Clear as Water:
Water Industry Transparency in the United Kingdom

Erin C. Ferguson*

Abstract: This paper examines privatisation and access to environmental information within the United Kingdom. Focusing on the privatised water industry in England and Wales, this paper presents the results of an empirical investigation into the transparency practices of the privatised water companies since 2015, when it was decided that they are public authorities for the purposes of the Environmental Information Regulations 2004 (EIR). Through this investigation, the paper explores potential methods and challenges of measuring transparency. The findings will inform a larger project on the relationship between privatisation and public access to official information in the UK, with the aim of identifying recommendations for legislative reform.

Key Words: privatisation, water industry, environmental information, transparency

I. Introduction

This paper examines water industry transparency in the United Kingdom, specifically within the privatised water companies in England and Wales.[1] The analysis involves two significant parts: the first is a doctrinal analysis of the *Fish Legal* judgment, which determined that private water companies are public authorities for the purposes of the Environmental Information Regulations 2004 (EIR).[2] The second part is a socio-legal examination of how the private water companies have responded to their new transparency requirements since the 2015 *Fish Legal* judgment.

The overall aim is to identify the ways in which privatisation has affected – or can affect – access to information in the water industry, thereby serving as a case study to inform whether and how the UK's access to information laws should be extended or amended to ensure that information rights are not diminished as the result of privatisation.[3]

The rest of the paper is divided into five substantive sections. It begins with an exploration of commodification of the water industry and the presumed tensions between privatisation and the right to water. The paper then provides an overview of the history and current structure of the water industry in England and Wales, focusing on the events that led up to the industry's 1989 privatisation. This is followed by an explanation of the legal framework for access to environmental information in the UK and the complex cases that led to the decision that the privatised water companies *are*

---

* Erin Ferguson is a PhD Researcher and Tutor at the University of Strathclyde Law School and, from September 2019, will be Lecturer in Law at the University of Buckingham.

[1] The water industry was privatised in England and Wales in 1989. Since 2001, Welsh Water (Dŵr Cymru) has operated as a non-profit company. Scottish Water remains under public ownership, though privatisation was seriously considered during the 1990s and there is a significant degree of private sector involvement, most notably in the form of public-private partnerships (PPPs) and private finance initiative (PFI) projects. This paper is part of a larger project looking at how different forms of water industry privatisation throughout the UK affect information rights, but this paper focuses on the privatised water industry in England and Wales.

[2] *Fish Legal v Information Commissioner* [2015] UKUT 0052; *Fish Legal v Information Commissioner* (C-279/12)

[3] For more on this, see, generally: Office of the Scottish Information Commissioner, *FOI 10 Years On: Are the Right Organisations Covered?* (OSIC 2015); Information Commissioner's Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law* (ICO 2019); Information Commissioner's Office, *Transparency in Outsourcing: A Roadmap* (ICO 2015)

public authorities under the EIR. The final section explains the methodological approach and the results of the empirical investigation on how the privatised water companies have responded to their EIR obligations since 2015.

II. Water: Common Good or Commodity?

It is not an exaggeration to say that life depends on water. Water is necessary for, *inter alia*, sanitation, agriculture, hydration, and transportation. Access to clean water and sanitation is necessary for public health, but, globally, providing universal access remains challenging. The World Health Organization (WHO) reported in 2015 that 844 million people lack access to a drinking water service, and more than two billion people use a contaminated water source.[4] Water contamination leads to an estimated 502,000 deaths annually.[5]

Expanding access to clean water is imperative, but, at the same time, water is a finite resource. Climate change, population growth, and urbanisation contribute to immense pressure on water services. The WHO estimates that by 2025, half of the world's population will be living in water-stressed regions.[6] Sustainable water governance must therefore balance the goal of increasing access to clean water to those in need, whilst simultaneously protecting a finite resource for future generations.

International financial institutions (IFIs) like the World Bank and International Monetary Fund (IMF) have encouraged the commodification of water as a solution to the challenges of water supply, with privatisation in some instances a necessary condition for receiving an IMF loan.[7] Privatisation is presented as an efficient and effective model of service delivery, particularly in developing countries, where states are considering lacking in the necessary resources and skills to provide adequate water and sewerage services directly. However, privatisation has been met with resistance from those who view water as a common good and collective resource, with some arguing that access to water is a fundamental human right.[8]

Perhaps more so than any other service or utility, the water industry delivers a vital resource, one that must be delivered equitably, affordably, and in accordance with environmental standards. Sustainable and equitable water governance requires transparent and accountable service provision. Privatisation is therefore seen as a potential threat as private companies are not usually subject to the same transparency laws or standards as public bodies.[9]

Traditional regulatory frameworks for transparency have been deemed insufficient because (1) powerful private companies have, in some circumstances, weakened the effectiveness of regulatory agencies and (2) regulatory agencies do not necessarily hold

---

[4] World Health Organization, 'Drinking-water' (7 February 2018) <http://www.who.int/news-room/fact-sheets/detail/drinking-water> accessed 5 December 2018

[5] ibid.

[6] ibid.

[7] Christine Cooper, William Dinan, Tommy Kane, David Miller, and Shona Russell, Scottish Water: The Drift to Privatisation and How Democratisation Could Improve Efficiency and Lower Costs (University of Strathclyde, October 2006) 8

[8] See e.g. Henri Smets, 'The Right to Water as a Human Right,' (2000) 30 Environmental Policy and Law 248; K. Moyo and S. Liebenberg, The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability,' (2015) 37 Human Rights Quarterly 691

[9] For example, freedom of information (FOI) laws in many jurisdictions have been designed to apply to public bodies. Whilst provisions can be made to extend FOI legislation to private bodies that perform public duties or functions of a public nature, they have not always kept pace with privatisation and outsourcing.

all of the environmental information the public might seek.[10] Moreover, voluntary disclosure mechanisms suffer from a lack of enforceability, as an information requester has no legal recourse should their request be denied. A legally enforceable right of access to environmental information held by private water companies is therefore one way of enhancing water industry transparency, but, as this paper will demonstrate, this right has only recently been recognised in the UK. It is now time to reflect on why it took so long for privatised water companies to be classed as public authorities for EIR purposes in the UK, how they have responded to their new transparency obligations, and what this means for other private bodies delivering public services.

III. The Water Industry in the United Kingdom

Historically, water and sewerage services in the UK have been provided by a mix of public and private providers.[11] State involvement in the water industry increased after the cholera outbreaks in London and other major urban areas in the mid-19th century claimed tens of thousands of lives. After epidemiologists determined that the disease and its spread were the direct result of poor sanitation, the government accepted that it has a 'binding moral duty' to provide clean water and waste disposal services to all households.[12] The public health imperative led to widespread engineering projects, designed to deliver water to Britain's growing urban centres and surrounding towns.

Thus, by the early 20th century, private sector involvement become less common as public sector provision increased.[13] In most cases, water services were provided directly by local authorities, with over 1400 such authorities existing during the early 20th century. After World War II, successive governments sought to improve efficiency through the amalgamation of water suppliers. As a result, the number of municipal water authorities was reduced to 150 by 1974. Control of the water authorities was transferred to joint boards, comprised of neighbouring authorities, whereas before each local authority had maintained control of its own supply.

Water supply, however, is not the only task of the water industry. It also provides sewerage treatment and maintains the water environment, e.g. through controlling water abstraction, regulating water use for recreational purposes, and maintaining infrastructure.[14] Amalgamation did not occur as it had with the water supply companies, so, in 1974, there were still 1393 sewerage authorities in England and Wales, most of them very small and suffering from underinvestment. Local authorities at the time were more likely to invest in visible public works projects, rather than improving the sewerage system. This led to environmental consequences, as without the resources to treat water effectively, dirty water was pumped back into rivers and seas.[15]

The third function of the water industry, maintaining the water environment, was also traditionally the responsibility of local authorities in England and Wales. In 1948, 32 River Boards were created to manage the water environment. These were replaced in 1963 with 29 River Authorities.[16] The Water Act 1973 was introduced to address the fragmentation of the industry through a systematic restructuring, replacing the 29

[10] Uzuazo Etemire, 'Public Access to Environmental Information Held by Private Companies,' (2012) 14 Environmental Law Review 7, 11-12
[11] See e.g. Colin Ward, *Reflected in Water: A Crisis of Social Responsibility* (Cassell 1997)
[12] ibid. 6
[13] Peter Saunders and Colin Harris, *Privatization and Popular Capitalism* (Open University Press 1994)
[14] ibid.
[15] ibid. 36
[16] ibid.

River Authorities with ten Regional Water Authorities (RWAs). The newly created RWAs were tasked with taking over all three functions of water industry management. The local authorities fought to maintain some control over sewerage services, but, ultimately, they could not compete with the larger, better-resourced RWAs.

III.I Water Privatisation in England and Wales

The first suggestion to privatise the water authorities came in 1985 and was motivated by several factors. Frustrated by financial constraints and government pressure on nationalised industries, the Chairman of Thames Water was among the first to publicly declare that the RWAs would be better off free from government control. In addition, the aging infrastructure needed upgrading, and since central government had taken over the water industry in 1974, capital investment expenditure had been cut by one half.[17] At the same time, public utilities including gas, electricity, and telecommunications had been or were being privatised in the UK, and the water industry was seen as the 'last frontier' of privatisation.[18]

The process of water privatisation was fraught with numerous challenges. Firstly, it was a politically charged issue, one that was very unpopular with the public. Privatising water, a vital natural resource and common good, was anathema to many people, who argued that the private sector should not be allowed to profit from water services, a criticism that Margaret Thatcher later dismissed as 'emotive nonsense.'[19] Secondly, there were the practical issues, such as determining how to charge for water. Furthermore, underinvestment in infrastructure meant that some RWAs would be less attractive investments than others, with most of RWAs in need of upgrading to ensure compliance with environmental regulations.

Most importantly, as explained above, the RWAs had responsibility for both utility service and regulatory functions. That is, in addition to supplying and treating water, the RWAs were responsible for granting water abstraction licences to private companies. If the RWAs were to be privatised, then private companies would become responsible for regulating other private companies, an unprecedented arrangement. On the other hand, separating the utility and regulatory functions would undermine the principle of integrated river basin management, which the amalgamation and consolidation of the local water authorities had sought to achieve.

Between 1985 and 1987, there was considerable public and political debate on the how to address these challenges.[20] The water industry was in favour of privatisation, but on the condition that the RWAs maintained control of their existing powers and functions (i.e. including the power to grant abstraction licences). Initially, the government appeared to comply with this condition, but its 1986 White Paper was met with opposition from a range of stakeholders, both public and commercial. The chemical, agricultural, and brewing industries relied on water abstraction and did not want licensing powers to be granted to the privatised water companies. Public opinion was

---

[17] Ward (n 11) 93-94

[18] Moyo and Liebenberg (n 8) 692. The privatisation of the water industry was not, however, the final industry to be privatised in the UK. Perhaps most notably, the Royal Mail was privatised in October 2013 through a public flotation, in which the government sold off 70% of its shares. See e.g. David Parker, 'Privatisation of the Royal Mail: Third Time Lucky?' (2014) 34 Economic Affairs 78

[19] Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 682

[20] See e.g. *Water Authority Privatisation: A Discussion Paper* (Department of the Environment Water Directorate 1985)

also strongly against privatisation, and in July 1986, the government announced that it would be putting its privatisation plans on hold.

However, the pause was short-lived. In its May 1987 election manifesto, the Conservative party asserted its intention to 'continue the successful programme of privatisation,' including water privatisation.[21] Significantly, it pledged to establish a new National Rivers Authority (NRA) to take over responsibility for the regulatory and safeguarding functions of the water industry. The water supply and sewerage functions would be privatised. In other words, the Conservatives had decided to move away from the principle of integrated river basin management so that the privatised water companies would not have regulatory powers. The water industry was finally privatised in 1989.

IV. Access to Environmental Information

Access to environmental information in the UK is regulated by the Environmental Information Regulations 2004 (EIR) and the Environmental Information (Scotland) Regulations 2004 (EIR-S), which are based in European Union law.[22] The origins of the Regulations are in the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (hereafter, the 'Aarhus Convention'), a multilateral environmental agreement that recognises the importance of multiple stakeholders in environmental governance. Access to environmental information is one of its three pillars, based on the understanding that information is necessary to support participatory democracy and the accountability of public authorities.[23]

The EIR require public authorities to provide access to information in two ways: (1) through the proactive dissemination of environmental information and (2) by responding to public requests for environmental information. Requests can be made verbally or in writing, and authorities are obliged to provide a response within 20 working days.

Though there is a general presumption of transparency under the EIR, there are two broad exceptions that can be applied to withhold information.[24] Both exceptions are qualified exceptions, subject to the public interest test, meaning that the public authority has to demonstrate that information disclosure would have an adverse effect on the public interest.

The scope of the EIR and EIR-S is intentionally broad; they extend to all public authorities listed in Schedule 1 of the Freedom of Information Act 2000 (FOIA) and the Freedom of Information (Scotland) Act 2002 (FOISA), as well as additional organisations that perform 'functions of public administration.' Regulation 2(2) sets out the definition of 'public authority':

---

[21] Conservative Party, *General Election Manifesto 1987: The Next Moves Forward* (Conservative Party 1987)

[22] The EIR and the EIR-S incorporate Directive 2003/4/EC into UK law.

[23] See e.g. Etemire (n 10); Sean Whittaker, 'Access to Environmental Information and the Problem of Defining Public Authorities,' (2013) 15 Environmental Law Review 230

[24] Regulation 12(4) refers to the information or the information request, i.e. Regulation 12(4)(a) refers to information that an organisation does not hold. Regulation 12(5) can be applied in circumstances where information would have an adverse effect on, inter alia international relations (Regulation 12(5)(a)) or intellectual property rights (Regulation 12(5)(c)).

Subject to paragraph (3), "public authority" means –

(a) government departments

(b) any other public authority as defined in section 3(1) of the Freedom of Information Act (the Act) disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –

  (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description;

  (ii) any person designated by Order under section 5 of the Act;

(c) any other body or person, that carries out functions of public administration; or

(d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and -

  (i) has public responsibilities relating to the environment;

  (ii) exercises functions of a public nature relating to the environment; or

  (iii) provides public services related to the environment.

The broad definition of public authority is aligned with the aims of the Aarhus Convention and Directive 2003/4/EC. Recognising that environmental information is held by a range of bodies, not just traditional state or public sector organisations, the aim is to extend transparency obligations to any organisation, public or private, that exercises 'special powers' not ordinarily found in private law.

V. Are Private Water Companies 'Public Authorities?'

Despite the apparently broad definition of 'public authority' under the EIR, determining whether the private water companies in England and Wales fall within this definition has been complicated. In 2012, the Upper Tribunal held in *Smartsource*[25] that private water companies are not public authorities for EIR purposes, as it did not meet the definitions set out under Regulation 2(2)(c) or Regulation 2(2)(d). Regarding 2(2)(d), the UT remarked that a distinction must be made between 'regulation' and 'control.'[26] In other words, just because the water industry is regulated by the state, it does not necessarily mean that it is under its control as this, according to the UT, involves a higher degree of command and establishes a higher threshold that must be met. However, in its concluding remarks, the Tribunal observed that the notion of 'public authority' is dependent on context and is both 'place and time-specific.'[27] It suggested that the application of the definition set out in the EIR could change in the future, which is exactly what happened in the 2015 *Fish Legal* judgment.

The facts of the *Fish Legal* case are complex, but briefly: the case involved two separate requests for information, one made by a private individual and the other by Fish Legal, the legal arm of the Angling Trust, a charitable body set up to protect anglers' rights and fish conservation. Both requested information from private water companies, which eventually provided the information, but not within the 20-day time limit out under the EIR. The requesters complained to the ICO about the way their requests had been handled, but the ICO declined to adjudicate on the grounds that the water companies are not bound by the EIR.

The requesters appealed to the First-tier Tribunal, and, following the *Smartsource* judgment, were given permission to appeal to the UT. The appellants argued that the question of whether a body is performing 'functions of public administration under national law' is a matter of EU law, not simply a matter of domestic law. As such, the

[25] *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC)

[26] ibid. para 74

[27] ibid. para 101

courts must consider the purpose of Directive 2003/4/EC as well as 'the precautionary and preventative principle which underpin EU environmental law generally,' and the principles of access to information and public participation underpinning the Aarhus Convention.[28] The appellant maintained that the water companies *do perform* functions of public administration and are under the control of bodies falling within the scope of Articles 2(2)(a) and 2(2)(b) of the Aarhus Convention. Moreover, the appellants argued that since private water companies are public authorities for the purposes of the European Directive, it should follow that the privatised water companies in England and Wales be classified as public authorities under the EIR.

Referral to the Court of Justice of the European Union (CJEU)

Based on the appellants' submissions, the UT referred five questions to the Court of Justice of the European Union (CJEU). For the purposes of this paper, the first three are the most significant. The first two questions concerned the meaning of 'public administrative functions' and the criteria for determining what these are, with the Tribunal judge noting that he was sceptical of some of the criteria that had been applied in *Smartsource*. The third question concerned the meaning of 'control' and whether it indeed differed from 'regulation' as previously decided.

The Grand Chamber of the CJEU responded in December 2013, establishing a test for determining whether bodies are performing 'public administrative functions' under national law. The test requires adjudicators to examine whether the bodies in question are vested with special powers 'beyond those which result from the normal rules applicable in relations between persons governed by private law.' This is referred to in shorthand as the 'special powers' test. The CJEU did not elaborate on the meaning of 'special powers,' leaving it instead to the adjudicating body to consider all parties' submissions and establish the relevant criteria.

Regarding Question 3, the Grand Chamber concluded that a system of regulation does not exclude control within the meaning of Article 2(2)(c). For example, if a regulatory system involves a 'particularly precise legal framework' that sets out specific directions for how a private company is to perform its public functions, then it can be said that these companies are not fully autonomous of the state. The Grand Chamber held that it is the responsibility of the UT to determine whether the regulatory framework set out in the Water Industry Act 1991 (WIA) meets this standard.

Fish Legal 2.0

The case was then returned to UT, which first had to establish the relevant criteria for the purposes of the 'special powers' test. It rejected the respondent's suggestion that this could be determined, at least in part, but considering whether the private companies are exercising 'state powers' because 'the nature of the state is not sufficiently clear.' In the UK, the role of the state in the economy and the provision of social welfare has changed dramatically over the past century. Post-World War II reforms led to the establishment of the National Health Service (NHS) and the nationalised industries, but since the rapid spread of privatisation during the 1980s, the role of the state has once again shifted. Accordingly, the nature of 'state powers' has shifted over time, to the extent that its imprecise meaning makes it ineffectual as a criterion for defining 'special powers.'[29]

[28] ibid.

[29] For more on the meaning of 'public' and 'private' functions, and the inherent difficulties of definition, see Janet McLean, 'Public Functions Tests: Bringing Back the State?' in David

Ultimately, the UT concluded that the private water companies *do exercise* special powers based on the following criteria: they have compulsory purchasing powers, the right to issue temporary hosepipe bans, and the right to decide (under strict conditions) whether to cut off customers' water supply. None of these are powers normally granted to bodies under private law. However, the UT did not accept that susceptibility to judicial review is a relevant factor for the special powers test because it refers to institutional characteristics (i.e. the argument would be that if a body is subject to judicial review, then it can be considered to have special powers). This is a somewhat circular argument that puts the emphasis on the classification of the body exercising power, rather than the *nature* of the powers themselves.

Regarding the 'control test,' the UT concluded that the criteria for establishing whether the private water companies were acting in a 'genuinely autonomous manner' when providing services related to the environment *had not* been met. Though the water companies are subject to strict regulation and oversight, the UT was not convinced that there was enough evidence to conclude that neither the Secretary of State for the Environment nor Ofwat (the regulatory body now responsible for overseeing the water industry in England and Wales) exert a level of control over the private water companies that prevent them from operating in a genuinely autonomous manner. The UT recognised that the threshold for meeting this test is high and that very few commercial enterprises will meet it.[30]

As the UT found that the private water companies did meet the criteria for the 'special powers' test, they were classed as public authorities for the purposes of the EIR. The private water companies must now respond to requests for information within 20 days and make information proactively available as set out under the Regulations. Four years on, how have the water companies been affected by and responded to their EIR obligations?

VI. Measuring Transparency in the Water Industry

The decision that private water companies are public authorities for EIR purposes raises the question: how transparent is the water industry in England and Wales? The aim of the empirical investigation was to determine how the private water companies are performing with regards to their new transparency obligations. The investigation does not attempt to quantify whether the water companies are 'more' or 'less' transparent than they were prior to 2015 as baseline data is not available. Rather, the objectives were to (1) gather data on the number and types of information requests received, exceptions engaged, and charges applied and (2) establish whether (and/or how) the water companies had adapted their previous transparency practices to comply with the EIR. It is anticipated that this data can be used for further research on the water industry in the UK, and to inform the debate currently taking place within the UK on the possible extension of FOI legislation to private bodies delivering public services.[31]

VI.I Methodology

The project was designed to collect and analyse qualitative and quantitative data, through the submission of information requests to sixteen water companies in England and Wales. Eleven requests were sent via email, and four requests were sent via online

Dyzenhaus, Murray Hunt, and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 185

[30] *Fish Legal* (n 2) para 155

[31] See e.g. Office of the Scottish Information Commissioner (n 3)

forms in the absence of a publicly listed email address. The request to Severn Trent Water was sent via post, as requested on its website.[32]

The private water companies were asked to provide the following information:

1. How many requests for information have you received since it was determined that [water company name] is a public authority for the purposes of the Environmental Information Regulations?
2. Are you able to provide statistics on the types of information requested and number of requests?
3. What percentage of requests are successful requests (meaning the requested information was disclosed)?
4. Which exceptions are most commonly engaged when deciding whether to withhold information? Are you able to provide data that details the number of times each exception has been applied?
5. What percentage of information requests incur charges?
6. How frequently are information requests withdrawn when the requester is advised of the fees?
7. Do you have a publicly available publication scheme?
8. Are you able to provide additional information on how becoming subject to the EIR in 2015 has changed your work (for example, with regards to staffing/resources or existing transparency practices)?

VI.II Results

13 out of 16 private water companies responded to the information requests. 10 companies (Affinity, Bristol, Northumbrian, Portsmouth, Southern, South West, Welsh, Wessex, and Yorkshire) provided some or all of the requested data. 3 companies (Thames Water, Severn Trent Water, and South East Water) declined to provide information on the grounds that the information requested is not 'environmental information' under the definition set out in the EIR. 3 companies (Anglian, South Staffordshire, and United Utilities) did not provide any response.

Northumbrian and South West provided raw data in spreadsheet (.csv) format. Portsmouth, Welsh, and Wessex responded in text format, with Wessex providing data since the EIRs came into force in 2005, rather than since 2015. Likewise, Affinity provided data from 2016, when it began keeping records, and Bristol provided data from January 2018, due to organisational changes.

[32] Severn Trent Water, 'Environmental Information Regulations,' <https://www.stwater.co.uk/about-us/environment/environmental-information-regulations> accessed 24 May 2019.

Questions 1 and 2: Number/Types of Information Requests

Company Name	No. of Requests	Types of Information Requests
Affinity Water	35*	Low water pressure
Anglian Water	---	---
Bristol Water	9**	Does not record
Northumbrian Water	338	Wastewater infrastructure Wastewater treatment Water quality Water pollution Drainage and sewers Flooding
Portsmouth Water	12	"All environmental"
SES Water	9	Water treatment Street works Water quality Company assets
Severn Trent Water	---	---
Southern Water	285	Development enquiries Flooding Discharges Incidents
South East Water	---	---
South Staffordshire Water	---	---
South West Water	143	Waste water Water resources Corporate Drinking water Personal/private data
Thames Water	---	---
United Utilities	---	---
Welsh Water	360	Does not record
Wessex Water	504***	General environmental information about the company (for example, from students interested in our environmental work) Information about our discharges to the water environment (related to sewage treatment) Information on the quality, amount or effects relating to supply of drinking water Information about other emissions from our assets (e.g. odour, carbon or other emissions) or sustainability data. Enquiries about the environmental effects, status or other details of our treatment works or other operational sites, land or assets. Information about our assets (or company activities) related to specific environmental aspects (for example, biodiversity, recreation, plastics, waste management etc.).
Yorkshire Water	156	Does not record

* Affinity Water hold records since 2016.
** Bristol Water provided data since January 2018, due to changes in organisational processes.
*** Wessex Water provided data since 2005, rather than 2015.

Questions 3 and 4

What percentage of information requests are disclosed? And which exceptions are most frequently engaged when deciding to withhold information?

Company Name	Successful requests (%)	Frequently engaged exceptions
Affinity Water	77.1	Regulation 12(5)(g) x1 Requests for other organisations (x7)
Anglian Water	---	---
Bristol Water	100.0	N/A
Northumbrian Water	64.2	Regulation 12(4)(c) (x55) Regulation 12(4)(a) (x50) Regulation 13 (x33) Regulation 6(1)(b) (x23) Regulation 12(4)(b) (x12)
Portsmouth Water	83.0	Regulation 13 (x2) Regulation 12(5)(a) (x1)
SES Water	86.0	National security (x1)
Severn Trent Water	---	---
South East Water	---	---
South Staffordshire	---	---
Southern Water	93.0	Does not record
South West Water	81.1	GDPR personal data (x9) Not environmental information (x5) CON29DW (x3) Data not available (x3) National security (x2) Information already available (x2)
Thames Water	---	---
United Utilities	---	---
Welsh Water	Does not record	Does not record
Wessex Water	85.0	Not environmental information (x11) Personal information (x7) National security (x3)
Yorkshire Water	75.6	Does not record

Questions 5 and 6: Charging for Information

The water companies are allowed to charge for information requests, as set out under Regulation 8 and in accordance with the Information Commissioner's Office (ICO) guidance.[33] On their websites, many of the water companies indicated that a charge might be applied to information requests. For example, Northumbrian Water and

[33] Information Commissioner's Office, *Charging for Environmental Information (Regulation 8)*, (ICO 2016)

Wessex Water report that staff time spent locating information and handling requests will be charged at £25 per hour.

However, the majority of the water companies reported that they have not or have only rarely made charges for responding to EIR requests. Affinity, Bristol, SES, Southern, South West, Wessex, and Portsmouth reported that they have never made charges. Welsh Water responded that it does not routinely charge for EIR requests, though it has for one 'very large request' in the past (the cost was not provided). Yorkshire Water reported that it has made charges on five occasions, though only one resulted in payment (no amount provided). As no reason was given for withdrawing the information request, it is not possible to conclude whether the charge acted as a deterrent to the requester. The exception is Northumbrian Water, which has made 31 charges for responding to information requests, with total charges between £25.00 and £700.00.

This study did not attempt to evaluate whether the fees, or the potential fees, act as a deterrent to requesters. Future research can be conducted to determine whether listing or applying charges dissuade requesters from making or following through with requests, and which categories of requesters are more likely to be affected by charges.

Question 7: Publication Scheme

The EIR do not require publication schemes, though the ICO recommends it as good practice to support bodies in compliance with the requirement to make certain types of information proactively available.

The vast majority of respondents do not have a specific publication scheme, but indicated that they proactively publish information on their websites. The exceptions are Wessex Water[34] and Welsh Water, which is currently reviewing its publication scheme.[35]

Question 8: Changes since 2015

The final question asked for additional information on how, if at all, becoming subject to the EIR in 2015 has changed the work of the water companies. Though most indicated that they had previously been committed to voluntary transparency, many introduced some changes to prepare for compliance with the EIR.

Affinity Water appointed an Information Officer in 2017, who is responsible for monitoring and responding to all EIR requests.

Bristol Water did not appoint any new staff or additional resourcing, but reported that its Environment Team take responsibility for handling EIR requests, with support from its Legal and Customer Service departments as needed.

Northumbrian Water reported that it has introduced five changes to comply with the EIR: (1) widened the remit of its Information Access team to handle requests; (2) recruited one full-time equivalent (FTE) staff member; (3) conducted an awareness

[34] Wessex Water, 'Environmental Information – Information Already Available,' <https://www.wessexwater.co.uk/About-us/Environment/Protecting-the-environment/Environmental-information> accessed 7 December 2018

[35] Welsh Water, 'Environmental Information Regulations – What information is already available to you?' <https://www.dwrcymru.com/en/Company-Information/EIR/Available-information.aspx> accessed 9 December 2018

campaign and trainings for staff members; (4) written new procedures; and (5) written a new policy.

Portsmouth Water reported that it 'did not make any significant changes.'

Likewise, SES Water reported that 'no real change has been required' due to the low volume of requests it receives, but it has a central compliance function for handling EIR requests on a 'case by case basis.'

Southern Water has set up a dedicated webpage and email address. They held a mandatory training session for all staff, and reviewed contracts to ensure compliance where third parties hold environmental information.

South West Water reported that it was 'well prepared' for the implementation of the EIR, due to its existing transparency practices, which included a 'very effective' contacts and complaints team. Within this team, they have created a specialist team to manage EIR requests. This work is overseen by a senior manager and the legal department, who review responses before they are issued. Employees across the organisation can get support via its intranet on identifying and responding to EIR requests.

Welsh Water has not appointed additional staff or resources, but has trained 'a number of staff' to handle EIR requests.

Wessex Water responded it does not keep factual records on this type of information and declined to provide an answer as 'any response would inevitably be an opinion/subjective view.'

Likewise, Yorkshire Water declined to provide a response due to organisational changes.

VI.III Discussion

Perhaps unsurprisingly, the larger water and sewerage companies (WASCs) receive far more information requests than the smaller water-only companies (WOCs). The responses indicate that the companies have adopted different recording practices, and some were more willing than others to share data. Therefore, it is not possible to make meaningful comparisons between water companies, but the data has revealed several interesting points for discussion.

Firstly, all respondents indicated that the majority of information requests are successful (meaning that some or all of the requested information was disclosed). The most commonly engaged exceptions relate to requests for personal information, information that is not environmental, or information that is not held by the company. Beyond these, the most commonly engaged exception is 12(5)(a) – international relations, defence, national security or public safety.

Secondly, the water companies have adopted very different practices with regards to charging for information. Whilst they reserve the right to charge for staff time, very few have done so in practice. Northumbrian Water is the only company that responded that it routinely charges for information requests, though the reasons for this are unclear. Follow-up data could be collected to determine whether, for example, this is because the company is stricter than others on applying charges, or whether it receives a higher volume of time-consuming requests.

Interestingly, the exception under Regulation 12(5)(e) – 'the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest' – has not been engaged by any of the respondents, according to their reports. This is surprising as it was assumed that as

commercial companies, the water companies would be applying this exception to protect their commercial interests, or those of their partner organisations. The data suggests that they have either not had cause to consider application of the exception, or could not demonstrate that disclosure would harm a 'legitimate economic interest.' Future research can be conducted to determine whether, and under what circumstances, the exception will be applied.

Thirdly, the empirical research project highlighted some of the challenges of conducting transparency research, a field that is notoriously difficult to research due lack of consensus on the meaning and purpose of transparency.[36] Even when operational definitions and key indicators have been established, collecting data is not straightforward. The 10 water companies that responded with information did not hold or record all of the requested information, and not all were able to supply information to satisfy the entire request. The organisations record data in ways that are meaningful to them and in accordance with their operational processes, but, as this exercise has shown, means that gathering the necessary data to objectively evaluate transparency across the sector is difficult and requires extensive data cleaning to be useable. In addition, 3 of the water companies did not respond at all, and a further 3 declined to provide information as it is not 'environmental information' and therefore outwith the scope of the EIR.

This leads to the next challenge of relying on voluntary disclosure to evaluate transparency and highlights the downside of voluntary disclosure mechanisms generally. When the 3 water companies declined to provide information, there was no legal recourse. The water companies accurately determined that the requests were not for 'environmental information,' though, unlike several other respondents, chose not to provide any information at all. Voluntary disclosure leaves requesters to rely on the goodwill of organisations to provide information and is not a substitute for a legally enforceable right to information.

Finally, the water companies provided noticeably varied responses to Question 8, which is to be expected, considered the differing sizes of the organisations and the volume of requests that they receive. Interestingly, several of the smaller water companies reported that they implemented no or minor changes to prepare for EIR compliance. This is significant, as it has frequently been argued that transparency legislation is a 'burden' for organisations, particularly smaller and under-resourced organisations.[37] These responses suggest that the perceived 'burden' might be minimal, and the volume of requests received proportionate with the size of the organisation. Nevertheless, the fact that the larger organisations reported introducing more significant changes indicates that there are often costs of compliance, noticeably on staffing and training. It also indicates that even if an organisation has been committed to voluntary transparency, some changes will likely need to be made as legally enforceable transparency mechanisms require additional compliance practices. Notably, none of the respondents indicated that this had been a burden.

---

[36] See e.g., Elizabeth Fisher, 'Transparency and Administrative Law: A Critical Evaluation,' (2010) 63 Current Legal Problems 272; Andrea Bianchi and Anne Peters, *Transparency in International Law* (Cambridge University Press 2014); Albert Meijer, 'Understanding Modern Transparency,' (2009) 75 International Review of Administrative Sciences 255; Amitai Etzioni, 'Is Transparency the Best Disinfectant?' (2010) Journal of Political Philosophy

[37] See e.g. Mark Smulian, 'FOI Extension will Lead to Cost Burden, Scottish Landlords Warn,' (December 2016) Inside Housing (online) <https://www.insidehousing.co.uk/news/foi-extension-will-lead-to-cost-burden-scottish-landlords-warn-48830> accessed 24 May 2019

VII. Conclusion

This paper has chronicled the history of water privatisation within the UK and the legal process through which it was determined that the private water companies are 'public authorities' under the EIR. In doing so, it has contributed to the discussion on how privatisation affects public access to information and the challenges that can arise when attempting to measure transparency.

Significantly, the discussion of the *Smartsource* and *Fish Legal* judgments has demonstrated that the apparently broad, 'functional' approach to coverage embedded in the EIR is not as broad as it might first appear. The 'special powers' and 'control' tests establish high thresholds that must be met in order for bodies to be classified as 'public authorities.' This means that many organisations delivering public services still fall outwith the scope of EIR or other transparency laws.[38] As a result, transparency, specifically in the form of access to information, is likely diminished when public services are privatised or outsourced.

The paper has also outlined the process for collecting data on private water companies and the EIR, highlighting the challenges of collecting meaningful comparative data. As such, it has not attempted to measure whether the private water companies have become 'more' or 'less' transparent over time, but has instead developed a list of indicators and collected baseline data on how the water companies have responded to the EIR obligations since 2015. The results can be used to develop further research on water industry transparency and to inform broader discussions on the ways in which privatisation has or could affect public access to information.

[38] For example, in February 2019, the First-tier Tribunal (General Regulatory Chamber; Information Rights) found that registered providers of social housing in England do not meet the threshold and therefore are not classified as public authorities under the EIR. For more on this, see Erin Ferguson, 'Public Authorities and Access to Environmental Information: The Legacy of *Fish Legal*,' <https://adminlawblog.org/2019/04/24/public-authorities-and-access-to-environmental-information-the-legacy-of-fish-legal> accessed 24 May 2019

Bibliography

Barot, S., 'Beware of the Boojum: Private Companies as Public Authorities under the Environmental Information Regulations 2004,' (2015) 20 Judicial Review 96

Etemire, U., 'Public Access to Environmental Information Held by Private Companies,' (2012) 14 Environmental Law Review 7

Fisher, E., 'Transparency and Administrative Law: A Critical Evaluation,' (2010) 63 Current Legal Problems 272

Information Commissioner's Office, *Outsourcing and Freedom of Information – Guidance Document* (ICO 2017)

Krämer, L., 'Transnational Access to Environmental Information,' (2012) 1 Transnational Environmental Law 95

McLean, J., 'Public Functions Tests: Bringing Back the State?' in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 185

Meijer, A., 'Understanding Modern Transparency,' (2009) 75 International Review of Administrative Sciences 255

Moyo, K. and S. Liebenberg, 'The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability,' (2015) 37 Human Rights Quarterly 691

Parker, D., 'Privatisation of the Royal Mail: Third Time Lucky?' (2014) 34 Economic Affairs 78

Prosser, T., *Law and the Regulators* (Clarendon 1997) 139

Saunders, P. and C. Harris, *Privatization and Popular Capitalism* (Open University Press 1994)

Smets, H., 'The Right to Water as a Human Right,' (2000) 30 Environmental Policy and Law 248

Thatcher, M., *The Downing Street Years* (Harper Collins 1993) 682

Ward, C., *Reflected in Water: A Crisis of Social Responsibility* (Cassell 1997)

Whittaker, S., 'Access to Environmental Information and the Problem of Defining Public Authorities,' (2013) 15 Environmental Law Review 230