

Reference: FPR0987680

The Environmental Information Regulations 2004 (Regulation 16) Practice Recommendation

United Utilities Water Limited
14 October 2024

Summary

Section 48 of the Freedom of Information Act 2000 (FOIA) empowers the Information Commissioner (the Commissioner) to issue a practice recommendation where it appears to him that a public authority has failed to conform, specifically, to the FOIA Codes of Practice. Section 47 of FOIA also makes clear that the Commissioner has a duty to promote the following of good practice beyond just the requirements of the Codes of Practice.

Regulation 16(5) of the Environmental Information Regulations 2004 (EIR) provides that the general functions of the Commissioner under sections 47 and 48 of FOIA shall apply under the EIR with modifications.

United Utilities has repeatedly failed to classify information as environmental, according to regulation 2(1) of the EIR. This has been highlighted by numerous complaints the Commissioner has dealt with, where United Utilities has erroneously refused to deal with a request for information on the basis that the information being requested isn't environmental.

It's important to establish whether information being requested from United Utilities is environmental because United Utilities, as a water and waste water service provider, has an obligation to comply with requests for environmental information, under the EIR, but not non-environmental information, under FOIA. If the requested information isn't environmental, the Commissioner doesn't have any power to investigate how the request has been handled, or compel United Utilities to take any steps. Incorrectly classifying information as non-environmental denies individuals access to important environmental information about how United Utilities works and the effect its work has on the environment.

The Commissioner has reached the view that, in repeatedly failing to categorise information as environmental, either during its initial handling of the request or during any subsequent investigation of the Commissioner's, United Utilities has repeatedly failed to issue responses to EIR requests within the statutory timeframe and so has failed to conform with part IV of the EIR Code of Practice.

The increasing number of complaints that the Commissioner has received about United Utilities also gives him concern that United Utilities has failed to adequately train its staff in what environmental information is and so has failed to conform with part I of the EIR Code of Practice. Likewise, the Commissioner is concerned that United Utilities has failed to give sufficient

Reference: FPR0987680

consideration to the proactive publication of environmental information and so has failed to conform to part II of the EIR Code of Practice.

United Utilities' failures in accordance with the EIR Code of Practice are reflected in the recommendations laid out below. The EIR Code of Practice was issued by DEFRA in 2005.¹ The wider concerns the Commissioner has in this case, which reflect his broader statutory role to promote good practice, are addressed in the "Other matters" section below to keep them distinct from the specific recommendations he has made that relate to the EIR Code of Practice.

¹ https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Recommendations

| Area of Code | Non-conformity | Recommendation of steps to be taken |
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| <ul style="list-style-type: none"> Part IV – Timeliness in dealing with requests for information. <p>Part IV of the EIR Code of Practice states that 'Requests for information must be responded to within 20 working days. The 20 day time limit can be extended to 40 working days if the complexity and volume of the information requested means that the 20 working days deadline cannot be complied with.</p> | <p>The Commissioner has dealt with multiple complaints (including IC-300506-F5G4, IC-300509-B8G8, IC-308907-L6N0, IC-312208-W6X8 and IC-302600-G4W7) where United Utilities erroneously claimed the requested information wasn't environmental and therefore didn't believe it was obligated to deal with the request.</p> <p>In order for environmental information to be provided within the statutory timeframe; it's important the requested information is recognised as environmental, and therefore dealt with as an EIR request, by United Utilities in the first instance.</p> | <p>United Utilities needs to stop interpreting environmental information so narrowly. "Any information" on the environment covers any environmental information about, concerning or relating to the various factors, elements and other items stated in regulation 2(1) of the EIR and should be interpreted broadly.</p> <p>For example, United Utilities has repeatedly maintained the position that operational data, specifically technical information that relates to the performance of it's wastewater treatment works, isn't environmental information because it relates 'to the internal workings of pieces of mechanical, electrical or civil equipment, rather than providing information about elements of the environment'.</p> <p>The Department for Business, Energy And Industrial Strategy v The Information Commissioner & Alex Henney [2017] EWCA Civ 844 (29 June 2017) makes it clear that when considering whether information is a 'measure or activity affecting or likely to affect the state of the elements of the environment', it's 'permissible to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture.'" In the Commissioner's opinion, United Utilities has repeatedly and deliberately been ignoring the bigger picture in its interpretation of environmental</p> |

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| | | <p>information. In line with the Aarhus Convention, any information that would inform the public about matters affecting the environment or enable them to participate in decision-making is likely to be environmental information, even if the information does not directly mention the environment.</p> |
| | | <p>United Utilities must consider the Commissioner’s guidance when deciding whether information is environmental.² It must apply the test about whether the information is on or about something falling within the definitions in regulations 2(1)(a)-(f), rather than thinking about whether the information directly mentions the environment or any environmental matter.</p> |
| | | <p>United Utilities must ensure that it applies a holistic approach to determining whether information is environmental, with the aim of assisting the applicant.</p> <p>United Utilities should not class requested information as non-environmental as its first position but then apply an exception under the EIR; this isn’t in keeping with the spirit of the EIR.</p> <p>Without being pre-determinative since every request must be dealt with on a case-by-case basis, it’s highly likely that a significant majority of the information</p> |

² [Regulation 2\(1\) - What is environmental information? | ICO](#)

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| | | <p>requested from United Utilities, especially it's operational information, will be environmental given it's functions and self-defined purpose. United Utilities should work backwards from the assumption that information being requested is environmental information, rather than the alternative - this would also be more in-keeping with its core values to 'be better' and 'do the right thing'.</p> |
| <p>• Part II - Proactive Dissemination Of Information</p> <p>Part II of the EIR Code of Practice states 'Under Regulation 4, a public authority has a duty to progressively make the information available to the public by electronic means which are easily accessible, and to take reasonable steps to organize [sic] information relevant to its functions with a view to active and systematic</p> | <p>The Commissioner has been dealing with an increasing number of complaints about United Utilities, for operational data relating to its wastewater treatment works³ and its start and stop time of discharge data.⁴</p> <p>This leads the Commissioner to question whether there is more information that United Utilities could publish in order to "head off" such requests.</p> | <p>Not only should United Utilities assume the majority of the information it holds is environmental, but in line with part II of the EIR Code of Practice, and the Commissioner's recent letter⁵, it should review its culture around proactive disclosure. The Commissioner's letter specifically instructs water companies to publish start and stop times of discharges on a monthly basis.</p> |

³ [ic-301905-y8s8.pdf \(ico.org.uk\)](#); [ic-312208-w6x8.pdf \(ico.org.uk\)](#); [ic-301903-b7z1.pdf \(ico.org.uk\)](#)

⁴ [ic-278687-q9s1.pdf \(ico.org.uk\)](#)

⁵ [Information Commissioner calls for water companies to be crystal clear with public over sewage pollution | ICO](#)

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| <p>dissemination...</p> <p>When public authorities are considering what information to disseminate proactively, they should not restrict themselves to the minimum requirements as listed in the Directive. For example, consideration should be given to disseminating frequently requested information, which will reduce individual requests for such information in the future.'</p> | | <p>A disclosure log, where United Utilities publishes its responses to previous EIR requests, would increase transparency and reduce individual requests for such information in the future.</p> <p>United Utilities should also review its approach to proactive publication and publish the findings of this, setting out its approach to comply with this element of the EIR in the future.</p> |
| <p>• Part I – Training</p> <p>Part I of the EIR Code of Practice states 'All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR.</p> | <p>In failing to correctly categorise information as environmental, and thus refusing to deal with requests for environmental information, United Utilities is failing to comply with its obligations under the EIR.</p> | <p>United Utilities should ensure that staff are sufficiently trained in what environmental information is and review its procedures and practices to ensure they provide responses that fully comply with regulation 4 of the EIR and part I of the EIR Code of Practice.</p> |

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| <p>It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code...'</p> | | |
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Reasons for issuing this Practice Recommendation

This practice recommendation formalises the Commissioner’s concerns and holds United Utilities accountable for improving its EIR request handling practices, specifically ensuring it adequately trains its staff, proactively publishes information and accurately classes information as environmental. In turn this will help it to comply with its obligations under the EIR within the statutory timescales. This will increase public confidence and trust in its information rights practices.

Other matters

United Utilities doesn’t currently publish its compliance statistics in relation to EIR requests. United Utilities should study the Commissioner’s guidance⁶ for public authorities on how to report on performance on handling requests for information, with a view to publishing its compliance stats.

⁶ [How to report on your performance on handling requests for information under FOIA 2000 | ICO](#)

Reference: FPR0987680

United Utilities also doesn't currently publish its responses to previous EIR requests. The Commissioner would urge United Utilities to review this, in the aim of transparency.

There is no statutory requirement to have a publication scheme under the EIR, although as noted in the recommendations above, there is a requirement to progressively make information available to the public. The Commissioner would urge United Utilities to publish as much information as possible about its performance, including that of its waste treatment water works. Recognising that there might be limitations to United Utilities' resources, it should aim to publish its compliance statistics and disclosure log as soon as possible and signpost the Commissioner to this information as soon as this has been done.

Failure to comply

A practice recommendation cannot be directly enforced by the Commissioner. However, failure to comply with a practice recommendation may lead to a failure to comply with the EIR, which in turn may result in the issuing of an enforcement notice. Further, a failure to take account of a practice recommendation may lead in some circumstances to an adverse comment in a report to Parliament by the Commissioner.

United Utilities should write to the Commissioner by **14 February 2025** to confirm that it has complied with its recommendations and how it has achieved this. It should also publish this response on its website, alongside the action plan it develops to comply. The Commissioner will have regard to this practice recommendation in his handling of subsequent cases involving United Utilities.