

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

Decision notice

Date: 19 January 2017

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

Decision (including any steps ordered)

1. The complainant has requested information on the detection of cryptosporidium in water samples by United Utilities Water Limited (UUWL). UUWL sought to withhold the information in parts 1 – 5 of the request on the basis of regulation 12(5)(b) and the information in part 6 under the exception at regulation 12(4)(d).
2. The Commissioner found that the information at part 3 of the request was not held and that regulation 12(4)(d) was not engaged with regard to the information held at part 6 of the request. For parts 1, 2, 4 and 5 the Commissioner found the regulation 12(5)(b) exception was engaged and the public interest favoured maintaining the exception.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information held for part 6 of the request.
4. 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

5. On 21 August 2015, the complainant wrote to United Utilities Water Limited (UUWL) and requested information in the following terms:
 - 1) *"What date and time in August 2015 was cryptosporidium first detected in the water supply in Lancashire?"*
 - 2) *At what date and time was the first health warning (to boil water etc) issued to a) the media and b) affected households?"*
 - 3) *How many each of phone calls, texts, emails and leaflets on health warnings were sent to individual customers within the 24 hours after the alert was first issued?"*
 - 4) *What was the level of cryptosporidium in the water at its highest and which date was this on?"*
 - 5) *Please supply me with a full list of ALL the things were examined as possible sources of the cryptosporidium contamination during the course of the investigation.*
 - 6) *How many customers have contacted United Utilities stating a) they have been infected with cryptosporidium and b) seeking compensation over an infection?"*
6. Following a decision notice from the Information Commissioner, UUWL responded to the request on 7 April 2016 stating that the requested information could form part of the Drinking Water Inspectorate's (DWIs) ongoing investigation with a view to enforcement action. As such, UUWL considered the information exempt from disclosure on the basis of regulation 12(5)(b) of the EIR.
7. After an internal review, UUWL responded further on 24 May and upheld its decision.

Scope of the case

8. The complainant contacted the Commissioner on 8 June 2016 to complain about the way her request for information had been handled. Specifically she was very unhappy with the time taken to provide a response and the limited response received. The complainant did not believe UUWL had adequately explained its use of the regulation 12(5)(b) exception and had applied this in a blanket manner to all parts of the request.

9. During the course of the Commissioner's investigation, UUWL sought to rely on regulation 12(4)(d) in relation to the information requested in part 6 and argued that the information requested in part 3 was not environmental information.
10. The Commissioner considers the scope of her investigation to be to determine if UUWL has correctly applied the regulation 12(5)(b) exception to withhold information held for parts 1 -5 of the request, (providing the information for part 3 is found to be environmental) and, if so, where the balance of the public interest lies. For part 6 of the request, the Commissioner will investigate whether the regulation 12(4)(d) exception has been applied correctly.

Background

11. In August 2015, during routine testing of the water supply, traces of cryptosporidium were detected at water treatment works in Preston. On 6 August, UUWL issued a boil water notice (BWN) which was then lifted on 5 September 2015.
12. UUWL is regulated by the Environment Agency, the Health and Safety Executive, OFWAT, the Consumer Council for Water and the DWI. The DWI's role is to provide independent reassurance to the public that the water industry provides safe, clean drinking water to consumers. It does this in many ways including via a system of monthly (self-reported) regulatory returns on water quality sampling, an obligation to self-report trigger events which may pose a risk to human health, the setting of water quality standards, the publication of guidance and the application of its enforcement powers.
13. The DWI is subject to the Legislative and Regulatory Reform Act 2006 and its enforcement powers stem from section 86 of the Water Industry Act 1991 (WIA)¹. These powers provide the Chief Inspector of Drinking Water with the power to investigate whether there has been a breach of sections 68, 69 and 79 of the WIA.

Reasons for decision

Is the information environmental information?

14. Before going on to consider the application of the exception by UUWL the Commissioner has firstly looked again at the request and the

¹ <http://www.legislation.gov.uk/ukpga/1991/56/section/2>

information supplied by UUWL to establish if the information is environmental information and therefore subject to consideration under the EIR.

15. The main consideration here is the information requested in part 3 of the request – the number of phone calls, texts, emails and health warnings sent to individual customers after the first alert was issued. UUWL has argued that this information would not be environmental information as defined in relation 2 of the EIR. UUWL considers that the fact that warnings were transmitted could be environmental information but the number of such warnings is not in itself environmental.
16. Environmental information, as defined in regulation 2 of the EIR, can be any information on:
 - the state of the elements of the environment (2(a));
 - factors affecting the elements of the environment, such as substances, energy, noise, radiation, emissions (2(b));
 - measures such as policies, legislation, plans and activities affecting the elements and factors and measures designed to protect those elements (2(c)); and
 - the state of human health and safety, including contamination of the food chain (2(f)).
17. The Commissioner does acknowledge there is a difference between information on the reasons for warnings being issued (which is much more likely to be environmental information as it will relate to factors affecting the elements of the environment), and the warnings themselves which are not obviously information on the elements or factors but may well be information on measures if the warnings contain details of what to do, such as boiling water, to counteract the contamination.
18. For this reason, the Commissioner considers this information would be environmental as even though it is just for the number of warnings issued this would be information on a factor (the contaminations) affecting the state of an element (water source) of the environment. Therefore this is information which should be considered under the EIR.
19. That being said, UUWL argues that even if this information were to be deemed environmental it is not held. UUWL has explained that it does not have any record of the specific number of warnings issued to the level of detail requested. The request asked for the number of phone calls, texts, emails and health warnings sent to individual customers in the first 24 hours after the warning was issued. UUWL maintains it does

not have a figure for the number of any of these warning issues in this time period and with no further evidence to the contrary the Commissioner has to accept the explanations offered by UUWL and agree that the information is not held.

20. She has therefore focused her investigation on the information requested in parts 1, 2, 4, 5 and 6 of the request and the application of the regulation 12(5)(b) and 12(4)(d) exceptions to withhold this.

Regulation 12(4)(d)

21. UUWL has sought to apply regulation 12(4)(d) in relation to the information requested at part 6. This is the number of customers who contacted UUWL stating they had been infected with cryptosporidium and the number seeking compensation over an infection.
22. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
23. UUWL has explained that it does have a figure for the number of contacts it had from customers who reported they believed the water had made them ill, this comes from the number of illness claims received by its litigation department. UUWL argues that this figure is not the same as the number of people who are found to actually be infected. Therefore it states that though the information is not incomplete it would be misleading as the overall figure for the number of claims is not necessarily indicative of the number of actual cases of illness from cryptosporidium. As all claims have not been finalised, UUWL considers this is incomplete data.
24. From this the Commissioner believes the limb of the exception UUWL is relying on is the limb relating to incomplete data, although this has not been specifically stated by UUWL. That being said, she cannot see how it could be argued the requested information is either material still in the course of completion or an unfinished document.
25. The Commissioner has considered UUWL's arguments but does not accept that this information can be said to be incomplete. Whilst UUWL may, at the time of the request, still have been considering some of the claims made to it and the allegations of infection this does not change the fact that UUWL did hold the requested information which, for clarity, was the number of customers that had contacted UUWL stating they had been infected and the number seeking compensation. Whether these individuals then turned out to have been infected directly as a result of

the contamination and whether they had a legitimate claim does not change the fact that the information was held and was not incomplete.

26. UUWL themselves even acknowledge the information is not incomplete but rather that it would be misleading as it may not reflect the true situation or number of people who were actually infected. The Commissioner cannot accept an argument about information being misleading or inaccurate in this case and can only consider if the information is incomplete and she has concluded it is not. Consequently she finds the regulation 12(4)(d) exception is not engaged in relation to the information requested at part 6 of the request.

Regulation 12(5)(b)

27. UUWL has withheld all remaining information under regulation 12(5)(b) of the EIR. This regulation provides an exception to the general duty to disclose environmental information where a disclosure would adversely affect –

“the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.”

28. The successful application of this exception is dependent on a public authority being able to demonstrate that the following three conditions are met:

- the withheld information relates to one or more of the factors described in the exception;
- disclosure would have an adverse effect on one or more of the factors cited; and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

29. The Commissioner's guidance on regulation 12(5)(b) sets out that there is no definitive list that covers circumstances when a public authority may wish to consider applying the exception. The Information Tribunal² commented that the 'course of justice' does not refer to a specific course of action but is *“a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’”*.

30. UUWL has not indicated it is applying this exception due to any legal privilege and does not consider any of the information attracts legal

² *Rudd v IC & the Verderers of the New Forest (EA/2008/0020)*

professional or litigation privilege. UUWL argues that disclosure of the information subject to this exception would have an adverse effect on the DWI investigation, on any hearing and on the course of justice, specifically its ability to receive a fair trial.

31. UUWL has explained that the DWI would have begun investigating UUWL as soon as it self-reported the presence of cryptosporidium in the water sample. The DWI has the powers to bring prosecutions and to institute proceedings under section 70 of the WIA. UUWL argues that as part of any potential enforcement action, particularly with regard to prosecutions, one defence available to it is to demonstrate it took all reasonable steps and exercised all due diligence to avoid the commission of the offence. The prospect of success for this defence will be greater if information relevant to this defence or information that could be used as part of a prosecution is not placed in the public domain, therefore hindering the course of justice and the ability of UUWL to receive a fair trial.
32. UUWL has explained that it is required to comply with the DWI's investigation and to provide any information it requires. Whilst this is done voluntarily, the DWI does have powers under section 202 of the WIA to compel the provision of information. DWI investigations will generally be looking into the root cause of an event, the procedures and plans in place at the time, how the incident was responded to and lessons learned. It is after investigating this that the DWI will make a decision about what action is necessary.
33. The question for the Commissioner is whether disclosing the information in each part of the request to the public would adversely affect the course of justice. In this case this with regard to the DWI's ability to conduct an inquiry and the ability of UUWL to receive a fair trial.
34. The Commissioner's guidance on regulation 12(5)(b)³ states that the principle of an adverse effect on the course of justice is wide enough to cover any adverse effect on investigations and proceedings. The Commissioner would accept that the DWI has a duty to conduct investigation and proceedings under the WIA so she must consider if the information requested in each part of the request would adversely affect the DWI's ability to conduct its investigation if it were disclosed.
35. In terms of the argument about UUWL receiving a fair trial; the Commissioner's guidance is that this is all part of the overall concept of the course of justice but it can be looked at separately and it is not

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https://ico.org.uk/media/fororganisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

reliant on criminal proceedings being instigated at the time of the request. The Commissioner is satisfied the DWI has the powers to conduct both criminal and civil investigations but it is not clear how disclosing any of the withheld information would impact on the ability of UUWL to receive a fair trial when the investigation is conducted 'behind closed doors' until a decision is reached as to whether to impose sanctions. Whether information is publicly known or not, the DWI as an independent body will still conduct its investigation on the facts of the case and UUWL will still be able to rely on this information to build a defence. That being said, the Commissioner will still go on to consider each part of the request and the applicability of the regulation 12(5)(b) exception when considering the possibility of an adverse effect on the course of justice.

Part 1 and Part 2 – what date and time was cryptosporidium first detected in the water supply and at what date and time was the first health warning issued to the media and affected households

36. UUWL states that the time that this was first reported and the time that the public were first notified is part of the DWI's investigation. It argues that releasing these material facts into the public domain while the investigation is ongoing could prejudice a potential prosecution as disclosing this information would show when UUWL first ascertained the presence of cryptosporidium and whether this was sufficiently early and whether the advice was then provided as quickly as possible to the public.
37. The Commissioner does not dispute that this information will form part of the DWI's considerations when investigating the contamination. However, the question is whether disclosure of this information would have an adverse effect on the investigation. The arguments presented on this by UUWL are general arguments that disclosure of any information which has been passed to the DWI as part of its investigation may prejudice the investigation as it will prevent the investigation from taking place without external influences.
38. The Commissioner accepts that disclosing information at the time of the request, when the investigation was in its beginning stages and media interest was high may have led to increased scrutiny and external comment. Whilst the Commissioner has no doubt that disclosing this information at the time of the request would not have influenced the DWI investigation and this would have continued based on the factual information presented to it, there is the possibility that any decision taken in the future would no longer have the appearance of impartiality as it could be argued by those affected that any decisions taken were unduly influenced by public and media pressure.

39. For this reason, the Commissioner accepts that the exception was engaged in relation to this information.

Part 4 – What was the level of cryptosporidium in the water at its highest and which date was this on?

40. UUWL argues that this information is crucial to the DWI investigation and to determining the level of any fine, if any at all that should be imposed.
41. For the same reasons as those for the information held for parts 1 and 2 of the request, the Commissioner finds the exception to be engaged for this information. The information clearly is pertinent to the investigation and therefore there is a possibility that disclosure may have an adverse effect on the investigation and consequently to the course of justice.

Part 5 – the full list of all the things that were examined as possible sources of the cryptosporidium contamination during the investigation

42. For the same reasons as those for the information held for parts 1, 2 and 3 of the request, the Commissioner finds the exception to be engaged for this information. The information clearly is pertinent to the investigation and therefore there is a possibility that disclosure may have an adverse effect on the investigation and consequently to the course of justice.
43. As the Commissioner has accepted that the information held in parts 1, 2, 4 and 5 of the request does engage regulation 12(5)(b) she must now go on to consider the public interest test.

Public interest arguments in favour of disclosure

44. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure which exists in the EIR.
45. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
46. In addition to this, UUWL has also considered the need for the public, particularly those affected by the contamination, to have the appropriate information available to them to allow for better scrutiny of UUWL. The Commissioner also notes this may allow for individuals to hold UUWL to account.

47. Disclosure of this information may also provide reassurance to the public that the DWI has all the relevant information required to conduct its investigation and is focused on the relevant issues and the facts of the incident.

Public interest arguments in favour of maintaining the exception

48. UUWL argues that the greater public interest is served by having assurances that any investigation by a regulator (in this case the DWI) is conducted in an impartial manner, free from any influences which could impact on the regulators independence.
49. UUWL has also argued that there is the prospect of civil claims if it is found it has breached any duty of care under the tort of negligence. The information withheld under parts 1, 2, 4 and 5 may well be of evidential benefit to any potential claimants. UUWL states that in the context of civil claims, claimants can apply to the court for disclosure of material before an action and additionally the rules of civil evidence disclosure are governed by the Civil Procedure Rules (CPR). Therefore, UUWL considers disclosure of this information through the EIR would prejudice the course of justice as it would result in enforced disclosure and would circumvent the CPR.
50. Whilst the Commissioner recognises that there is another access regime for accessing information relevant to a civil claim and that a genuine claimant will not lose out due to non-disclosure under the EIR, information disclosed in this way is only disclosed to that individual or their legal representative and not to the wider world. Therefore, the Commissioner still has a duty to consider the wider disclosure of this information and the public interest in this under the EIR.
51. UUWL has also argued there would be a "chilling effect" from disclosure. Whilst it acknowledges that the DWI has the powers to compel UUWL to provide information it requires for its investigations this is normally done voluntarily. Information is shared in a free and frank manner with the expectation this will not be disclosed while the investigation is ongoing. UUWL argues that disclosing this information in this case may have an inhibitory effect in the future as it would be more cautious.

Balance of the public interest arguments

52. The Commissioner accepts that in general there is a clear interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to public well-being. In this case the argument is particularly relevant and the media attention the contamination generated supports the public interest in the disclosure of

information which sheds light on the actions of UUWL in managing the incident.

53. The Commissioner does not attribute any great weight to the “chilling effect” arguments as UUWL is obliged to provide information to the DWI under the WIA. Chilling effect arguments carry much greater weight when the information being considered for disclosure is not factual in nature, which is the case here. For example, where the information consists of opinions of staff or discussions that have taken place it can be argued that disclosure would lead to a more guarded approach and less frank sharing of information in future cases. However, where the information is factual it is difficult to see how there would be any chilling effect as the information that is provided to the DWI would be the same whether it is provided voluntarily or under obligation.
54. That being said, the Commissioner has to factor in the timing of the request and the fact that this occurred very close to the initial notification of the contamination to the public. The DWI’s investigation was in its initial stages and disclosure of the information at this stage when the incident was still generating significant media attention would almost inevitably have placed the DWI’s investigation under increased scrutiny and commentary from members of the public and the media. Whilst it is difficult to say whether this would have had any bearing on the outcome of the investigation (and it should be noted the investigation has, to date, not concluded) there is legitimacy to the argument that the outcome might be questioned as to whether it had any external influence. This would have an adverse effect on the course of justice and this would not be in the public interest.
55. For this reason the Commissioner finds that, although finely balanced, the public interest in maintaining the exception is stronger than that in disclosing the information held for parts 1, 2, 4 and 5 of the request.
56. The Commissioner therefore considers that the council was correct to apply the exception in Regulation 12(5)(b) to these parts of the request in this case.

Right of appeal

57. 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

58. 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.
59. 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

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