

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

Date: 18 January 2024

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

Decision (including any steps ordered)

1. The complainant has requested information and reports that have been produced since April 2022 regarding the Rivers Surveillance Network (RSN) water quality monitoring scheme from the Environment Agency (EA). The EA provided some information but refused other information, citing regulations 12(4)(e) (internal communications), 12(4)(d) (material in the course of completion) and 12(4)(c) (requests formulated in too general a manner) of the EIR.
2. The Commissioner's decision is that the EA has appropriately cited regulation 12(4)(e) of the EIR and that the public interest lies in maintaining the exception regarding documents 1-4. However, he has decided that the public interest favours disclosing documents 5-10. The Commissioner has also found that the EA breached its obligations under regulations 5(2) and 11(4) of the EIR.
3. The Commissioner requires the EA to take the following steps to ensure compliance with the legislation.
 - Disclose documents 5-10, minus any personal data.

The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 20 April 2023, the complainant wrote to the EA and requested information in the following terms:

“I would be very grateful if you could provide me with all the information and reports that have been produced since April 2022 regarding the Rivers Surveillance Network water quality monitoring scheme. It would be particularly helpful if this information could include full technical details of how the data that is generated by the scheme will be processed and what environmental benefits will be achieved.”

5. The EA provided some information on 25 May 2023 but refused to provide other information, citing regulations 12(4)(c), 12(4)(d) and 12(4)(e) of the EIR.
6. The complainant asked for an internal review on 6 July 2023 in which they clarified what had been meant by “all the information”. This was apparently treated as a new request even though the EA has accepted that the original request was clear (see paragraph 9 below).
7. On 15 September 2023 the EA provided an internal review which stated that it had not complied with its duty to respond within the statutory timeframes. The EA maintained its position of withholding the requested information, providing further argument regarding its citing of regulations 12(4)(d) and (e) of the EIR but not referring to regulation 12(4)(c).

Scope of the case

8. The complainant contacted the Commissioner on 30 October 2023 to complain about the way their request for information had been handled.
9. After the Commissioner began his investigation, the EA confirmed that it had cited regulation 12(4)(c) of the EIR incorrectly as the request was “clear and not open to more than one interpretation”.

10. The Commissioner considers that the scope of this case is to consider the EA's citing of regulation 12(4)(e) as this covers all the withheld information. Depending on his findings, he may go on to look at the EA's citing of regulation 12(4)(d) of the EIR to some of the information.

Reasons for decision

Is the requested information environmental?

11. 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);
12. As the request is information relating to the monitoring of water quality, the Commissioner believes that it is likely to fall under regulations 2(1)(a) and 2(1)(c) above. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(4)(e) - internal communications

13. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications' and includes any information someone intends to communicate to others. An internal communication is a communication that stays within one public authority. "The exception is drafted to cover all internal communications, not just those actually reflecting internal thinking."¹. Once a communication has been sent to someone outside the authority, it is generally no longer captured under this exception. There is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be engaged.

14. The EA has cited this exception regarding all the withheld information – 10 documents in total - and has provided the Commissioner with that information.

15. The EA states that -

"All the documents are internal communications and have not been shared with any third parties including any other public bodies. The reports were not produced with the intention for sharing with third parties or for publication..."

These are "internal discussions" and a "live matter as decisions on the methodology are ongoing as are those on the future of the programme [RSN monitoring]".

16. The EA argues the following:

"The documents do not demonstrate meticulous thinking, robustness of thought and a scientific approach within a research and development programme, the nature of which is highly uncertain at the present time...They reflect internal discussions which were had in a 'safe space' and reflect some positions which are no longer relevant and could be misleading."

17. It begins by itemising four draft documents that the EA contends are internal communications:

- 1) River Surveillance Network Year 1 Data Exploration report;
- 2) The National Health of our Rivers presentation;

¹ [Regulation 12\(4\)\(e\) – internal communications | ICO](#)

- 3) RSN Portal Proof of Concept Paper;
 - 4) Custodian Paper.
18. Document one was created by an EA employee. It is described as a "handover document that represents the work programme leads (sic) thoughts and summary of the year, ready for the new post to be filled". It is marked as an "internal communication", considered to be a draft and therefore "subject to change". The EA states that the information "was created 'in a private thinking space'" in order to assist the new person in the role regarding the "ongoing debate on the RSN monitoring programme". It was not intended to be shared with third parties or shared widely internally.
19. The EA stresses that it is the lead's thoughts on the RSN project and "sensitive as it highlights the internal deliberations and differences of opinions (as shown by the comments on the document included by other EA officers)". The discussions are on-going and need resolution "before a final decision is made regarding the methodology to be used for the RSN project". It points to the 'track changes' and comments by EA staff that reflect "internal thinking discussing different options..." and that it is a "live matter" as decisions have yet to be made. Its view is that disclosure would -
- "harm the 'safe space' which is required by the EA to debate the live issues and make final decisions regarding the programme. This document does not set out the EA's position on the matter as the work is ongoing."
20. Document 2 was withheld because it contains information from the withheld presentations (explained later in this decision). It also contains information from the River Surveillance Network Year 1 Exploration document. This document "contains more detailed information (such as interactive maps) about ongoing discussions about the RSN methodology and the options/recommendations to improve the monitoring". The EA describes the content as "sensitive" as it has not yet decided on its approach and contains "operational delivery challenges which we are addressing". It is incomplete because it only has year 1 data. It contains a story map that is "continuously updated" and is therefore live. The EA stresses that it is an internal document and documents "internal thinking" and evidences the comments made by its officers to support this view. It was not created with the purpose of sharing it outside the EA.
21. Document 3 is the RSN Portal Proof of Concept Paper. The EA describes this information as "an internal communication produced for capturing work completed in Year 1 of the NCEA programme". It links to the National Health of our Rivers presentation. It is not standalone and

"forms part of the presentation and the same arguments apply for non-disclosure".

22. Document 4 is "The Custodian Paper" and is an internal communication, in draft, and not finalised: "This paper was put together to be taken to one of our governance groups for discussion." It "was drafted but never relied (sic) as was not completed" and "never presented to the governance group and remains unfinished". The Commissioner notes that this information postdates the date of the request but appears to have gone through several versions.

23. Both documents 3 and 4 are also being withheld because -

"...they are internal communications drafted by the authors but were never subject to review and have not been through our formal technical assurance process as remained unfinished documents and therefore are not being relied upon in relation to the ongoing discussions".

The EA argues that:

"Disclosure would prejudice ongoing discussions as would put into the public domain information which is not being considered by the EA in relation to the ongoing discussions surrounding the RSN programme."

24. Additionally, the EA is also "withholding six presentations regarding WP2 year 1 Progression". These are "confidential internal communications relating to the ongoing discussions on the RSN methodology and issues which the EA are still considering before making a final decision". They were delivered to "a select number of EA employees" because of "the sensitive nature of the work and ongoing discussions on the issue of RSN monitoring". The EA argues that they are "outdated" and that "conversations have moved on significantly". Its view is that disclosure "would prejudice the ongoing discussions and would put into the public domain potentially misleading information". The EA is -

"in the midst of a research and development programme where we are still defining user requirements, developing how we will analyse and report data and specifically, how the data will be used. All of which is completely normal for a science programme which is producing new data".

25. It is "trying to ascertain the best methodology, highlighting issues and possible solutions". Release of the withheld information could "harm the 'safe space' the EA requires to continue to have discussions on the outstanding issues relating to the programme". The EA needs this space

“for frank and open exchange of views to consider, evaluate, and potentially reject, inappropriate options with regards” to its RSN monitoring programme. It argues that a chilling effect would occur if the information is disclosed and the EA is “subject to scrutiny or releasing incomplete work” whilst matters remain ‘live’. The EA stresses the issues facing the RSN monitoring programme and “what needs to be done to ensure that it results in representing an accurate picture”.

26. The EA supported its argument that this information should not be disclosed by stating that it had disclosed information (see footnote, page 11) falling within scope in its initial response on 25 May 2023 and had not “applied a blanket refusal”.
27. The complainant has explained to the Commissioner that the EA reviewed its monitoring programme over a 5 year period which cost over a million pounds and then introduced the Rivers Surveillance Network. They state that, “Despite many requests, the Agency has never produced any detailed information as to why this system was selected, the cost benefit and what other options were considered.” The complainant argues that the EA has said that -

“the system will not provide information on the worst conditions that occur in rivers, and has agreed that the system will demonstrate that rivers are of better quality than existing information shows”.

28. The complainant suggests that,

“If the relevant documents are still incomplete, it would be a simple matter to avoid any misunderstandings or false conclusions by providing an explanation that the documents are now finalised and are still in the course of completion.”

They dispute that these are now “early thought processes” as six months have passed. They dispute that there could be harm to the relationships between the EA and stakeholders as had been stated because the request -

“...was simply for information relating to the Rivers Surveillance Network for reassurance that the monitoring is cost effective and will provide useful and relevant data. Any actions taken by the Agency to ensure this are hardly likely to cause harm to relationships with Stakeholders”.

29. The Commissioner accepts that the withheld information falls within the definition of internal communications as the information was never intended for an external audience and therefore, he finds that the exception is engaged.

30. He will now go on to consider whether it is in the public interest to release this information or continue to withhold it.

Public interest test

Arguments in favour of disclosing the information

31. The complainant highlights "The recent problems" that are "associated with discharges of sewage to rivers has caused great concern to the public". They explain that -

"One of the reasons why this situation has developed, over many years, is the failure of the Agency monitoring system to detect the effect of these discharges on river water quality".

The complainant considers that the failure is -

"largely due to the way in which monitoring systems are designed to sample water quality at random times, and do not target known situations where pollution occurs. There might only be a 1 on 50 chance of monitoring occurring during a significant rainfall event, so if monitoring is not targeted to the times when problems are likely to occur, it is not surprising that problems are not detected".

32. They state that,

"The RSN System does not target the times and places where pollution occurs, so it is very much in the public interest to ask the Agency for detailed technical information regarding how effective the monitoring systems are. One of the reasons why the RSN is an inappropriate and ineffective monitoring system is that the Agency introduced the scheme without carrying out proper consultation with external interested parties."

The complainant believes that "The present situation appears to repeat this mistake" as the EA "is withholding information and wished to make strategic decisions in private prior to any public involvement or external comment". They argue that "There is a difference between thinking in private and making strategic decisions in private." The complainant suggests that consulting with the public "would be reasonable" considering the "public concern over the condition of the Nation's rivers". They also point to the cost of £2.5 million per year to carry out the monitoring and the need to make changes quickly in order to avoid wasting public money.

33. The complainant stresses that they "have been attempting to engage with the EA, in varying degrees of success since 2014 on this issue" and

they dispute that “the age of these documents has not been duly accounted for in the public interest test” whilst also arguing from the Commissioner’s guidance that a matter being under “active consideration”²...does not always favour maintaining” an exception, “regardless of the sensitivity of the information”.

34. The EA states that it is “an open and transparent organisation and takes account of the general presumption in favour of disclosure of environmental information under the EIR”. It contends that it “would only withhold information if [it] is sure that disclosure would cause substantial harm”.
35. It recognises that “there is a genuine public interest in disclosure of environmental information as the public should be able to hold public authorities to account with regard to how decisions are made...” The EA has published raw data on the RSN on its open data portal. However, the EA stresses that the information relating to the RSN programme is not in the public domain. Release of the information will not contribute to the public debate as the “internal discussions...are ongoing and a final position on the future of the RSN is yet to be taken”.

Arguments in favour of maintaining the exception

36. The EA describes the harm that would occur because the information “relates to ongoing discussions where options are still being discussed and debated” and where disclosure “at this stage into the public domain would be misleading” as the viable options “are yet to be made”.
37. The EA’s view is that staff need a “...‘safe space’ in which they can discuss and evaluate options and make decisions relating to sensitive matters”. It considers that there is,

“a strong public interest in public authorities being able to carry out their regulatory functions without these processes being circumvented or prejudiced by early release of information”.
38. These documents were not “created for the purpose of sharing with any third parties”. It argues that this would be “harmful and would impact upon” EA’s ability to carry out its business – “in this specific case relating to the future of the RSN monitoring programme”. Disclosure could create a chilling effect on its staff and “they may become reluctant to express themselves openly” if “public and media scrutiny” were applied whilst matters are ‘live’. This would prejudice “the effective

² [The public interest test | ICO](#)

running of the EA or other public bodies" as it "would harm our efforts in trying to achieve the best for the environment through the RSN". Premature external comment might also make staff less willing to discuss risks that they believe may cause public alarm making public affairs less transparent which, it argues, is not in the public interest.

39. The EA contends that there is a public interest in ensuring that disclosed information "is factually correct and not likely to be misleading to the public". If information is released into the public domain about 'live' matters that are "yet to be agreed and approved" it would -

"distract public debate away from the substantive issue. Instead, any debate could focus on secondary issues such as any deficiencies with the data rather than focussing on how the problems could be fixed".

This would mean the expenditure of time and resources on "defending deficiencies which the EA are aware of rather than exploring how we get reliable data and information from the RSN programme".

40. The EA intends to share information "once decisions have been made regarding how to make the data more reliable and accurate". It still has to "ensure that the tools implemented are capable of providing the data sought and at this present time there is not enough confidence or certainty that they do". The EA has considered the Commissioner's guidance on the "'disclosure of information which may be misleading information' not carrying much weight and such disclosure can usually be put into context". However, "in this case this factor weighs heavily in favour of non-disclosure as much of the information is outdated as discussions have moved on considerably...the withheld documents are detailed, and things have changed significantly since they were produced." The EA argues that it is not in the public interest to put the information prematurely into the public domain.

Balance of the public interest

41. The Commissioner notes that regulation 12(2) requires a presumption in favour of disclosure. Additionally, a public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
42. The Commissioner has taken into account the presumption in favour of disclosure and the complainant's arguments for disclosure and recognises the strong public interest in the monitoring of the river network, the quality of the water and the cost implications. He has therefore decided that documents 5-10 should be disclosed as they will contribute to the public interest in EA's awareness of limitations in the

RSN in the context of a monitoring scheme taking place over a protracted period of time. There is no other exception that needs to be considered for these documents as none was cited by the EA.

43. Regarding documents 1-4 the Commissioner has concluded that the public interest in this instance lies in protecting the EA's "need for a safe space for private thinking". He is generally not convinced by arguments that information could be misleading or may be inaccurate because he considers that context or explanation can be provided when information is disclosed. However, he does not accept that this particular information, some of it in draft and not finalised, containing emendations and comment, some of it never presented and subject to change as a result of internal "private thinking" should be disclosed. He considered the release of document 3 but, as it is not a standalone document and is linked to document 2 which he has decided was appropriately withheld, the balance falls in favour of non-disclosure. Document 4 appears to be out of scope of the request as it postdates it. The fact that it is also unfinished and was never presented or relied on tips the balance in favour of maintaining the exception.
44. He has made this decision having also looked at the information that the EA has disclosed³ which includes some technical detail and awareness of the limitations of the monitoring and the potential options available. The Commissioner considers that this met the public interest and that the disclosure of these particular documents would not add to public understanding.
45. As the Commissioner has decided that the public interest favours non-disclosure regarding documents 1-4, he has not gone on to consider regulation 12(4)(d) of the EIR which was also cited for this information.

Procedural matters

46. Regulation 5(2) of the EIR states information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
47. In this case, the request was made on 20 April 2023 and the EA did not provide its response until 25 May 2023. At that point it provided the

³ RSN Implementation Evaluation Work Year 1 & Year 2
RSN Geodatabase
Understanding the value of (toxic) chemicals data collected as part of RSN monitoring

complainant with some information to which they were entitled. This is just outside the statutory timeframe as set out in the EIR.

48. The EA was also late providing an internal review, the review having been requested on 6 July 2023 and not provided until 15 September 2023. Regulation 11(4) 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.
49. The Commissioner notes that the EA apologised in the internal review for failing to meet the statutory timeframes.

Right of appeal

50. 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

51. 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.
52. 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
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