

Information and Water Pollution

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Water Companies - lifting the information lid

- Aarhus convention first pillar – access to “environmental information” by right;
- Environmental Information Regulations 2004 (EIR) – Reg 4 *“Dissemination of environmental information”. . .by the Public Authority for environmental information and to “progressively make the information available to the public by electronic means which are easily accessible” and “take reasonable steps to organize the information. . .with a view to the active and systematic dissemination to the public of the information.”*
- “Public Authority” defined but not listed (compare with FOIA, schedule 1)
- EIR: by definition: “public authority” means obvious ones like government departments. Otherwise *“any other body or other person, that carries out functions of public administration”* (2.2.(c)); or *“under the control of such a person”* (2.2.(d))



Fish Legal and the Water Companies

- *FL & Shirley v ICO, United Utilities plc, Yorkshire Water Services Ltd, Southern Water Services and SSEFRA [2015] UKUT 0052 (AAC)*
- 2009 FL asks water companies for full details of all discharges for deemed consents but refused as they say they are *not* public authorities;
- Complaint to ICO and appeal to First Tier then Upper Tribunal via ECJ
- “*Special powers*” test: the companies have special powers to satisfy the test laid down by the CJEU. Therefore, the companies are public authorities for the purposes of Aarhus, EID and EIR.

MOVE ALONG



NOTHING TO SEE HERE

We got the info but
we're not telling!

Exemptions. Regulation 12 EIR:

- Public authority may refuse where falls into particular category as listed (and public interest in keeping secret outweighs the public interest in disclosing the information – with a presumption in favour of disclosure). Exception for some is where it is to do with *emission* to environment
- Most common response to FL requests:
- internal communications – Reg 12(4)(e)
- course of justice - Reg 12 (5)(b)
- confidentiality of proceedings protected by law – Reg 12(5)(d)
- confidentiality of commercial or industrial information – Reg 12(5)(e)
- EA: “identity of the polluter is personal information. Get a third party disclosure order or we aren’t sharing it!”



Information which needs to be published

- **EPR R 46** (“Duty of the regulator to maintain a public register”) and sched 27 EPR (permits, permit applications, monitoring data, notices etc etc. S&TC formal complaint to OEP as EA not provided a full and public reg for public inspection (Windows XP 2003 computer in Fradley, West Midlands). NRW records of permits are incomplete and still digitizing pre-2018 records
- **Water Resources Act 1991** Part VIII including 189 Register of abstraction and impounding licences; s 190 Pollution control register; s 191 Register for the purposes of works discharges;
- Environment Act 2021 s 79 amends **Water Industry Act 1991** with new 94A – “Drainage and sewerage management plans: preparation and review” (1) Each sewerage undertaker must prepare, publish and maintain a drainage and sewerage management plan.” (also see WIA more generally for publication requirements for notices, statements and reports).
- Planning applications - s 100D Local Government Act 1972 (planning related – e.g. new sewage works/ infrastructure) – background papers to be included in officer’s report. *R (Joicey) v. Northumberland CC* [2014] EWHC 3657 (Admin).



Haven't looked!

- Absence of information – we don't do flow to treatment ("Pass Forward Flow" monitoring)
- EA "Incident Triage": we don't turn up to all pollution events: Not logging all incidents if classified 3-4 (However, standard policy document - *"Incidents and their classification: common incident classification scheme"* - says that the EA needs to record *all* incidents on the NIRS system (see page 9 of the CICS document) EA "Incident Triage" doesn't require all incidents to be recorded.
- Alternative reality: there's no problem here! "Rivers in best state since Industrial Revolution"



The Art of the Deal

- The plea bargain: the scope of the damage and its cause is not considered in open court and the EA then refuses to share information;
- Enforcement undertakings: there is evidence that these are being agreed with water companies and other polluters;
- Although they should be published, they regularly aren't. Also see Schedule 26 of the EPR ("Publication of enforcement undertakings" – limited to "*from time to time publish the cases in which an enforcement undertaking has been entered into. . . (2) This paragraph does not apply in cases where the Agency considers that publication would be inappropriate.*")
- When they are agreed with the EA, the EA regularly refuses to disclose investigation documents
- Delay in releasing information maybe years after pollution

Maybe some good news?

- Water companies tending generally to be more open than the EA;
- Water companies also tending to own up to problems more than before;
- Public profile of sewage pollution has meant that there is pressure for government bodies or water companies to be more open.