

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

Decision notice

Date: 2 August 2021

Public Authority: Maritime & Coastguard Agency
Address: Spring Place
105 Commercial Road
Southampton
SO15 1EG

Decision (including any steps ordered)

1. The complainant requested various categories of data about pollution incidents over a two-year period. The Maritime & Coastguard Agency ("the MCA") variously relied upon Regulations 12(4)(a) (not held), 12(4)(b) (manifestly unreasonable) and 12(4)(d) of the EIR (material in the course of completion) to withhold information.
2. The Commissioner's decision is that the request engages Regulation 12(4)(b) of the EIR and that the public interest favours maintaining this exception. However, she also finds that the MCA failed to provide adequate advice and assistance to help the complainant refine his request and therefore breached Regulation 9 of the EIR. Also, in failing to issue a valid refusal notice within 20 working days, the MCA breached Regulation 14 of the EIR.
3. The Commissioner does not require further steps.

Background

4. On 11 January 2018, the complainant contacted the MCA requested information in the following terms:

"I would like to request a list of marine pollution incidents going back to 1 January 2008

"For each incident i would like to know:

- *The date of the incident*
- *Who was responsible for the incident (name of company or individual)*
- *How severe the incident was*
- *What the pollutant was (oil, slurry, chemicals etc.)*
- *What action was taken in response to the incident (was there a prosecution or some other kind of action taken?)*
- *An approximate location of the incident*

"It would be helpful if the information was as up-to-date as possible.

"It would be helpful if the information was supplied in an Excel spreadsheet.

5. The MCA responded to this request on 19 January 2018. It provided him with some of the requested information and indicated where more could be found, but it withheld the most recent year's data and relied on Regulation 12(4)(d) of the EIR to do so.
6. On 2 October 2018, the complainant contacted the MCA again and asked:

"I would like to request an up-to-date version of the attached spread sheet with the latest information for 2018 please."
7. The MCA responded on 2 November 2018 and provided the requested information.

Request and response

8. On 18 June 2020, the complainant wrote to the MCA again, including a copy of the covering email that had accompanied the MCA's response of 2 November 2018 and requested information in the following terms:

"Follow up request -

"Can I get another updated version of this spreadsheet?"
9. The MCA responded on 16 July 2020. It pointed the complainant toward information in the public domain and stated that:

"The information and report are being developed for the 2018-2019 report and data is being gathered for the 2019-2020 report. These reports and future reports will be published on the ACOPS website as they are completed."

10. The complainant requested an internal review on 3 September 2020. He argued that the documents referred to did not contain the information requested and queried why the MCA was no longer able to supply more recent versions of information it had previously disclosed.
11. The MCA responded to this correspondence on 9 September 2020. It now stated that it wished to rely on Regulation 12(4)(d) of the EIR to withhold information. However it argued that most of the information the complainant had sought was available via the published Advisory Committee on Protection of the Sea (ACOPS) report. It also noted that some of the information he had requested would no longer be held by the MCA due to a post-Brexit change in arrangements.
12. A formal internal review was completed and provided to the complainant on 30 September 2020. The MCA maintained its stance that the information was covered by Regulation 12(4)(d), but also argued that it would be entitled to rely on Regulation 12(4)(a) for parts of the request and Regulation 12(4)(b) for the whole of the request.

Scope of the case

13. The complainant contacted the Commissioner on 28 October 2020 to complain about the way his request for information had been handled.
14. The Commissioner began her formal investigation on 4 June 2021 with a letter to the MCA asking it to explain why it considered that Regulation 12(4)(d) would apply to the requested information.
15. The MCA responded on 5 July 2021. It's submission indicated that it considered that the information related to "unfinished documents" – although it also stressed the amount of work that would be required to compile the requested information and that it did not hold all the information requested.
16. Having considered this submission, the Commissioner was not wholly persuaded that the requested information did relate to unfinished documents. Nor was she persuaded that the data was "incomplete" in the sense referred to in her guidance – rather it was the MCA's own analysis of that data that was not yet complete. However, given that the MCA had emphasised the amount of work necessary to compile the requested information – and had already cited Regulation 12(4)(b) in its

internal review – she decided to seek further representations from the MCA which would establish the burden of responding to the request.

17. The Commissioner considers that the scope of this decision notice is to determine whether or not the request would impose a manifestly unreasonable burden upon the MCA. If she considers that it would not, she will then go on to consider whether any other EIR exceptions apply.

Reasons for decision

Is the requested information environmental?

18. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) *the state of the elements of the environment, such as air and atmosphere, water, 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)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

19. As it is information relating to pollution, the Commissioner believes that the requested information is likely to be information on “factors” affecting the elements of the environment. As the complainant has also sought information about enforcement activity, the requested information will also be information on “measures” affecting those factors. For procedural reasons, she has therefore assessed this case under the EIR.

Was the request manifestly unreasonable?

20. Regulation 5(1) states that:

“a public authority that holds environmental information shall make it available on request.”

21. Regulation 12 of the EIR states that:

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(b) the request for information is manifestly unreasonable;

22. The Commissioner considers that a request can be manifestly unreasonable for two reasons: firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources.

23. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOIA under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the “appropriate limit”. This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”) as £600 for central government departments and £450 for all other public authorities.

24. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
25. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether the information is held;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.

The complainant's position

26. The complainant did not provide any submissions as to why he believed his request was not manifestly unreasonable – although the Commissioner notes that, not only was he under no obligation to do so, but that, at the point of making his complaint, the MCA was primarily relying on a different exception.
27. However, the complainant did question why the MCA was apparently no longer able to provide the requested information when it had been able to do so previously.
28. The complainant also noted that, as part of the MCA's response of 3 September, it had encouraged him to contact an EU agency to obtain some of the information he was seeking. That agency had responded to say that it held the information, but that it could only provide it with the permission of the MCA. The complainant had then sought the MCA's permission, but been refused.

The MCA's position

29. The MCA noted that, as the national competent authority for marine pollution in the UK, it receives notifications from multiple different sources about potential pollution incidents within the UK's Exclusive Economic Zone. Over the period covered by the requested, it noted that it had received some 6,728 notifications which it would need to sift in order to compile the data that the complainant was seeking.
30. The MCA explained that it received CleanSeaNet satellite reports when potential incidents of pollution were detected, but that these required

corroboration as some natural phenomena (such as a large shoal of fish close to the surface) can trigger a pollution report – equally, the MCA must establish whether or not a discharge is one which is permitted or not.

31. In addition to the CleanSeaNet data, the MCA explained that it also received notifications from HM Coastguard (POLREPS) and notifications directly from some Oil and Gas producers (known as a Pollution Operations Notice 1 – or PON1). These again required cross-referencing with other data to prevent duplication. They may also require checking to determine whether the discharge is unauthorised.
32. This pollution data was, the MCA explained, usually verified, checked and compiled in the annual Advisory Committee on Protection of the Sea (ACOPS) reports. Unfortunately ACOPS had been experiencing resourcing issues around the time of the request and the work to complete the most recent years' reports was behind schedule.
33. The MCA informed the Commissioner that, out of the original 6,728 notifications it had been able to isolate some 287 CleanSeaNet Notifications, 356 POLREPs and 1,194 PON1s that would require further investigating and cross-referencing with other data in order to supply the requested information – in addition to 3,462 notifications where the data appears to be verified.
34. In respect of CleanSeaNet detections, the MCA argued that it would need to interrogate each report to isolate the source of the pollution and then cross-reference that with information from HM Coastguard or the Energy Portal to ensure that all the requested information was captured. It estimated that, checking all 287 detections would take between 23 and 29 hours.
35. In respect of POLREP notifications, the MCA argued that it would need to search 125 weekly reports to isolate pollution incidents then cross-reference them with information from HM Coastguard or the Energy Portal to ensure that all the requested information was captured. It estimated that, checking all 356 notifications would take between 23 and 41 hours.
36. Finally, in respect of PON1 notifications, the MCA argued that it would need to cross-reference those with information from HM Coastguard to ensure that all the requested information was captured. It estimated that, checking all 1,194 detections would take between 39 and 100 hours.
37. During the course of her investigation, a discrepancy arose over the scope of the complainant's request. The original 2018 request is quoted

above and the MCA appeared to recognise that the present request derived from that earlier request. However, in its submissions to the Commissioner, the MCA noted that:

"[the complainant]'s most recent requests for information, those made within 2020, have been repeated, amended and expanded over time, thus changing the information requirements, albeit subtly in some areas, but materially overall (See Enclosure 1 attached). In broad terms he has asked for:

`For each incident I would like to request the following information:

- Pollution substance
- Location
- Which country's waters the incident is in
- Length of oil slick
- Date
- Source of the pollution
- Vessel name if the source of the pollution is a vessel

`I would like the information to be as up-to-date as possible and I would like the data to be supplied in Excel format.'"

38. This version of the request was repeated in the MCA's submission as to why the request was manifestly unreasonable.
39. The Commissioner pointed out the discrepancy between the contents of the MCA's responses to the complainant which had referred to information about enforcement activity (which formed part of his January 2018 request) and the version of the request (which did not include such information). The MCA supplied a copy of the January 2018 request but did not comment on how it had arrived at its own version. The complainant confirmed that the January 2018 version was the correct version of his current request and he could not understand where the MCA's version had come from.
40. In determining whether a request is manifestly unreasonable, it is important to determine whether or not the public authority has correctly interpreted the scope of that request. The public authority cannot claim that a request would impose an unreasonable burden if that unreasonable burden comes from compiling information that has not been requested.

41. In this particular case, whilst the Commissioner is concerned that the MCA seems to have adopted its own version of the request, she nevertheless considers that the MCA's interpretation is actually narrower than the complainant's. The activities set out above would be required regardless of the version of the request. She therefore accepts that the MCA's estimate is not rendered unreasonable by its apparent failure to scope the request properly.
42. As referred to above, the quantifiable burden will only form part of the Commissioner's consideration as to whether a request is manifestly unreasonable. She will also take into account qualitative factors such as the size of the public authority and the value of the information. Larger public authorities will be required to accept a more significant burden when searching for environmental information – especially information which would be of significant interest to the general public.
43. In this particular case, the Commissioner notes that the information relates to pollution – which is a form of emission. Information on emissions is given special status under the EIR and there are several exceptions (although none of the ones the MCA has cited in this case) which public authorities are not permitted to rely on to withhold information related to emissions. In addition, Regulation 5(5) requires a public authority, on request, to disclose details of measurement and analysis used to compile information falling within this section of the EIR definition of "environmental information." She therefore considers that the MCA would be required to spend longer than usual collating the information.
44. Equally, the Commissioner is not impressed by the MCA's repeated assertions that the raw data cannot be disclosed because it is open to misinterpretation. Almost all statistical data can be misinterpreted or mis-represented – especially by those who have a vested interest in doing so. The Commissioner sees no reason why the raw data could not be published, providing that it was accompanied by explanatory notes setting out both the extent and limitations of the data. Nothing in the EIR prevents a public authority from offering additional explanations alongside information it is disclosing – where these are necessary for the recipient to make sense of the information they are being provided.
45. However, the Commissioner is also obliged to take into account the fact that the MCA is not a large public authority and the task of responding to this particular request would fall on a relatively small number of people within the organisation.
46. The size of the burden the MCA has outlined is considerable. At its lower estimate, complying with the request would require 85 hours of staff time – and possibly as much as 170 hours. The Commissioner considers

that, even if the MCA were able to complete the work in half that time (ie. 42 hours) that would still be a manifestly unreasonable burden to expect it to bear.

47. Furthermore, the Commissioner does accept that the MCA may not be able to supply all the data points for each incident, thus reducing the overall value of the information that has been requested. Whilst the MCA has been unable to give much indication about how extensive the gaps might be, the Commissioner accepts that there will be gaps.
48. The Commissioner therefore accepts that the request was manifestly unreasonable and therefore Regulation 12(4)(b) of the EIR would be engaged.

Public interest test

49. Regulation 12(4)(b), like most EIR exceptions, is subject to a public interest test and therefore a public authority may be required to take on a manifestly unreasonable request if there are very strong public interest factors in favour of disclosure.
50. In this case, the Commissioner notes that the information in question relates to the specially protected category of emissions. There will always be an inherent public interest in disclosure of such information.
51. The MCA argued that there was little public interest in the requested information because it would not indicate that the MCA was guilty of wrongdoing. Whilst the Commissioner accepts that she has seen no evidence of wrongdoing, she still considers that there would be some public interest in the information.
52. The MCA is the national competent authority for monitoring marine pollution in UK waters. There is a public interest in understanding how well the MCA is performing this function and the requested information would help public discussion about the MCA's effectiveness.
53. The Commissioner also notes that similar data is usually produced by ACOPS but that process appears to have ground to a halt as no new reports have been published since 2017-18. Although not relevant to this particular request, the Commissioner would draw attention to the requirement at Regulation 4 of the EIR for a public authority to make environmental information that it holds progressively available on a proactive basis.
54. However, the Commissioner also notes that there is a stronger public interest in protecting public authorities from expending scarce resources on requests which are unreasonable. Whilst the MCA will presumably have to expend most of these resources anyway in order to produce the

ACOPS reports, there is a strong public interest in allowing the MCA to prioritise its resources and spread this work out over a longer period – rather than the 40 working days it is permitted in order to respond to an EIR request.¹ Given the concentrated burden of responding to the request and the likely gaps in the resulting information, the Commissioner accepts that, in this case, the balance of the public interest will favour maintaining the exception.

Presumption in favour of disclosure

55. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner & Government Legal Department* [2019] UKUT 247 (AAC), “*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*” and “*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*” (paragraph 19).
56. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – Advice and Assistance

57. Regulation 9 of the EIR requires public authorities to provide reasonable advice and assistance to individuals making (or proposing to make) information requests.
58. The advice and assistance it will be reasonable for the public authority to provide will vary according to the circumstances and wording of the request. However, as a general rule, the Commissioner would normally expect a public authority relying on a claim that a request would impose a manifestly unreasonable burden to offer advice and assistance to help

¹ Regulation 7 of the EIR allows a public authority to extend the deadline for complying with a request from 20 working days to 40 where the “complexity or volume” of the requested information is such that it would be impractical for the authority to respond earlier.

the requestor refine their request to one which imposes a more reasonable burden.

59. In this particular case, as the MCA knew the complainant was already aware of the ACOPs report, the Commissioner does not consider that the MCA had, at the point it completed its internal review, provided the complainant with any meaningful advice and assistance that would have helped him to have submitted a request that would not have imposed a manifestly unreasonable burden on the MCA. She therefore considers that the MCA failed to comply with its Regulation 9 duty to provide advice and assistance.
60. The Commissioner considered whether, having identified a breach of the EIR, it would be proportionate for her to require remedial steps. She concluded that it would not be.
61. The MCA provided the Commissioner with a copy of a letter it had sent to the complainant on 31 December 2020 in respect of a different (but pollution-related) request. In that letter, the MCA did set out to the complainant a number of options which would enable him to submit a request likely to result in information that was of use to him.
62. In the Commissioner's view, if she were to require the MCA to provide advice and assistance, it would be able to meet that obligation by simply providing a copy of that letter. As the complainant should already have a copy, the Commissioner does not consider that it would be proportionate to require the MCA to take additional steps to remedy its breach.

Procedural Matters

63. Regulation 14 of the EIR states that:

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
- (3) The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation*

12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

- (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.*
- (5) The refusal shall inform the applicant—*
- (a) that he may make representations to the public authority under regulation 11; and*
 - (b) of the enforcement and appeal provisions of the Act applied by regulation 18.*
64. In this case, the MCA's response of 16 July 2020 did not specify any valid EIR exception that would have allowed it to withhold the requested information.
65. Whilst the MCA's response of 3 September 2020 did cite a valid EIR exception, the Commissioner notes that neither it nor the previous response complied with Regulation 14(4) because they did not provide an estimated date for the material to be completed.
66. Finally, the Commissioner notes that it was not until the MCA had completed its internal review (some three months after the request had been submitted) that it informed the complainant that it did not hold some of the requested information or that it wished to rely on Regulation 12(4)(b) of the EIR to refuse the request.
67. The Commissioner thus considers that the MCA breached Regulation 14 of the EIR in responding to the request.

Other matters

68. In addition to the procedural breaches highlighted above, the Commissioner considers that this complaint has highlighted some poor request-handling practices on behalf of the MCA.
69. The failure to identify the correct version of the request is the most obvious failing. The Commissioner accepts that a public authority cannot keep requests indefinitely and that, for a requestor to repeat a request they submitted several years previously is not desirable.
70. However, in this case, the Commissioner notes that the MCA did (and still does) retain a copy of the complainant's January 2018 request and so she struggles to understand why the MCA used a different version in its submission without any paper trail explaining why this (and not the original) version was the correct one.
71. Even if the MCA did not have a record of the previous request, the obvious course of action would have been to clarify, with the complainant, the categories of data that he wished to receive. A public authority should not simply assume that it knows what a requestor wants to receive.
72. In this case, it would probably have been best practice for the MCA to have repeated the January 2018 request back to the complainant and checked that this was still what he wished to receive.
73. In addition, the Commissioner is also concerned that the MCA appears to have begun applying exceptions to withhold information before establishing exactly what information it did and did not hold.
74. When a public authority receives what appears to be a request for information under the EIR, its first step must be to determine whether it is a valid request and whether it has sufficient clarification to identify all relevant information it may hold. If the request is not clear, the public authority must comply with its Regulation 9 duty to provide advice and assistance to help the requestor clarify the request. It may also, if it wishes, rely on Regulation 12(4)(c) of the EIR to refuse the request if it believes that the request has been "formulated in too general a manner" to allow the requested information to be identified.
75. Having determined that the request is clear and valid, a public authority must next decide whether it can comply with that request. Public authorities are not obliged to comply with requests that are manifestly unreasonable – either because they are vexatious or because they are overly-burdensome. If the request is manifestly unreasonable, the public authority may rely on Regulation 12(4)(b) of the EIR to refuse it

(subject to the public interest test and the presumption in favour of disclosure).

76. Thirdly, once a public authority has established that it is obliged to comply with a request, it must identify all the relevant information it holds and any parts of the requested information that it does not hold. Where information is not held, the public authority should rely on Regulation 12(4)(a) of the EIR to refuse those parts of the request.
77. Finally and only when all of the first three steps have been completed, should the public authority begin thinking about what exceptions might apply to the remaining information. A public authority should not merely assume that, because an exception from disclosure would apply to any information that was held, it can simply skip straight to the end of the process.

Right of appeal

78. 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

79. 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.

80. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF