

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

**Date:** 18 September 2023

**Public Authority:** South West Water  
**Address:** Peninsula House  
Rydon Lane  
Exeter  
EX2 7HR

**Decision (including any steps ordered)**

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1. The complainant has requested the start and finish time regarding a discharge (combined sewer overflow) on a specific date and any other spills that occurred at the same time in the Exmouth area. South West Water (SWW) refused the request, citing regulation 12(5)(b)(course of justice) of the EIR.
2. The Commissioner's decision is that SWW has correctly relied on regulation 12(5)(b) of the EIR to withhold the information and the balance of the public interest favours maintaining the exception. However, SWW breached regulations 11 and 14 of the EIR.
3. The Commissioner does not require further steps.

**Request and response**

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4. On 15 March 2023 the complainant wrote to SWW and requested information in the following terms:

"Thanks for the offer to raise an EIR on the discharge 8 March from Maer Road CSO [combined sewer overflow] permit 200126. Please

can you advise the start and finish time? Could you also advise any other CSO that triggered a spill at this time in the Exmouth area?"

5. SWW responded on 26 April 2023 and confirmed that the information was held but that it was being withheld under regulation 12(5)(b) of the EIR.
6. On 25 May 2023 the complainant made a request for an internal review. This was followed by a chaser on 21 July 2023.
7. SWW provided an internal review on 25 July 2023 in which it maintained its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 22 July 2023 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of this case is SWW's application of regulation 12(5)(b) of the EIR to the requested information.

### **Reasons for decision**

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#### **Is the requested information environmental?**

10. Regulation 2(1) of the EIR defines environmental information as being information on:
  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
11. As it is information relating to the management of wastewater, the Commissioner believes that the requested information is information on factors affecting the elements of the environment and falls under the EIR.

**Regulation 12(5)(b) – course of justice**

12. Regulation 12(5)(b) of the EIR allows a public authority to withhold information the disclosure of which would adversely affect the course of justice or the ability of a public authority to conduct a formal inquiry.
13. The Commissioner notes that there are ongoing inquiries, by both the water regulator Ofwat and the Environment Agency into the performance of water companies. In previous decision notices (see paragraph 26), he has accepted that disclosure of data relevant to those inquiries would adversely affect their ability to reach a swift, thorough and fair conclusion.
14. The complainant contended that -
- “1. SWW has not reached the required threshold that disclosure would adversely affect the course of justice
  - 2. The EIR was on assets that are not in the scope of the ongoing investigation
  - 3. SWW is routinely using this exemption and thereby avoiding the core principle presumption in favour of disclosure
  - 4. Shortly after refusing this EIR SWW released a new web service which includes this information so proving that disclosure does not have an adverse affect”
15. The complainant later added that the requested information “is now provided through SWW’s WaterFit website which gives real-time reports on the start and stop times of the storm overflows associated with Exmouth” and provided the link [WaterFit Live Exmouth Beach \(southwestwater.co.uk\)](https://www.southwestwater.co.uk/WaterFit-Live-Exmouth-Beach) that “shows the CSOs at Exmouth”. Clicking on

any CSO "will show the last spill start and stop time. As such it is clear there is no detriment to SWW from releasing this information contrary to their claim in refusing to disclose".

16. SWW explained to the Commissioner that it had -

"received a number of requests for 'spill data' under the Environmental Information Regulations 2004 ('EIR'), and SWW has adopted a consistent position on the release of spill data".

SWW has applied the same rationale "irrespective of the breadth of the requests being made" and relied on regulation 12(5)(b) of the EIR. It describes its approach to these requests as "consistent" regardless of whether the data set requested is large or small where the "request is for raw, unvalidated spill data". However, most of the refusals have related to wider data sets. It asked the Commissioner to note that -

"annual data on the operation of CSOs is reported to the Environment Agency on an annual basis, in accordance with the Environment Agency's guidance on reporting methodology and following a validation process, and made public. SWW also provides near-real time data on CSO operation in bathing water areas within its WaterFit Live website".

17. SWW states that the request -

"is for operational data for a particular period and asset that is in 'raw' form, not subject to validation. It is this (raw, not validated) spill data that has been the subject of a number of previous decisions of the ICO..."

18. SWW provided detailed argument to the Commissioner, explaining that

"in IC-163737-D3Q3, the Commissioner explored the refusal of a request for specific discharge data from an individual sewage treatment works operated by Severn Trent Plc and discharges into the River Severn. The ICO had agreed with the public authority that the information should not be released."

SWW suggests that the type of information being requested here "whilst the Investigations are ongoing, would cause an adverse effect on the course of the investigations and any criminal or regulatory proceedings that follow the conclusion of the Investigations, if any."

19. SWW also cited IC-206791-F9G9 but acknowledged that it -

“related to a request of SWW for information for all the data held on the quantity, frequency and type of discharges into the sea that SWW has made in the last 10 years. This is a far more wide-reaching request...”

20. The Commissioner asked SWW in his investigation letter for more detailed information concerning the investigations being conducted by Ofwat and the Environment Agency. SWW provided links to information available on both organisations' websites<sup>1</sup>. SWW emphasised that they characterised these investigations as “major, widespread and ongoing”. SWW quotes the following from Ofwat:

“As part of our investigation, we have therefore gathered focused information from companies about how they manage FFT levels at their wastewater treatment works. This has enabled us to understand the frequency and likely causes of treatment works failing to meet the required FFT level before they discharge untreated flows, either into storm tanks and/or to the environment.”

21. The Environment Agency is “conducting its largest ever criminal investigation to assess whether there has been widespread and serious non-compliance of environmental permits at wastewater treatment works. All water and sewerage companies operating in England are under investigation by the Environment Agency.”

22. SWW states that -

“The nature of the information requested – the raw, unvalidated CSO operational data – falls squarely within the scope of the Investigations and is indeed data which is being scrutinised by both Ofwat and the Environment Agency.”

23. It believes that “there is a clear causal relationship between the disclosure of the information and the adverse effect...” SWW argues that “it cannot be correct” that whilst the detailed investigations “to understand the data and what conclusions can (and cannot) be drawn from the data, the same raw data is released into the public domain...” where it concludes (based on experience) that third parties “will publicise their own conclusions and seek to drive a particular narrative through social media and the press”.

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<sup>1</sup> [Environment Agency investigation into sewage treatment works - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/environment-agency-investigation-into-sewage-treatment-works)  
[Investigation into sewage treatment works - Ofwat](https://www.ofwat.gov.uk/news-and-press/news/2018/09/2018-09-11-environment-agency-investigation-into-sewage-treatment-works/)

24. SWW highlighted previous decisions of the Commissioner in [IC-233573-N8Y8](#) and [IC-230605-Q2W0](#) where "the Commissioner accepted that the disclosure of data relevant to the Investigations would adversely affect their ability to reach a swift, thorough and fair conclusion".
25. It remains of the view that disclosing the information would:
- harm SWW's ability to defend itself;
  - remove the Environment Agency and Ofwat's ability to adduce evidence at a time of their choosing;
  - adversely affect the Environment Agency and Ofwat's ability to reach a swift, thorough and fair conclusion;
  - would expose SWW to the risk of any undue influence from outside sources caused by releasing relevant information into the public domain; and
  - adversely impact the Environment Agency and Ofwat's ability to make their own assessment following their investigations.
26. The Commissioner accepts that the exception is engaged for the same reasons as set out in his previous decision notices: [IC-233573-N8Y8](#), [IC-230605-Q2W0](#), [IC-191914-H6X8](#), [IC-218612-B1J7](#), [IC-206971-F9G9](#), [IC-163737-D3Q3](#), [IC-244679-N2X3](#) and [IC-247696-K0K4](#).

### **Public interest test**

27. As set out in the decision notices listed in the previous paragraph, the Commissioner recognises that there is a considerable public interest in the disclosure of information relating to sewage spills.
28. SWW pointed to the Commissioner's decision in [IC-233573-N8Y8](#) as precedent for the public interest favouring non-disclosure. SWW explained to the Commissioner that it will commit to reviewing its position after the investigations have been completed and intends to seek to "revert to our previous position of releasing this type of information".
29. The Commissioner understands the complainant's arguments regarding the information they sought. However, for the same reasons set out in the decision notices listed in paragraph 26 above, the Commissioner considers that the balance of the public interest favours maintaining the exception.
30. The Commissioner's decision has been informed by the presumption in favour of disclosure but he does not consider that this affects the public interest balance that has been struck.

## **Procedural matters**

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31. The complainant made a request for information to SWW on 15 March 2023 but SWW failed to respond until 26 April 2023. Regulation 14 of the EIR requires a public authority wishing to withhold information to issue a refusal notice within 20 working days. SWW did not issue its refusal notice within 20 working days and therefore breached regulation 14 of the EIR.
32. SWW was also late providing an internal review, the review having been requested on 25 May 2023 and provided on 25 July 2023. Regulation 11 of the EIR requires a public authority to complete a reconsideration (internal review) of its response within 40 working days of a review request. The public authority failed to inform the complainant of the outcome of its internal review within 40 working days and consequently breached regulation 11 of the EIR.

## Right of appeal

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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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**