Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **18 September 2019**

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

Decision (including any steps ordered)

1. The original applicant's father has brought this complaint to the Commissioner with his son's authority. The notice is served on the applicant/or son but much of the notice refers to the father, as the complainant.

2. The applicant has requested information relating to his (and his father's) ongoing concerns and dispute with the Environment Agency (EA) concerning Shoreham-on-Sea Water Supply Work (operated by Southern Water). The EA has refused to comply with two requests citing regulation 12(4)(b) of the EIR.

3. The Commissioner's decision is that the EA is entitled to rely on regulation 12(4)(b) of the EIR and that the public interest rests in maintaining this exception. She has however found the EA in breach of regulation 5(2) and 11 of the EIR in this case.

4. The Commissioner does not require any further action to be taken.

Request and response

5. On 5 November 2018, the applicant wrote to the EA and requested information in the following terms:

Request 1

"1. What was the year that the 'prescribed process legislation' was enacted and what year was it abolished? This regulated and required permits for the use and storage of Chlorine gas, release of Chlorine to the Air or Water, etc
2. Please provide all records (as detailed above in para 1) in relation to this regulated activity.
3. What is the current permit or regulation that is required in order to store and use Chlorine Gas?
4. The site has an inground chemical waste storage tank, this is below ground and on top of the SPZ1 aquifer. Did the installation of the chemical tank require
a) A permit
b) Consideration of risk of contamination to the aquifer
c) What is the quantity of this type of chemical waste that can be stored below ground, above an SPZ1 without a permit or the EA's involvement?
5. Is the EA aware of the inground chemical waste tank?
6. Please provide all records (as detailed above in para 1) which relate to this chemical waste tank
7. The site has an above ground Phosphoric Acid chemical storage tank, this is top of the SPZ1 aquifer. Did the installation/storage/use of the chemical tank require
a) A permit
b) Consideration of risk of contamination to the aquifer
c) What is the quantity of this type of chemical that can be stored above an SPZ1 without a permit or the EA's involvement?
8. Please provide all records (as detailed above in para 1) which relate to this Phosphoric Acid chemical tank
9. The site had (until 2012) an above ground Sulphur Dioxide chemical storage, this is top of the SPZ1 aquifer. Did the installation/storage/use require
a) A permit
b) Consideration of risk of contamination to the aquifer
c) What is the quantity of this type of chemical that can be stored above an SPZ1 without a permit or the EA's involvement?"

Request 2

"I require a copy of all water discharge/trade effluent discharge permits applications which have been considered by the Environmental Agency

where the discharge enter into the river Adur, either directly or indirectly"

6. As the applicant received no response, he requested an internal review on 8 January 2019.

7. The applicant chased the EA again on 13 February 2019 and advised the EA that he would refer the matter to the Commissioner.

8. The EA responded to the applicant's first request on 22 February 2019.

9. In relation to the applicant's second request, the EA issued a response on 15 March 2019. The EA stated that it was refusing to comply with the request in accordance with regulation 12(4)(b) of the EIR, as it considered the request to be manifestly unreasonable.

10. The applicant wrote to the EA on 16 March 2019 to request an internal review for his first request.

11. The applicant then wrote to the EA on 20 March 2019 to request an internal review for his second request.

12. The EA did not carry out an internal review for the applicant's first request. But it did carry out an internal review for the second request and notified the applicant of its findings on 23 April 2019. It upheld its previous application of regulation 12(4)(b) of the EIR and advised the applicant that it would not respond to any future requests or future requests for internal review on the same topic. It clarified that it would only respond to new requests for new information going forward.

Scope of the case

13. The complainant first contacted the Commissioner on 1 March 2019 to complain about the way in which his son's requests for information had been handled. At this time the son had received a response to his first request but no response to his second request. The Commissioner therefore wrote to the EA on 2 March 2019 and ordered the EA to provide its response to the second request within 10 working days. The EA complied and issued its response to the second request on 15 March 2019.

14. When the internal review response to the applicant's second request was issued, the complainant referred the matter back to the Commissioner for further investigation. He wished to dispute the application of regulation 12(4)(b) of the EIR.

15. The Commissioner notes that no internal review was ever completed for the first request. Regulation 11 of the EIR provides a statutory obligation to provide an internal review. Normally the Commissioner would order this process to be completed before accepting a complaint for full investigation. However, in this case, due to the delays the complainant's son had already suffered, the internal review that had been completed for the second request and the EA's latest position being that regulation 12(4)(b) of the EIR covers both requests, she has decided to accept both requests for full investigation.

16. This notice will therefore consider whether the EA is entitled to rely on regulation 12(4)(b) of the EIR for both requests.

Reasons for decision

17. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.

18. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should 'obviously' or 'clearly' be unreasonable. A request can be manifestly unreasonable for two reasons: Firstly where it is vexatious and secondly where the public authority would incur unreasonable costs or where there would be an unreasonable diversion of resources.

19. There is no definition of the term "vexatious" in the Freedom of Information Act, however the issue of vexatious requests has been considered by the Upper Tribunal in the case of The Information Commissioner and Devon County Council v Mr Alan Dransfield (GIA/3037/2011). In the Dransfield case the Tribunal concluded that the term could be defined as "manifestly unjustified, inappropriate or improper use of formal procedure." The Tribunal identified four factors likely to be relevant in vexatious requests:

    - The burden imposed by the request on the public authority and its staff
    - The motive of the requestor
    - Harassment or distress caused to staff
    - The value or serious purpose of the request.

20. The Upper Tribunal's decision established the concepts of "proportionality" and "justification" as being central to any consideration of whether a request for information is vexatious. The key to

determining whether a request is vexatious is a consideration of whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear it is necessary to weigh the impact of the request on the public authority against the purpose and value of the request. To do this a public authority must be permitted to take into account wider factors associated with the request, such as its background and history.

The complainant's arguments

21. The complainant states that he is the adjoining landowner at the Shoreham-by-Sea Supply Work and the EA has permitted a water company (his neighbour) to dispose of its trade effluent onto his field (half a million gallons per day) to save the company money due to the cost of disposing of it correctly and putting it into the sewer. He states that the discharge was allegedly raw groundwater but he tested it and it contains chlorine. He confirmed that the EA tested for the wrong substance (salt-chloride) and not chlorine and are now blocking access to the results. The complainant believes that this has implications for the environment and the public as a whole, as well as him directly. He states his other FOIA requests relate to the maladministration of the EA in relation to the permit determination.

22. Additionally, the complainant confirmed that his FOIA requests have assisted Ofwat and the public with the record fine handed to Southern Water. He confirmed that he has been in communication with the EA for the past 2 years and has sent and received FOIA requests that have led to the Ofwat fines and the EA taking enforcement action against Southern Water. He stated that the FOIA requests found that sampling was not conducted, reporting appeared to be false, monitoring of machinery not working, incorrect data reporting practises and so on. Ofwat then looked into the operation and all sites operated by Southern Water and found the same pattern exists at all sites. He confirms that this directly led to the £125 million fine.

23. The complainant does not consider the requests are manifestly unreasonable given the above circumstances and the EA should be ordered to comply with the requests and provide the requested information.

The EA's arguments

24. The EA confirmed that it is now aware (from the Commissioner herself) that the complainant is working with his son, between them making numerous requests and complaints relating to the Shoreham-by-Sea Supply Work over a couple of years. The requests being considered here were made by the son. The referral to the Commissioner was made by

the complainant. When this was questioned, the complainant explained that his son has been working with him to try and obtain information from the EA on this subject matter as it has been too much for him to deal with himself.

25. It stated that historically it has been the son which has made the information requests and the complainant that has been responsible for the majority of complaints and correspondence. At times this has switched but generally this has been the pattern. The son started making information requests in June 2017 relating to this topic. The complainant first contacted the EA in September 2017 with an information request. When the EA responded to this request it turned into a complaint. Requests, complaints and correspondence has continued from this point.

26. Dealing with the son first, the EA advised that between 15 June 2017 and 15 March 2019 it has responded to at least 25 requests for information, some of which included multiple questions associated with information previously provided. These requests have asked for information on:

- Storage of chemicals associated with the water treatment works
- Questions regarding hazardous substances and the legislation around their control
- Land ownership queries
- Complaints around piling works and groundwater interaction
- Legislation regarding groundwater discharges and permitting
- Development planning queries relating to development at the site
- Requests for all permits and all associated documents for the Shoreham Water Treatment Works site
- Numerous questions in relation to these documents
- Two internal reviews of information withheld, where the EA maintained its refusal to disclose.
- Requests for all permits issued to Southern Water for Water Supply Works Sites
- Request for all discharge/trade effluent permits into the River Adur (*the second request being considered in this notice).*

27. It explained that the first request the subject of this notice asked for copies of chemical storage and use permits. The request itself comprised of questions which it had previously answered in 2017. The response it issued confirmed this and linked back to various historic responses where the questions were previously addressed.

28. With regards to the complainant, between 21 September 2017 and 19 June 2019 the EA has responded to at least 6 information requests, again some of which have included multiple questions associated with

information previously provided. Alongside this there has been a significant amount of additional correspondence.

29. The EA confirmed that the correspondence from the complainant totals in excess of 110 emails between 2017 and 19 June 2019 either sent to the EA directly or being copied in. It explained that the complainant often sends multiple emails in a single day or on consecutive days usually following a response from the EA or another responder in the email chain. The contents of the emails passing through the EA cover subjects including but not limited to:

- Accusations of Southern Water intentionally flooding his property, which with some adjoining land was purchased from Southern Water through the permitted discharge. The discharge arrangement has been in place since the 1960s.
- Alleged breaches of his human rights as a result of the flooding.
- Complaints relating to the EA's regulation of Southern Water.
- Arguments relating to tide locking and lack of maintenance of the receiving watercourse.
- Accusations of permit breaches by Southern Water (a small percentage of which were valid where, the EA says, it has taken reasonable and proportionate action – but this does not change its position on the operation of the site in question).
- Proposals to construct a (potentially illegal) flood wall with the intention of diverting the Southern Water discharge back into his property.
- Challenges (EA's comments they are invalid) to flood defence law and to the Environmental Permitting Regulations 2016.
- Challenges to the use of sandbags in flood defence.
- Subject Access Requests under the Data Protection Act (which were responded to separately by the EA's data protection team).
- Alleged environmental incidents relating to water quality (chlorine being discharged which, the EA says, has been proven by detailed scientific analysis to not be the case).
- Accusations of incorrect testing by EA staff in relation to the investigation of the alleged environmental incidents involving chlorine.

30. The EA commented that emails have also been sent to organisations and individuals including but not limited to:

- The Environment Agency (including the National Laboratory Services)
- Defra, including Minister of State Thérèse Coffey
- Southern Water
- The MP for East Worthing and Shoreham

- The Lead Local Flood Authority
- The Local Authority
- Ofwat
- Serious Fraud Office

31. The EA went on to say that the complainant refuses to accept its responses to the vast majority of his concerns. It commented that the complainant uses sentences and statements from comprehensive responses out of context to make his own points and uses figures in documentation (such as the *maximum* allowable discharge in the permit of 2000m^3 per day) to state as a fact that is what is happening on the ground, every day, which is simply not the case. It has therefore ceased correspondence with both the complainant and son for anything further in relation to this site.

32. It said that it has recently responded to another request from the complainant; one made to the EA's National Laboratory Service. The complainant again asked for the same or similar information detailed above. It wrote to the complainant on 19 and 24 June 2019 refusing the request and to advise him that the National Laboratory Service is part of the EA and is therefore covered by the refusal notice issued in connection with these requests (12(4)(b) of the EIR). It stated that it reminded the complainant of the correspondence that was issued and the EA's decision to close down all correspondence on this matter. Despite this the complainant has continued to send in emails – 16 to the date of the EA's submissions to the Commissioner dated 25 July 2019.

33. The EA went on to say that the complainant considerably exaggerates the volumes of water that is discharged. It stated that it has provided evidence to him which shows that the volumes quoted by him are simply not true. Despite this the complainant continues to refuse to accept EA's evidence or position. It commented that the same can be said for the alleged presence of chlorine in the discharge. The EA said that it has provided him with a report following samples being taken and tested, which confirmed that *"we did not find any evidence, which would suggest that Southern Water is currently disposing, or has disposed of, chlorinated water to surface water at the Shoreham Water Treatment Works site."* Again it stated that the complainant refuses to accept EA's evidence and position. It commented that whilst it does not disagree that there would be implications to the environment *if* the levels of chlorine entering the environment were as he states – it is simply not the case that it is and therefore there is no risk to the environment.

34. The EA confirmed that whilst the complainant may believe he is responsible for the scrutiny facing Southern Water and the associated fines they have received from Ofwat, it is worth noting that Ofwat is the

economic regulator of the water sector in England and Wales. It advised that the EA regulates the environment including the operations of water companies. The EA commenced a criminal investigation into Southern Water Services in March 2016. During the course of that investigation, matters came to light which required separate consideration by both regulators, working closely together to ensure the right regulator considered the issues appropriate to their remit. It explained that this was to ensure separate, parallel, informed regulations. It confirmed that the environmental aspect is the subject of ongoing criminal investigations by the EA, in relation to which it is unable to conmment further.

35. The EA said that the details of Ofwat's investigation and the subsequent penalty can be found here:

    https://www.ofwat.gov.uk/publication/notice-of-ofwats-proposal-to-impose-a-penalty-on-southern-water-services-limited/

36. The EA stated that it is appropriate to point out that the Ofwat notice states in the executive summary that:

    "*This notice sets out the details of Southern Water's failings and how these have occurred. The failings relate to the management, operation and performance of its wastewater treatment works. These are vital assets that are used to clean and treat sewage (or wastewater) and which have a direct impact on the environment, particularly bodies of water, such as rivers or streams, into which treated wastewater is released.*"

    It stated that the complainant is the adjoining landowner to Shoreham-by-the-sea Water Supply Work and the Ofwat investigation did not cover this. It covered wastewater treatment works.

37. The EA explained that it has complied with all previous requests, either providing the requested information or issuing appropriate refusal notices where it considers information is exempt. It believes it is no longer in the public interest to continue to correspondence with both the complainant and his son on this matter. It commented that it has to date spent a considerable number of hours compiling responses to their enquiries and to continue would impose a significant burden on the EA in terms of time and resources. Repeated communications on this issue would divert resources from its primary tasks of protecting the environment and communicating with the public about its work.

38. It commented that it was sorry that it has to date been unable to identify a mutually agreeable outcome with the complainant and his son. However, it needs to manage its resources in an efficient way and as

such it is EA policy not to engage in further correspondence with customers where it has already clearly documented its position and answered questions to the best of its ability.

39. The EA stated that all the indicators listed in paragraph 19 above have been met in this case. It is therefore justified in applying regulation 12(4)(b) of the EIR to these requests and any future requests relating to the same issue.

The Commissioner's decision

40. The Commissioner is of the view that the EA can take into account both the complainant's and his son's requests for information if there is evidence they are acting together for the same cause and apply regulation 12(4)(b) of the EIR if the aggregated impact of dealing with the requests would cause a disproportionate and unjustified level of disruption, irritation or distress.

41. We know the complainant and his son are working together trying to obtain the information they believe they need in order to investigate and challenge the issues they have with the Shoreham-by-Sea Water Supply Work. They have confirmed this to the Commissioner. The question now is whether the EA is entitled to rely on regulation 12(4)(b) of the EIR for both requests based on the aggregated impact of dealing with them. Would compliance cause a disproportionate and unjustified level of disruption, irritation or distress?

42. It is clear that the complainant and his son have been in regular correspondence with the EA since 2017 over their concerns about the water supply work. Between them they have submitted 31 information requests, often containing multiple questions, submitted complaints and a significant amount of other correspondence. The EA has said that some requests have asked for the same information, to which it has already provided a response. At times it has received multiple emails in a single day or on consecutive days and the complainant often copies in a number of other third parties. The Commissioner accepts that such level of correspondence and requests, together with the pattern of sending multiple emails on one day or over consecutive days at times and copying third parties in, will have been difficult and time consuming for the EA to manage. The EA has stated that there is a clear unwillingness to accept the responses it has provided and despite outlining its final position on matters raised, correspondence and requests continue. It is confident that continuing to respond will just generate further requests and correspondence.

43. The EA has confirmed that it is EA policy to cease correspondence with a member of the public on a particular matter when it has assisted them

so far as it is able and has communicated its final position to them. The Commissioner considers this is a reasonable and fair approach to take and ensures that unnecessary time and resources are not directed away from its statutory functions. The Commissioner considers the EA has spent a considerable amount of time and resource answering the complainant's and his son's requests, complaints and correspondence to date and that given the clear pattern of responses simply generating more, it is reasonable to conclude that continuing to comply with ongoing requests will place an unjustified and disproportionate burden upon the EA. The appropriate channel for challenging the application of regulation 12(4)(b) in a given case is the Commissioner and then, if still not satisfied, the First-tier Tribunal. The EA has said that despite two refusal notices informing them that 12(4)(b) of the EIR applies, correspondence has continued. It considers this supports its view that there is an unwillingness to accept the EA's position regardless of the responses it issues and that a response simply generates more correspondence, continuing the burden both on time and resource.

44. The EA has confirmed that it has provided evidence to the complainant that the volumes of water discharged that he quotes are not true and provided a report to him that confirms that it found no evidence of chlorinated water in the discharge. It states that he is unwilling to accept this evidence or the EA's position and has in the past exaggerated statements it has provided him.

45. It said that it has also considered the evidence the complainant has supplied in support of his concerns over the level of chlorine and advised the complainant of its final position and why this does not alter its viewpoint.

46. The Commissioner considers the requests do have serious purpose and value. They concern the discharge of water from a water supply work which can raise environmental concerns. However, in this case the serious purpose and value must be weighted against the continuing burden complying with requests and ongoing correspondence from these two individuals will cause. It has to be noted that the EA has complied with all previous requests, answered the complainant's and his son's concerns and questions and tried to reach a mutually agreeable outcome. While the complainant and his son clearly disagree, the EA has informed them of its final position on matters raised and provided evidence to support that (the report and discharge levels referred to in paragraph 33). Continuing to respond to requests for information is unlikely to end this dispute and considering the considerable time and resources already spent on addressing them the Commissioner is satisfied that any serious purpose and value is outweighed by the continuing burden responding and complying would cause.

47. For the above reasons the Commissioner is satisfied that regulation 12(4)(b) of the EIR applies to both requests.

Public interest test

48. The EA said that it has considered the factors in favour of complying with these requests and providing the requested information and acknowledges the general presumption of openness. The EA would only refuse to provide information if it is sure that continued engagement would cause substantial harm. It stated that here the harm is that giving further time and other resources to the complainant's and his son's repeated communications on this issue will divert resources from its primary tasks of protecting the environment and communication with the public about its work.

49. It stated that it acknowledged the importance of enabling the public to review the decisions taken by public authorities and understand how these decisions have been reached. However, the further provision of material and answers to questions which have already been supplied in previous correspondence would not aid the understanding of the factors taken into account in making the relevant decisions in respect of the Shoreham-by-the-Sea Water Supply Work operated by Southern Water.

50. The EA confirmed that it considers the arguments in favour of maintaining the exception are weighty. The complainant and his son refuse to accept its responses and its considers their persistence in pursuing requests (despite disclosure and explanations as to their responsibilities and process) is part of an obsession. It does not consider continuing to comply with their requests benefits society at large. Dealing with repeated communications and requests is a distraction from its primary tasks and functions and several teams have already spent many months attempting to satisfy their concerns and queries to no avail. It said that it has repeatedly explained to them both what falls within its remit and has directed them to multiple organisations where it is unable to help, yet they continue to request information and answers which have already been provided or redirected to the relevant organisations. The EA confirmed that it is not in the interests of the wider public to continue corresponding and complying to requests in this particular case.

51. The Commissioner recognises the public interest in complying with these requests and providing the information. Compliance and disclosure would promote openness, transparency and accountability and provide the complainant and his son with information they believe they need to continue to investigate and raise their concerns. There is a public interest in understanding the decisions public authorities make and why and disclosure of information assists with that. The Commissioner has

also said that it would be incorrect to say that the requests have no serious purpose or value. She acknowledges that the EA has said that the complainant and his son keep requesting information and answers to questions that have already been addressed or provided. However, the complainant and his son do appear to have genuine concerns about the discharge from the water supply work adjacent to the complainant's property.

52. However, in this case the EA has said that it has already spent a significant amount of time and resource addressing their complaints, requests and correspondence and to continue to do so will place a disproportionate and unjustified burden on it as a public authority. The Commissioner accepts that it is not in the interests of the wider public to divert the EA away from its core functions. The EA has also said that it has tried to assist the complainant and his son and has communicated its final position to them on more than one occasion. It has also provided them with its own evidence which it believes proves there are no concerns about the level of discharge from the work or there being chlorinated water. The complainant and his son are unwilling to accept this and are using the EIR to continue to pursue this dispute. There is clearly a pattern of responses provided generating more and more correspondence and requests and there seems to be no evidence to suggest that this will stop.

53. The complainant and his son have been informed of the EA's position. The Commissioner therefore considers the EA is justified to now bring correspondence and requests on the same topic to end. It is not in the interests of the wider public not to do so.

Procedural breaches

54. As the EA failed to respond to these requests within 20 working days of receipt, the Commissioner has found the EA in breach of regulation 5(2) of the EIR.

55. The EA also failed to carry out an internal review for both requests within 40 working days of the receipt. The Commissioner has therefore also recorded a breach of regulation 11 of the EIR against the EA.

Other matters

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56. The Commissioner does not consider there is an equivalent of section 17(5) of the FOIA in the EIR. The EA should therefore continue to respond to all requests received. If the requests are on the same topic the EA is entitled to issue short refusal notices and internal reviews

stating that fact. The appropriate recourse would then be to the Commissioner and ultimately the First-tier Tribunal.

57. If the requests are for new and unrelated information the EA should consider these as it would do any other in accordance with its obligations under the EIR.

58. The Commissioner can refuse to make a decision on a particular application in accordance with section 50(2)(c) of the FOIA (and thereby regulation 18 of the EIR) if she finds the application is frivolous or vexatious. It would seem logical to say that this could be used if it was found that an applicant was continuing to bring new applications to the Commissioner in relation to regulation 12(4)(b) of the EIR when the applicant has already had the Commissioner's decision. The appropriate recourse following the Commissioner's decision is to the First-tier Tribunal.

Right of appeal

59. 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@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.

61. 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
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