

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

Decision notice

Date: 16 July 2024

Public Authority: Environment Agency

Address: Horizon House, Deaney Road, Bristol, BS1
5AH

Decision (including any steps ordered)

1. The complainant has requested EA to disclose the United Kingdom Accreditation Service (UKAS) audit reports for water companies, which concern each of the water company's Monitoring Certification Scheme ('MCERTS') site conformity inspection certificate for flow monitoring. EA refused to disclose the information citing regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that EA is not entitled to rely on 12(5)(e) of the EIR. It also breached regulation 14(2) of the EIR by failing to issue a refusal notice within 20 working days of the receipt of the request.
3. The Commissioner requires EA to take the following steps to ensure compliance with the legislation.
 - Disclosed the withheld information to the complainant. EA is permitted to redact personal data from the withheld information in accordance with regulation 13 of the EIR.
4. The public authority must take these steps within 30 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 28 August 2023, the complainant wrote to EA and requested information in the following terms:

"Please provide the UKAS audit reports for the water companies referred to in your response to me dated 18 July 2023 from 2015 - **"One requirement is that the organisations responsible for OSM sampling and analysis have MCERTS accreditation which is granted by the United Kingdom Accreditation Service (UKAS) who carry out regular audits."**
6. EA responded on 5 October 2023. It refused to disclose the requested information citing sections 41 and 43 of FOIA.
7. The complainant requested an internal review on 19 October 2023.
8. EA carried out an internal review and notified the complainant of its findings on 15 December 2023. It maintained that the request should be processed under FOIA and that sections 41 and 43 applied.

Scope of the case

9. The complainant contacted the Commissioner on 19 January 2024 to complain about the way their request for information had been handled.
10. During the Commissioner's investigation EA agreed that the information request should be processed under the EIR. It claimed reliance on regulations 12(5)(e) and (f).
11. Towards the end of the Commissioner's investigation EA withdrew its application of regulation 12(5)(f) of the EIR, as it realised following advice from the Commissioner, that it could not rely on this exception.
12. This therefore leaves 12(5)(e) of the EIR and the following section will outline the Commissioner's decision and record any procedural breaches of the EIR.

Background

13. EA provided the following background to the Commissioner:

"EA flow permit conditions normally require water companies to hold a valid Monitoring Certification Scheme ('MCERTS') site conformity

inspection certificate for flow monitoring. CSA-Sira will then check the MCERTS Inspector's report and the Quality Management System auditor's report. If the MCERTS requirements are met they will issue an MCERTS Inspection Certificate, usually valid for five years.

MCERTS is a permit requirement for operator self-monitoring for effluent quality, so that laboratories can demonstrate their competence in undertaking the sampling and/or chemical testing of compliance samples, to EA quality requirements. It is underpinned by international standard EN ISO 17025 and accredited by the United Kingdom Accreditation Service (UKAS).

UKAS accredits laboratory sampling and chemical testing services to the EA's MCERTS standard and carries out an annual surveillance/inspection of the accredited organisation and supplies to the Environment Agency (on a voluntary basis) a copy of its summary report.

The EA uses MCERTS to assure the quality measurements across permitted self-monitoring of those we regulate. We set the monitoring standards in our permits and via our MCERTS. We require the water company to comply with the relevant MCERTS schemes as requirements of the permit. A variety of MCERTS standards covers different self-monitoring activities, including sampling, laboratory analysis, equipment, and flow monitoring. Accreditation and certification to these MCERTS standards assures us that these activities are performed to our requirements."

Reasons for decision

Regulation 12(5)(e) - commercial or industrial information

14. Regulation 12(5)(e) states: "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."

15. When considering whether regulation 12(5)(e) has been applied appropriately, the following four criteria must be met:

- The information is commercial or industrial in nature.
- Confidentiality is provided by law.

- The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.
16. For information to be commercial or industrial in nature, it will need to relate to a commercial activity. Usually, it will involve the sale or purchase of goods or services for profit. Information about planning, including developing land for infrastructure, will be commercial information.
 17. EA stated that the withheld information is commercial in nature as the water company laboratories inspected for accreditation purposes also undertake commercial work, for example providing sampling and analytical services to private individuals/businesses. It said that the withheld information goes into considerable detail regarding how their laboratories are set up, their operations, personnel issues (management, technical competencies of employees, resource requirements, facilities, and equipment) all of which could be classed as information of a commercial nature which is likely to be of interest to other laboratories undertaking the same types of commercial work.
 18. As EA has confirmed that the water companies undertake commercial work and the withheld information broadly relates to that work and how their laboratories are set up to deliver those services to private individuals and businesses, the Commissioner is satisfied that the withheld information is broadly commercial in nature.
 19. EA advised that the withheld information satisfies the common law principles of confidentiality. It was passed from one party to another in circumstances importing a duty on the receiving party to keep the information confidential. It referred to all the reports containing a confidential status header which it believes evidences that when the reports were provided they were done so with the intention that they were solely for those they were addressed to, creating an expectation that they would not be shared with the world at large under the EIR.
 20. The Commissioner notes that the information is not trivial or otherwise publicly available and that the withheld information was shared with EA on a confidential basis and so the second bullet point is met.
 21. Turning to the third bullet point, EA considers the duty of confidence identified arises for the protection of the water companies' economic interests. It argued that most of the water companies have assessed the information to be 'commercially sensitive and confidential information' and it agrees with that assessment on the basis that the withheld information is not in the public domain and would harm their legitimate economic interests if disclosure was to the world at large.

22. EA confirmed that it received representations from the following water companies:

- Anglian Water
- South West Water
- Wessex Water
- Northumbrian Water

It appears from the submissions the Commissioner has received that Yorkshire Water wished to respond, but required additional time to do so. The Commissioner is not aware if it provided subsequent submissions to EA.

23. EA refer to Northumbrian Water's submission, which stated the following:

"Whilst some of the methods and processes used in our laboratories may be used by other water companies, the way in which NWL use them (the combination, the frequency, the point at which we use them, for example) at each of our sites is continually monitored and developed internally. Allowing this information to reach the wider public means it would be impossible to trace those who may begin to adopt NWL's methods. This could damage NWL's legitimate economic interest and affect its market position. It is important to ensure that NWL's competitors do not gain access to this commercially valuable information."

24. EA confirmed that the withheld information contains detailed information that is specific to the operations of each water company laboratory. They detail how their laboratories are set up, their operations, personnel issues, management, technical competencies of employees, resource requirement, facilities, and equipment all of which would be commercially valuable information for their competitors. It stated that the withheld information also details where improvements are required, and things that are not working well and this type of information could cause reputational damage for the specific laboratories as well as highlighting potential risks and vulnerabilities to processes and infrastructure of the laboratories identified.

25. EA stated that the withheld information has the potential to impact on the water companies' current and future business and services. It commented that some of the withheld information provides details of those whom they undertake commercial work for (customer list) and this type of information is of clear commercial interest to their competitors. EA advised that disclosure would harm the contractual

relationship between UKAS and the water companies too, and any other commercial partnerships held by them.

26. EA again referred to the submissions from Northumbrian Water, which stated:

“If this level of detail were in the public domain, NWL would be open to an unfair level of scrutiny vis a vis other water company commercial laboratory ventures. This in turn provides our competitors with an unfair commercial advantage. NWL believes the disclosure of the requested documents would lead to a harmful financial impact and a reduction in our potential to secure commercial contracts. As outlined, this would result in substantial harm to NWL. The Regulations allow a public authority to refuse to disclose information where disclosure would adversely affect such confidentiality provided that the public interest in maintaining the exception outweighs the public interest in disclosing the information. We have determined that the former outweighs the latter in this instance...”

27. In terms of the final bullet point, EA submitted that the withheld information is commercially confidential information and disclosure into the public domain would inevitably harm the confidential nature of the terms of UKAS’s agreements with the water companies, relating to information obtained or created during the accreditation process. It concluded by saying that it is therefore clear that there is an intention that such reports (withheld information) would not enter the public domain.
28. The withheld information is extensive and consists of numerous reports of various lengths for a number of water companies, produced by UKAS whilst undertaking its review of their MCERTs accreditation. EA currently has applied a blanket approach to non-disclosure and argued that each and every report in its entirety is exempt under regulation 12(5)(e) of the EIR. It is therefore saying that the entire contents of all reports have the ability to adversely affect the legitimate economic interests of each water company if it were disclosed under the EIR.
29. The Commissioner believes there will be elements of these reports which can be legitimately disclosed. Reading them, he finds it difficult to see that the entire contents of each report is information of a confidential and commercially sensitive nature. He accepts that some detail may be, but EA has not specifically identified that information in the various reports and instead applied a blanket approach to the application of the exception. EA has therefore failed to demonstrate a causal link between disclosure of those specific contents and the adverse effect disclosure would cause to the particular economic interests the water companies and EA has identified.

30. It is not the Commissioner's responsibility to go through the withheld information and identify what should and what should not be disclosed. This is for the public authority to do.
31. The Commissioner also notes from the submissions received from the water companies that one felt the reports could be disclosed with a small amount of detail redacted (personal data and the names of third party companies it does business with). Another felt the information was the intellectual property of UKAS and therefore it was not in a position to say whether the reports could be shared or not. It was concerned about the commercial nature of its relationship with UKAS and how disclosure could affect that relationship. It also had concerns over how information could be misconstrued and how that could affect the commerciality of its laboratory. But no more detail was provided and it also said that if the withheld information was going to be disclosed, it would ask that personal data is redacted.
32. One of the water companies also stated in its submissions to EA that due to time constraints it had not been possible to highlight which elements of the withheld information it felt should be withheld. Suggesting again that there are elements of the withheld information that could be disclosed.
33. As EA has failed to demonstrate how bullet points three and four are met, the Commissioner has decided that regulation 12(5)(e) of the EIR is not engaged.
34. As he has found that the exception is not engaged, the Commissioner has not gone on to consider the public interest test.

Procedural matters

35. EA breached regulation 14(2) of the EIR by failing to issue a refusal notice to the complainant within 20 working days of receipt of the request.

Other matters

36. EA instructed the Commissioner to consider the submissions received from Northumbrian Water if it was found that 12(5)(e) and (f) did not apply. EA advised that Northumbrian Water felt that 12(5)(a) and (c) could apply too.

37. The Commissioner has received no submissions from EA on either 12(5)(a) or (c) of the EIR. EA holds the information and is responsible for the processing of this request and making the final decision on the application of exceptions and whether information can be disclosed. It is also responsible for putting the necessary submissions to the Commissioner.
38. The Commissioner has therefore declined to consider these additional exceptions.

Right of appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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