

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

Decision notice

Date: 23 May 2016

Public Authority: Department for Environment, Food and Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Environment, Food and Rural Affairs ("Defra") relating to Prince's Consent.
2. The Commissioner's decision is that Defra has correctly applied regulation 12(4)(b) of the EIR and section 12(1) and section 12(2) of the FOIA to the request. However, Defra has breached regulation 5(2) and section 10 as it failed to provide a response to the request within 20 working days. Defra has also breached regulation 11 as it failed to provide an internal review within 40 working days.
3. The Commissioner requires Defra to take no steps.

Request and response

4. On 30 September 2015 the complainant wrote to Defra and requested information in the following terms:

"Please note that I am only interested in information which relates to the period 30 September 2014 to the present day.

Please note that the reference to Secretary of State and or Minister should also include the Secretary of State and the Minister's private office.

Please note that the reference to the Duke of Cornwall should include his personal office and or legal representatives of the Ducky of Cornwall.

Please note that the reference to policy should include any policy proposal and or bill and or act and or statutory instrument and or any other proposal and or order and or draft law which would require Prince's Consent.

1...During the aforementioned period has the department sought Prince's Consent for any policy which could have implications for either the Duke of Cornwall or the Duchy of Cornwall estate.

2.. If the answer to the above is yes can you please highlight the particular policy.

3...Can you please state why the Prince's Consent was sought and what changes if any were made to the particular policy proposal following receipt of the Duke's views.

4...During the aforementioned period has the Secretary of State and or any member of the ministerial team exchanged correspondence and communications including emails with the Duke of Cornwall about the aforementioned policy (s) or other matters relating to Prince's Consent. If the answer is yes can you please provide copies of this correspondence and communications including emails".

5. Defra responded on 1 December 2015. It explained that it had handled the request under the FOIA and the EIR. Defra applied section 12(1) and section 12(2) of the FOIA to the request. It also considered that regulation 12(4)(b) of the EIR applied on the grounds of costs.
6. Following an internal review Defra wrote to the complainant on 25 April 2016. It maintained its previous decision.

Scope of the case

7. The complainant contacted the Commissioner on 24 April 2016 to complain about the way his request for information had been handled.
8. The complainant was unhappy with Defra's failure to provide the requested information. He was also unhappy with the length of time it took Defra to respond to his original request and his request for a review.

9. The Commissioner has therefore had to consider whether Defra correctly applied section 12(1), section 12(2) and regulation 12(4)(b) to the request. He has also had to consider whether Defra complied with regulation 5(2), section 10 and regulation 11.

Reasons for decision

What access regime does the information fall under?

10. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form on

“(a) the state of the elements of the environment, such as air and atmosphere, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors such as substances, energy, noise, radiation or waste including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...”

11. The Commissioner's approach is to interpret *“any information...on”* fairly widely. He does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.
12. Defra explained that it has not located the information falling within the scope of the request by virtue of the application of regulation 12(4)(b) of the EIR and section 12 of the FOIA and therefore, it cannot be determined if the EIR or the FOIA (or both) apply to the request.

Therefore, in line with the Commissioner's guidance¹, it applied both the EIR and the FOIA in the alternative to the request.

13. The Commissioner is satisfied that it is likely that some of the requested information, if held would fall under the EIR. Similarly, the Commissioner is also satisfied that some of the requested information, if held, is likely to fall under the FOIA.
14. The Commissioner is therefore satisfied that the request would fall under the EIR and/or the FOIA. The Commissioner will first consider whether Defra handled the request in accordance with the EIR. He will then consider whether the request was handled correctly under the FOIA.

Regulation 12(4)(b)

15. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
16. In the Commissioner's view, "manifestly" means that there must be an obvious or tangible quality to the unreasonableness. In this case, Defra has argued that the request is manifestly unreasonable on the grounds of costs.
17. Unlike FOIA and, specifically, section 12, the EIR does not contain a provision that exclusively covers the time and cost implications of compliance. The considerations associated with the application of regulations 12(4)(b) of the EIR are, instead, broader than section 12 of FOIA. Specifically there is a requirement under regulation 12(1) of the EIR to consider the public interest test and the EIR has an express presumption in favour of disclosure. These factors will be taken into account when determining whether the request is manifestly unreasonable.
18. Defra explained that it has conducted an electronic search to identify files that contain key words in their titles that relate to the terms of the request such as 'prince', 'consent', 'bill', 'act' and 'statutory'. This search returned approximately 10500 files. Defra argued that some of these files may not relate to the subject of Prince's Consent and the relevant information subject to the request. However, Defra explained that each

¹ https://ico.org.uk/media/for-organisations/documents/1192/calculating_costs_foia_eir_guidance.pdf

file would need to be reviewed in order to determine whether the files contain any information that falls within the scope of the request.

19. Defra estimated that it would take one member of staff two minutes to review each file which would equate to 350 hours to complete this task.
20. Defra argued:

“Clearly, asking each team in the Department to perform such a search would place a significant and unreasonable financial and resource burden on the department, taking staff away from their other duties, and would far exceed the 24-hour time limit that applies in respect of the ‘appropriate limit’ provided for in section 12 of the FOIA. The amount of time and resource required to comply with the request and the burden that this would place on the department would also come within the ‘manifestly unreasonable’ exception at regulation 12(4)(b) of the EIRs and we consider that the public interest in maintaining this exception outweighs the public interest in disclosure.”

21. The Commissioner considers that Defra’s estimate of the time and costs that would be incurred if it complied with the request is reasonable. He further considers that even if it took Defra 30 seconds to review each file, it would still place a disproportionate burden on Defra. The Commissioner is satisfied that the request is manifestly unreasonable and regulation 12(4)(b) is engaged.
22. The EIR explicitly requires a public authority to apply a public interest test, in accordance with regulation 12(1)(b), before deciding whether an exception should be maintained. The Commissioner accepts that public interest factors such as proportionality and the value of the request will have already been considered by a public authority in deciding whether to engage the exception, and that these arguments will still be relevant considerations in the public interest test.
23. Defra recognised that there is a public interest in disclosure of information concerning the issue of ‘Prince’s Consent’, since it provides for transparency in the legislative process and facilitates the public’s understanding and participation. Defra explained that ‘Prince’s Consent’ is required for Bills that expressly mention the Duchy of Cornwall or otherwise have a special application to it. The Duchy consists of 53,000 hectares of land in 23 counties and as such, matters affecting it can have an impact on a significant number of people.
24. On the other hand, Defra argued that there is a strong public interest in maintaining the exception because of the unreasonable and disproportionate diversion of resources from the provision of public services, i.e. the Department’s core functions.

25. The Commissioner recognises the importance of accountability and transparency in decision making by public authorities. He further recognises that there is an express presumption of disclosure within the EIR and that public authorities should aim to provide requested environmental information where possible and practicable.
26. The Commissioner further recognises that a public authority will always be expected to bear some costs when complying with a request. For the sake of the public interest test, however, the key issue is whether in all the circumstances this cost is disproportionate to the importance of the requested information. In the Commissioner's view, in this case it is.
27. The Commissioner considers there is a strong public interest in Defra being able to carry out its core functions without the disruption that would be caused by complying with requests that would impose a significant burden in terms of both time and resources. The Commissioner is of the view that there is a very strong public interest in public authorities being able to carry out their wider obligations fully and effectively, so that the needs of the individuals they serve are met. The Commissioner is also mindful of the fact that Defra's ability to comply with other more focused requests for information would be undermined if it had to routinely deal with wide ranging requests requiring significant resources.
28. On this basis the Commissioner considers that it would be unreasonable to expect Defra to comply with the request because of the substantial demands it would place on its resources and the likelihood that it would significantly distract officials from their key responsibilities within the organisation. Therefore, in all the circumstances, the Commissioner has found that the weight of the public interest arguments favours maintaining the exception.
29. The Commissioner has therefore determined that Defra was correct to apply regulation 12(4)(b) to the request.

Section 12(1) and 12(2) of FOIA

30. To the extent that some of the requested information if held fell under the FOIA, Defra considered section 12(1) and 12(2) would apply to this information.
31. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations.)

32. Section 12(2) allows a public authority to refuse to confirm or deny whether it holds information of the nature requested if simply to do so would in itself exceed the appropriate limit.
33. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12 effectively imposes a time limit of 24 hours in this case and a cost of £600.
34. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - a. determining whether it holds the information;
 - b. locating a document containing the information;
 - c. retrieving a document containing the information; and
 - d. extracting the information from a document containing it.
35. The four activities are sequential, covering the retrieval process of the information by the public authority.
36. Defra relied up on the same arguments as set out under paragraphs 18-20 to apply section 12(1) and 12(2) to the request.
37. Similarly to paragraph 21, the Commissioner is satisfied that the time and costs that would be incurred if Defra confirmed whether any of the requested information fell under the FOIA would exceed the appropriate cost limit of compliance. In addition to this, if Defra confirmed that some of the requested information was held, the process of locating, retrieving and extracting the information would exceed the appropriate cost limit. This is because even if it took Defra 30 seconds to review each of the 10500 files, it would take over 52.5 hours. The fees regulations set a limit of £600 which equates to 24 hours for Defra. Therefore the estimate of 52.5 hours significantly exceeds the appropriate cost limit allowed under section 12.
38. The Commissioner is satisfied that Defra was correct to apply section 12(1) and section 12(2) to the request.

Regulation 5 and section 10

39. Regulation 5(2) of the EIR states that a public authority has a duty to inform the requester whether it holds the requested information, and if

so, to communicate the requested information to them *"as soon as possible, and no later than 20 working days after the date of receipt of the request"*.

40. Section 10(1) of the FOIA provides that:

"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

41. In this case, the complainant's original request was made on 30 September 2015 and a response was provided on 1 December 2015. It is clear that Defra did not provide a response within 20 working days and it has therefore breached regulation 5(2) of the EIR and section 10 of the FOIA. However, as a response has been provided, no further action is required by Defra.

Regulation 11

42. Regulation 11 states:

"an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request".

43. In other words, the EIR includes a statutory right for applicants to request an internal review, so long as they submit it within 40 working days of receiving the response. The public authority then has 40 working days in which to carry out its internal review.

44. In this case, the complainant asked Defra to undertake an internal review on 8 December 2015. Defra did not respond until 25 April 2016. Defra has therefore breached regulation 11 of the EIR by failing to carry out an internal review within 40 working days. As an internal review has been provided, the Commissioner requires Defra to take no steps.

Right of appeal

45. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

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