

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 5 December 2012

**Public Authority:** Foreign & Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

#### **Decision (including any steps)**

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1. The complainant has requested information which the public authority had previously advised him was "open source" material which he had been unable to locate. The public authority cited regulation 12(4)(a) of the EIR stating that it did not hold the material. The Information Commissioner's decision is that the public authority does not hold it and he therefore requires no steps to be taken.

#### **Background**

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2. In an earlier request, the complainant sought information concerning a statement made by the Foreign Secretary on 1 April 2010 entitled: "*New Protection for the Marine Life of the British Indian Ocean Territory (the 'BIOT')*"<sup>1</sup>. In responding to this request the public authority advised that it held no further information. However, in reference to what it termed "*the spirit of the Act*" it provided him with a list of publications which it described as being "*open source research*" which it believed might be useful to him. The complainant was unable to access some of this research material which resulted in him making this current information request.

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<sup>1</sup> <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=22001512>

## Request and response

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3. On 3 October 2011, the complainant wrote to the public authority and requested information in the following terms:

*"Further to an earlier request ... I now wish to submit a further request under the EIR 2004 for the following information, all of which was quoted in [name removed]'s response as supposedly (but incorrectly) being available Open Source material. I must therefore presume that either it is in his possession or in the alternative is in possession of another person on his behalf:*

- (1) The Fitzsimmons 2010 unpublished report;*
- (2) The Hahn et al in prep. document;*
- (3) Macdonald AHH, Lamb J, Schleyer MH (submitted) Population structure of *Platygyra daedalea* on the south-east African coastline;*
- (4) Sheppard and 37 others. Reefs and islands of the Chagos Archipelago, Indian Ocean: Why it is the world's largest no-take marine protected area. Submitted;*
- (5) Vogler C, Benzie J, Barber P, Sheppard C, Tenggardjaja K, Gérard K, Wörheide G. Submitted. Cryptic speciation: The crown-of-thorns starfish in the Indian Ocean. Proceedings of the Royal Society in review;*
- (6) Briggs JC, Bowen BW (2011) A realignment of marine biogeographic provinces with particular reference to fish distributions. Journal of Biogeography In press - I have been unable to find any record of this "in press" paper on the Journal of Biogeography website either as published or in the 'Early View' papers".*

4. The public authority responded on 1 November 2011. It stated that it did not hold the requested information and cited the exception in regulation 12(4)(a) of the EIR.
5. The complainant sought an internal review on 9 November 2011 saying that, as the articles had been referred to by the public authority, he presumed they must be in its possession.
6. Following an internal review the public authority wrote to the complainant on 13 January 2012 maintaining its position.

## Scope of the case

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7. On 12 February 2012 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled.
8. Following further correspondence with the complainant the Information Commissioner has considered the following:
  - timeliness;
  - whether the public authority holds any information.
9. During the course of the investigation, the public authority agreed to the Information Commissioner advising the complainant of the source of the list which was provided to him in respect of his earlier request; it said that the source was a third party who acts as an adviser to the BIOT Commissioner.
10. The complainant accepted that the list of articles was provided by a third party. However, in correspondence with the Information Commissioner he further stated:

*"In writing to me in the manner which it did, the FCO explicitly adopted the list as its own, despite the fact that we now know that it was not the original author. There was no attempt to state that for example: '[name removed] has supplied this list'. In so doing it also impliedly accepts that it has the right to access the information referred to in the list in order to answer questions arising from the provision of the list and its contents. Furthermore, the nature of the formal and remunerated relationship between the FCO and its Adviser, permits the FCO to require physical production of the information should it so require. Once again this is not some loose association between a public authority and a member of the public over which it has no sway. This was something done by an official Adviser in the course of a request which fell within the scope of his normal duties. The FCO chose to formally adopt the list and its contents and in so doing also adopted the information on which it was based, notwithstanding that it chose not to take physical custody of all the documents".*

11. The complainant believes that the adviser holds the information on behalf of the public authority in his capacity as an adviser. This is therefore what the Information Commissioner will consider below.

## Reasons for decision

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### Environmental information

12. The Information Commissioner has first considered whether the requested information would, if held, be environmental information and therefore whether the EIR was the correct access regime to apply.

13. Environmental information is defined in regulation 2(1) of the EIR of which the relevant sections provide that:

*"environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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."*

14. The information requested consists of scientific articles related to marine life and biodiversity. Both parties have accepted that the EIR is the appropriate access regime and the Information Commissioner is satisfied that they fall within the scope of the EIR.

### Regulation 12(4)(a) – Information not held

15. The public authority has refused the request under the exception in regulation 12(4)(a), which provides that it may refuse to disclose information to the extent that it does not hold that information when a request is received.

16. Regulation 3(2) of the EIR provides that environmental information is held by a public authority if the information:

- (a) is in the authority's possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

17. The complainant argued that because the public authority had obtained the list from the adviser this meant that it had a right of access to the information referred to in the list. The Commissioner has investigated whether in the circumstances of this case the information referred to in

the list was held by the adviser on behalf of the public authority. He does not however accept that the fact that the public authority had been given a list inevitably meant that it had a right of access to the information referred to in the list.

18. The public authority's position in this case is twofold. Firstly it maintains that the adviser is an adviser to the government of the BIOT and not to the FCO. It argues that as the government of the BIOT is constitutionally separate from the UK government any information held by the adviser on behalf of the BIOT government would not be held by the FCO. Secondly it argues that in any case the information disputed in this case is not held by the adviser on behalf of either the FCO or the BIOT government, it is held by the adviser in his own right.
19. The Commissioner, as in his previous decisions (FS50436500 and FS50413563), accepts the FCO's argument that the government of the BIOT and the UK government are constitutionally separate. He therefore accepts that any information held solely on behalf of the government of the BIOT, and not to any extent on behalf of the FCO, would not be held by the FCO.
20. The Information Commissioner asked the public authority to provide any evidence to support its position that the adviser was contracted to provide advice to the government of the BIOT rather than to the FCO. He also asked the public authority to contact the adviser and ask him to clarify his connection, if any, to the public authority and also in what capacity he had access to the articles which are the subject of this request.
21. The adviser confirmed that he advises BIOT and not the FCO. He also confirmed that he did not consider the articles to be held by the public authority or by the government of the BIOT. The public authority also provided the Information Commissioner with a copy of the terms of reference under which the adviser was engaged. The terms of reference clearly state that the adviser has been appointed to advise the government of the BIOT rather than the FCO. They do not state that the government of BIOT has a right of access to source papers upon which any advice provided to the government of the BIOT might be based
22. Having considered all the circumstances of the case the Commissioner has accepted the public authority's submissions on both points and concluded that the information was not held by the third party adviser on behalf of the public authority. He has therefore decided that the requested information is not held and so the exception in 12(4)(a) is engaged.

## Right of appeal

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23. 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: 0116 249 4253  
Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

24. 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.
25. 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 .....**

**Lisa Adshead  
Group Manager  
Information Commissioner's Office  
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SK9 5AF**