

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

Decision notice

Date: 11 July 2023

Public Authority: Department for Environment Food & Rural Affairs (Defra)

Address: Seacole Building
4th Floor
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested Defra to disclose information relating to the amount of waste discharged into the sea and watercourses in and around the UK, the fines issued year on year and the profit and bonuses of water companies. Defra confirmed that it does not hold the requested information and therefore wished to rely on regulation 12(4)(a) of the EIR. Where it could, it directed the complainant to the relevant public authority or source of the requested information.
2. The Commissioner's decision is that on the balance of probabilities Defra does not hold the requested information. It is therefore entitled to rely on regulation 12(4)(a) of the EIR.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On, 5 January 2023, the complainant requested Defra to provide the following information:
 - “1. the amounts of waste that has been dumped into the seas/watercourses in and around the UK, on a year by year basis and a site by site basis with volume totals across the range broken down into region and cross referenced by company responsible
 2. the amount that the water companies have made in profit again year on year since privatization
 3. the amount Ofwat, the EA and Defra agencies have issued as fines year on year since privatization, with a total of incidents in total and the amount per incidence and the fine per incidence
 4. the amount the profits have been made and the amount of bonuses that have been allowed during the time since privatization Ofwat does
 5. the amount that has been given back or allowed back or funded/granted to the water companies through any type of grant, funding or any scheme from the government
 6. the amount of total waste that has been allowed to run into the seas/watercourses - year on year and totals for region and the UK as a whole with direct numbers towards individual companies
 7. what amount of money has been charged year on year for the treatment of waste
 8. what waste has monitored and what have they left unmonitored, and having this laid out against waste that has gone untreated
 9. how many discharges onto beaches have occurred, and what is the economic damage to the UK from this and to tourism and the other bodies that use
 - 10.[section redacted].”
5. Defra responded on 1 February 2023. For part 1 it confirmed that the information is in the public domain. For parts 2 to 10 Defra advised the complainant that it does not hold the requested information.
6. The complainant requested an internal review on 23 February 2023.
7. Defra carried out an internal review and notified the complainant of its findings on 5 April 2023. It upheld its original position and confirmed

that regulation 12(4)(a) (information is not held at the time of the request) of the EIR applies.

Scope of the case

8. The complainant contacted the Commissioner on 5 April 2023 to complain about the way their request for information had been handled. They believe Defra should hold the requested information. They said that Defra is “managing the schemes in relation to Ofwat management and implementation in relation to water companies and claim to have no information in regarding anything to do with water companies and their record of horrific pollution.” They said that Defra has direct oversight of the Environment Agency (EA) who collate and monitor the companies and the pollution and Defra is directly managing the schemes for Ofwat, so they must hold information relevant to their request.
9. The Commissioner considers the scope of his investigation to be to determine whether or not, on the balance of probabilities, Defra holds any recorded information falling within the scope of the request and therefore whether regulation 12(4)(a) of the EIR applies.

Reasons for decision

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

10. A public authority is entitled to refuse a request for information if it determines that it does not hold the requested information at the time of the request.
11. The Commissioner asked Defra to go through the request again and explain why it does not hold any recorded information, particularly in light of the specific comments the complainant has made. He asked it to explain what searches it has carried out in order to reach this decision.
12. Defra explained that the responsibility for the policy regarding regulation of the Water Industry sits between the Water Services and Water Quality directorates within Defra and searches were conducted of the relevant file store system along with using the team’s knowledge of the relevant responsibilities of the regulators.
13. It established that Defra does not routinely collect or receive the regulatory data that the complainant refers to in their request. Their queries largely sit within the delegated responsibility of the regulators of the water industry, in this case the EA and Ofwat.

14. Defra stated that Ofwat is functionally independent of government and does not report to Defra as it is legally accountable to Parliament as per the Water Industry Act 1991. It said that it has explained to the complainant where the information they seek either falls within the remit of a regulator or is a matter of public record and have established which organisation may be responsible to get the information they seek.
15. Defra went on to say that while the EA is an Arm's Length Body of Defra, its regulatory functions are rightly independent to ensure fair enforcement proceedings free from outside influence. The EA is listed in schedule 1 of FOIA as a separate public authority to Defra. It therefore has its own FOIA function and its records are entirely separate to Defra's. It has therefore established that any data that falls within the regulatory remit of the EA should be obtained by sending a request directly to them.
16. It said that it has reasonably considered who holds the data, established that this is not data that falls within Defra's functions, and given the complainant a clear answer to each element of their request where they may be able to get that data.
17. In terms of sewage discharges, it is the responsibility of the water companies to monitor that and report to the EA, the EA then publish data annually. The water industry is privatised, Defra does not therefore receive information on individual companies' profits or bonuses (profits are published by the companies themselves). Fines fall within the remit of the EA and Ofwat so Defra does not hold this information. Defra confirmed that it does not issue or collect fines.
18. With regards to question 5 of the request Defra confirmed that government sets the strategic direction for the water industry but does not 'fund' water companies directly. Water companies raise capital from their customers and through debt and equity, which can then be invested into meeting the water companies' key obligations, including providing water and sewerage services to the public and investing in enhanced infrastructure.
19. The Commissioner is satisfied that on the balance of probabilities Defra does not hold the requested information and is therefore entitled to rely on regulation 12(4)(a) of the EIR. It has explained the separate functions of Defra, the water companies, Ofwat and the EA and how each have their own FOIA/EIR functions. It has also explained why it does not hold the requested information and directed the complainant to the bodies likely to hold it. Defra has also carried out all relevant searches to ensure that this is the case.

20. The Commissioner has no reason to doubt the validity of Defra's position in this case and has no evidence to the contrary. He is therefore satisfied that Defra is entitled to rely on regulation 12(4)(a) of the EIR.
21. Regulation 12(4)(a) is in theory subject to the public interest test. However, the Commissioner considers this is a pointless exercise when it is apparent that the public authority does not hold the requested information.

Right of appeal

22. 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

23. 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.
24. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF