

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

Date: 21 December 2021

Public Authority: Natural Resources Wales

Address: acesstoinformation@naturalresourceswales.gov.uk

Decision (including any steps ordered)

1. The complainant requested various information covering an Environment Agency (EA) investigation of a pollution incident in 1997. Natural Resources Wales (NRW) (which replaced the EA in 2013), confirmed that it held some relevant information, provided a link to information it was prepared to disclose and cited regulation 13 (personal information) in respect of other information. Following an internal review, NRW confirmed that it had provided all relevant information except the Farm Management Plan and cited regulation 12(5)(d) (adversely effect the confidentiality of proceedings of that or any other public authority where such confidentiality is provided by law) and regulation 12(5)(f) (adversely effect the interests of the person who provided the information) to withhold the report. Following the Commissioner's investigation, NRW confirmed that it wished to withdraw its reliance on regulation 12(5)(d), maintain its reliance on 12(5)(f) and reinstate its reliance on regulation 13.
2. The Commissioner's decision is that NRW has not complied with its obligations under regulation 5(1) of the EIR, however she has not ruled on the application of regulation 13 or 12(5)(f) for the reasons specified in the decision notice.
3. The Commissioner requires NRW to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant that either discloses the information referred to in paragraph 40 of this notice, or cite valid grounds for withholding.
4. NRW 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 27 September 2019, the complainant wrote to NRW requesting the following information in respect of an Environment Agency investigation of a pollution incident occurring on 17 November 1997 at Penback, Llandissilio, Pembrokeshire:

"...a copy of all data covering and including the site investigating officers reports and subsequent management contributions with conclusions for actions taken following the incident with particular reference to statements by all involved parties regarding the cause of pollution and actions taken by the EA.

For your reference purposes, the site investigator was [named individual A] and assisted by [named individual B]."

6. NRW responded on 23 October 2019. It confirmed that it holds some relevant information and provided a link to the complainant for him to access the information. It further informed him that third party personal information had been redacted under regulation 13 of the EIR.
7. The complainant contacted NRW on 25 October 2019 to request an internal review and stating that he was seeking all information on file with relevance to the cause of the pollution incident and actions taken by the Environment Agency about it.
8. By way of background, the investigation concerned a groundwater pollution incident which resulted in the contamination of the water supply of the neighbouring property.
9. Following an internal review NRW wrote to the complainant on 17 December 2019. It stated that it had provided all the information it holds relevant to the request but was refusing to disclose the Farm's Management report which it was withholding on the basis of regulations 12(5)(d) and 12(5)(f) of the EIR. It also maintained that the investigation report had been included in its original response.
10. There followed post internal review correspondence between both parties to clarify terminology of the documentation and whether the complainant had received all information falling within the scope of the request that was not being withheld.
11. The complainant disputed that the investigation report had been included with NRW's original response, and referred to many blank pages which, he suspected may have included the investigation reports in error.

12. NRW subsequently informed the complainant that it had reviewed the document and confirmed the blank pages which he referred to were all blank because of the format of pages overleaf in the original document.
13. The complainant subsequently contacted NRW stating that its explanation ruled out that the site investigation report was possibly in the blank pages, but provided no explanation for its absence.
14. On 25 June 2020 NRW informed the complainant that it was unable to offer more information than that already provided and informed him its internal process was now exhausted.

Scope of the case

15. The complainant contacted the Commissioner on 4 September 2020 to complain about the way his request for information had been handled. He is not satisfied with NRW's refusal to provide a copy of the Farm Waste Management Plan (Farm Management Report) or that he has received all other relevant information falling within the scope of the request including the Investigation Report.
16. During the course of the Commissioner's investigation, NRW withdrew its reliance on regulation 12(5)(d), reinstated its reliance on regulation 13 and maintained its reliance on regulation 12(5)(f). However, the Commissioner wishes to highlight that the complainant made a similar request for information to the EA in 2013 which was dealt with under case reference FER0539292 and which was appealed to the First-tier Tribunal under reference EA/2015/0049. As a result of this appeal, the complainant received a considerable amount of the information from the EA including the Farm Management Plan which NRW has refused on the basis of regulation 13 and 12(5)(f).
17. The Commissioner will not therefore make a ruling on information which has already been ruled on by the Tribunal and provided to the complainant by the EA. The scope of the Commissioner's investigation is therefore limited to determining whether NRW has complied with its obligations under regulation 5(1) of the EIR by identifying all the information it held that was within the scope of the complainant's information request.

Reasons for decision

Regulation 5

18. Under regulation 5(1) of the EIR, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
19. In scenarios where there is some dispute between the amount of information held by a public authority and the information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
20. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
21. Notwithstanding the Farm Management Report, the complainant does not accept that NRW has provided all relevant information it holds. The Commissioner's investigation must therefore determine whether NRW has complied with its obligations under regulation 5(1) of the EIR.
22. The complainant requested that NRW conduct a review which embraced all relevant information including any consideration given to the victims of the disaster.
23. As stated above, NRW informed the complainant in its internal review that it had provided all information on the incident file apart from the Farm's Management report. NRW further informed the complainant that it had interviewed the officer who originally provided the information who confirmed that at the time of the request a thorough search was carried out including team records, hard copies and legacy drives. He added that the Wales Incident Reporting System super-users had also been approached as to whether historic incident records were available for the time in question who confirmed they were not.
24. The Commissioner notes that NRW confirmed to the complainant that many pages in the 40 page Investigator's report were blank because the document is a scanned version of a hard copy (certain pages are blank because of the format of pages overleaf in the original document).

25. However, in correspondence dated 6 February 2020, the complainant stated that:

"...there is no explanation for the missing site investigation report said to be included in the original response. It remains an essential part of the information sought and has unfortunately been subject to avoidance."

26. The complainant further stated:

"The request ...was very specific in that the required detail was a copy of all data on the files about the pollution incident – cause of pollution and actions taken by the EA. The cause of pollution would undoubtedly be in the site investigators reports..."

27. He has also stated that the disclosure is only a part selection of documents from the known file content, and that the ICO records will show that a log of the file and description of contents has historically been subjected to refusal.
28. The complainant has confirmed that much has been released in the past but without a file log and data description, the full content is unknown.
29. The complainant remains dissatisfied with the integrity of the information provided by the EA and not convinced that the information released conforms precisely to the instructions of the Tribunal decision dated 29 September 2016.
30. The scope of the Commissioner's investigation is to determine whether NRW has complied with its obligations under regulation 5(1) of the EIR and does not extend to considering whether the EA's disclosure following the Tribunal ruling of 29 September 2016 has been complied with as this would be beyond the Commissioner's remit. The Commissioner will therefore focus on the details and evidence of the search conducted by NRW and make a decision on the balance of probabilities as stated in paragraph 19 of this notice.
31. In response to the Commissioner's queries regarding what searches were carried out and why NRW considers they would have been likely to retrieve any relevant information, NRW confirmed as it had previously done to the complainant, that a thorough search of its records was carried out at the time of the request including team records, hard copies and legacy drives.

32. It further informed the Commissioner that at the time of the appeal, further checks were made with the Incident Communication Team which is responsible for keeping records of incidents reported. The Incident Communication Team confirmed that no information was held.
33. NRW also confirmed that no locally held computers, files or folders contain information specific to the relevant incident.
34. NRW informed the Commissioner that the following search terms were used:
 - Name of farm – full address, nearest town/postal address.
 - Farm owner (at the time of the event)
 - Name of complainant and full postal address.
35. The Commissioner was also informed if any further information was held, it would be held manually and confirmed that earlier recorded information may have been held by the EA Wales (EAW) (one of its legacy bodies), however, this information may have been lost at the end of the use of its legacy systems.
36. NRW also informed the Commissioner that given that the event occurred over 20 years ago, the information may have been destroyed as part of EAW/NRW retention policies. Finally, NRW also informed the Commissioner that there is no statutory requirement for them to hold this information.
37. In respect of the Investigation Report, NRW informed the Commissioner that:

"... this report does not exist as the farmer was not prosecuted at the time. (Investigation reports are only produced when prosecuted)."
38. The Commissioner is unclear why NRW had maintained to the complainant that it had provided the Investigation Report with its original response, when it has since confirmed to the Commissioner that one was not produced. Confirmation of this point to the complainant may have prevented significant confusion around this matter.
39. The Commissioner has considered the details of NRW's search and is satisfied that it was reasonable and proportionate. He is also mindful that the incident occurred well in excess of 20 years ago, and that there was no statutory requirement for EAW to retain this information. Additionally, he acknowledges that NRW did not become operational until 2013 when it replaced a number of bodies including the EAW.

40. However, in response to the Commissioner's request for a list of all information it holds relating to the incident, NRW confirmed that it holds the following information which it does not consider falls within the scope of the request:

- Notice of powers and Rights – dated 19 November 1997
- Contemporaneous Notes of Interview with [name of farmer]
- Letter from JC Williams and Roberts Solicitors to the Environment Agency dated 30 December 1997 regarding the complainant's solicitors.
- Water: Other Portable Water: Untreated. Senders Ref. JAM17/111 source – Test result 18.11.97 ...
- Water: Other Portable Water: Untreated Senders Ref. JAM17 /112
- Letters from JC Williams & Roberts to Environment Agency dated 16 April 1998 and 23 April 1998.
- Letter from complainant to the Environment Agency dated 30 June 1998
- Letter to complainant from the Environment Agency dated 8 July 1998.

41. The Commissioner has considered the above list of information and is unclear why NRW did not consider it relevant to the request. The Commissioner's view is that this information is within the scope of the request.

42. Based on the above, the Commissioner has no option but to conclude that as there is additional information within the scope of the request held by NRW which was neither disclosed to the complainant or refused on the basis of an exception, that NRW has not complied with its obligations under regulation 5(1) of the EIR.

Right of appeal

43. 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

44. 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.
45. 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

**Catherine Dickenson
Senior Case Officer
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Wycliffe House
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