concerns about the development with which the section 106 application is associated; concerns about rainwater drainage in particular. Disclosing the section 106 application could lessen that concern.

Public interest in maintaining the exception

24. In its submission, UU has noted that disclosing the information would breach the expectation of confidentiality provided under section 206(1) of the WIA. This would increase the risk of complainants and third parties withholding or limiting essential information to protect them from exposure through future EIR requests.
25. UU considers it is also likely that the prospect that such information could be disclosed would prevent or dissuade applicants from engaging with the section 106 process. This would diminish the strong element of accountability and scrutiny which is currently in place. Any actual or

perceived impact upon a sewerage undertaker's ability to receive and deal with information in confidence may therefore adversely affect those undertakers' ability to process applications in the future. This would be to the detriment of the general public as not engaging with the section 106 process could increase the risk of illegal sewer connections, which brings a significant risk of environmental harm.

26. To summarise, UU argues that the public interest favours maintaining the exception for the following reasons:

- Third parties would not be dissuaded from making section 106 applications, as they would be confident their applications would remain confidential. Those third parties providing information to sewerage undertakers would therefore be able to be frank and open.
- This would give effect to the reasonable expectation of confidentiality on the part of those submitting information to sewerage undertakers. In turn, this would facilitate those undertakers to discharge their functions effectively.

Balance of the public interest

27. UU has confirmed that the function of the WIA is to regulate the water and wastewater network. The purpose of the section 106 agreement is to ensure that connections to the public sewer are of the correct standard. An undertaker can refuse to permit a section 106 agreement if the mode of construction or condition of the sewer or drain do not satisfy the standards reasonably required, or if making the connection would be prejudicial to the undertaker's sewerage system. Therefore the section 106 application needs to include all relevant information for the undertaker to make an informed decision. Undermining the confidentiality of the proceedings risks dissuading third parties from making section 106 applications and increases the risk of illegal or inappropriate sewer connections. This brings a significant risk of environmental harm which would be to the detriment of the general public. Section 106 applications need to be accurate and discussions need to be frank and open in order to ensure that the connections are to an appropriate standard. UU has confirmed that this is why it considers that, on balance, the public interest in maintaining the exception outweighs that in disclosing the withheld information.

28. There is a general public interest in UU being open and transparent. UU has directed the Commissioner to its website where information about section 106 of the WIA and general information about the decision making process regarding applications for connections to public sewers is published. To a satisfactory degree, the Commissioner considers that that general public interest is met through the published information.

29. The complainant has not presented a compelling public interest for the disclosure of the specific information in this case – their position appears to be that they consider that UU does not hold the information. While they may have concerns about the development, there is a route through which those concerns and objections can (or could) be submitted and considered; namely through the planning application process.
30. The Commissioner has taken into account the existence of another legal barrier in this case – section 206(1) of the WIA - as it suggests there is a strong public interest in maintaining the exception. Having considered all the circumstances, he considers that, in this case, there is greater public interest in withholding the requested information and maintaining the confidentiality provided by the WIA. This is so that third parties continue to engage in the section 106 process and the risk of illegal connections to the public sewer network, with their accompanying risk to public health and the environment, is reduced.
31. The Commissioner has decided that UU is entitled to withhold the requested information under regulation 12(5)(d) of the EIR and that the public interest favours maintaining the exception. As such, it has not been necessary to consider whether any of the withheld information is personal data that engages the exception under regulation 13.

Right of appeal

32. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Cressida Woodall
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