

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

Decision notice

Date: 20 September 2012

Public Authority: Department for Environment, Food and Rural Affairs (DEFRA)

Address: Nobel House
17 Smith Square
London
SW9P 3JR

Decision (including any steps ordered)

1. The complainant has requested details of meetings and discussions with any organisation about the potential for those organisations to take on land currently within the Forestry Commission's public forest estate. DEFRA identified four pieces of information within the scope of the request and withheld them on the basis of regulation 12(4)(e).
2. The Commissioner's decision is that DEFRA has correctly applied the internal communications exception and the public interest favours withholding the information.

Request and response

3. On 29 July 2011, the complainant wrote to DEFRA and requested information in the following terms:

"Please can you provide details of all meetings, site visits and/or discussions in person, via the phone or email that the Government and its officials (including Forestry Commission staff) have held with any organisations – including conservation NGOs and/or commercial and professional bodies – concerning any of those organisations and bodies potentially taking on land currently falling within the Forestry Commission public forest estate.

Please also provide details of all meetings, site visits and/or discussions in person, via the phone or email that the Government and its officials

(including the Forestry Commission staff) have held with any overseas based organisations – including conservation NGOs and/or commercial and professional bodies – concerning any of those organisations and bodies potentially taking on land currently falling within the Forestry Commission public forest estate.

Please specify the dates of any such meetings, site visits and/or discussions above and all those attending, and copies of notes of any such meetings, site visits and discussions in the form of paper and electronic records, including emails.

Please supply the average costs per hectare for managing the woodlands and forest that lie within the public forest estate in England and which are managed by the Forestry Commission.

Please specify the overall costs per annum to the taxpayer for managing the woods and forests of the public forest estate in England.

As well as the average costs across the entire 258,000 hectares of the public forest estate, please also supply management costs per hectare for the following indicative examples of woods and forests on the public forest estate:

- *a site with standard access, low visitor numbers, and a primary output of timber production;*
- *a site delivering the full mix of multi-purpose forestry benefits – access/recreation/timber/biodiversity/ecosystem services;*
- *a site redeveloped/restored as community woodland in close proximity to and delivering multiple benefits to urban populations."*

4. On 6 October 2011 DEFRA responded and listed six occasions on which policy options for the future of the public forest estate and an organisation's interest in owning or managing land currently within the Forestry Commission's public forest estate was discussed. DEFRA confirmed no site visits took place and that the meeting notes, discussion notes and telephone notes created from the occasions when discussions with organisations took place were exempt under regulation 12(4)(e). DEFRA made one exception and disclosed emails relating to one meeting with the Woodland Trust.
5. With regards to the request for average costs for managing the public forest estate, DEFRA directed the complainant to information on its website which provided details of costs. DEFRA stated it did not hold information in relation to the final part of the request – for management costs for specific types of woods and forests.

6. Following this, the complainant requested an internal review on 28 November 2011 specifically with regards to DEFRA's application of the internal communications exception and the public interest test associated with this.
7. DEFRA acknowledged this on 22 December 2011 and provided its full internal review response on 26 January 2012. In this response DEFRA identified four pieces of information it considered to be within the scope of the request and stated, after considering this further, that the internal communications exception was engaged and the public interest continued to favour withholding the information.
8. DEFRA also clarified its interpretation of the request, specifically with regard to the phrase "taking on". DEFRA interpreted this as "managing or owning" as this phraseology was used frequently by its policy teams when developing policy options.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant raised the following specific concerns:
 - That the withheld information may be 'internal documents' rather than 'internal communications';
 - That the public interest argument that a 'safe space' is required cannot apply after October 2010 as DEFRA had decided on its policy approach by this time;
 - That DEFRA did not apply a presumption in favour of disclosure when considering the public interest test;
 - That the internal review focuses on four documents but the refusal notice identified six documents as being within the scope of the request; and
 - That DEFRA has failed to respond to the request and to provide an internal review in accordance with the timescales in the EIR.
10. The Commissioner considers the scope of his investigation to be to determine the information within the scope of the request and whether DEFRA correctly applied the exception and the public interest test to withhold this information. The Commissioner will also consider whether DEFRA complied with the procedural requirements of the EIR.

Reasons for decision

11. The Commissioner has first considered what information is within the scope of the request. Having considered DEFRA's interpretation of the request for information on discussions about "taking on" the public forest estates meaning "managing and owning"; the Commissioner is satisfied that this allowed DEFRA to identify relevant information and did not narrow the scope of the request. This is because a natural reading of the request would suggest that the complainant was seeking information on discussions about other bodies having a potential interest in the public forest estate. "Taking on" would imply that interested bodies would have either a managerial or ownership role of the estate and the Commissioner therefore considers this interpretation to be reasonable. The Commissioner also notes the complainant has not disputed this interpretation beyond the internal review request.
12. Before considering the application of the internal communications exception the Commissioner has determined what information the exception has been applied to. In the refusal notice DEFRA listed six documents:
 - i. 20th October 2010 meeting between DEFRA officials and the Woodland Trust.
 - ii. 29th October 2010 telephone call between a DEFRA official and the Woodland Trust.
 - iii. 28th January 2011 telephone call between the Secretary of State and the National Trust.
 - iv. 1st February 2011 telephone call between the Parliamentary Under Secretary of State and the RSPB.
 - v. 2nd February 2011 meeting between the Secretary of State and the Woodland Trust.
 - vi. 8th February 2011 telephone call between the Minister of State and the Country Land and Business Association.
13. DEFRA disclosed the information under (i) at the same time as refusing the information under (ii) to (vi) under the internal communications exception. However, there remained five identified documents relevant to the request and the Commissioner wrote to DEFRA to establish the reason for the discrepancy.
14. DEFRA explained that following its internal review, it established that it did not hold information in relation to the meeting at (v). At the time of

initially responding to the request DEFRA had identified an email from the Woodland Trust which referred to this meeting. However, on further analysis DEFRA ascertained that although the email contained a reference to this meeting it did not contain any information on the substance of the meeting and was in fact a response prepared by the Woodland Trust to the complainant. As such DEFRA explained it did not consider this email to be within the scope of the request.

15. After considering the explanation provided by DEFRA, the Commissioner considers that as the complainant asked for details of meetings DEFRA were required to provide the complainant with the date and nature of the meeting which it did by listing it in the refusal notice. However, as DEFRA states that it does not hold any notes of this meeting the Commissioner accepts that there is no further information it can supply and the email from the Woodland Trust would not be within the scope of the request.
16. As such the Commissioner considers the information within the scope of the request and to which the internal communications exception has been applied to be:
 - An internal note (a partial record based on DEFRA's interpretation) prepared following a discussion between a DEFRA official and the Woodland Trust on 29 October 2010 (Document 1);
 - An internal email exchange dated 30 January 2011 following a conversation on 28 January 2011 between the Secretary of State and the National Trust (Document 2);
 - An internal note (based on DEFRA's interpretation) produced on 4 February 2011 following a 1 February 2011 phone call between Richard Benyon, Parliamentary Under-Secretary of State, and the RSPB (Document 3); and
 - An internal note (based on DEFRA's interpretation) produced on 10 February 2011 following a phone conversation between Jim Paice, the Minister of State, and the Country Land and Business Association (CLA) on 8 February 2011 (Document 4).

Regulation 12(4)(e) – prejudice to internal communications

17. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
18. The Commissioner considers that communications within one public authority will constitute internal communications for the purpose of this exception. All central government departments (including executive

agencies) are deemed to be one public authority. However, communications between a public authority and a third party will not constitute internal communications except in very limited circumstances. The definition of a communication is broad and will encompass any information intended to be communicated to others or to be placed on file where it may be consulted by others.

19. Based on the above, the Commissioner has considered whether each of the documents identified by DEFRA would constitute an internal communication.

Document 1 – internal note of discussion with the Woodland Trust

20. The Commissioner has viewed this document and notes that it was sent by a member of staff at DEFRA to other DEFRA employees summarising the main points of a conversation with the Woodland Trust on the issue of the public forest estate. The Commissioner's guidance on internal communications¹ also states that a communication can include letters, emails, memos and notes of meetings intended to be communicated to other.
21. Based on the broad description of what constitutes a "communication" the Commissioner accepts that this information would be a communication as it is an email summarising a discussion, written with the intention of being communicated to others. The Commissioner has next considered whether the information can be deemed to be an internal communication.
22. The email in this case was sent only within DEFRA and as such the Commissioner is satisfied it is an internal communication and regulation 12(4)(e) is engaged.

Document 2 – internal email exchange following a conversation with the National Trust

23. The Commissioner has viewed this document and notes that the first email in the chain was sent by a member of staff at DEFRA to other DEFRA employees summarising the main points of a conversation with the National Trust on the issue of the public forest estate and the consultation document. The second email in the chain provides further comment on this telephone call and was also copied to a member of staff at the Forestry Commission.

1

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

24. The Commissioner accepts that this would constitute a communication for the same reasons as document 1 and has therefore gone on to consider whether the document can be deemed to be an internal communication.
25. In this case, the email was circulated outside DEFRA and sent to the Forestry Commission. The Forestry Commission is a government department separate from DEFRA. Regulation 12(8) states that internal communications include communications between government departments. The Information Tribunal confirmed this view (*EA/2006/0073*) in a case where it concluded that communications between ECGD (a government department) and other central government departments were internal communications as all departments within central government were regarded as one public authority for the purposes of regulation 12(4)(e).
26. Any emails sent between DEFRA and the Forestry Commission would therefore constitute internal communications as they would be between central government departments. The Commissioner is satisfied that this document engages regulation 12(4)(e).

Document 3 – internal note of phone call with the RSPB

27. The Commissioner has viewed this document and notes that it was sent by a member of staff at DEFRA to other DEFRA employees summarising the main points of a conversation with the RSPB on the issue of management of the public forest estate.
28. Based on the broad description of what constitutes a “communication” the Commissioner accepts that this information would be a communication as it is an email summarising a phone call, written with the intention of being communicated to others. The Commissioner has next considered whether the information can be deemed to be an internal communication.
29. The email in this case was sent only within DEFRA and as such the Commissioner is satisfied it is an internal communication and regulation 12(4)(e) is engaged.

Document 4 – internal note of a phone call with the CLA

30. The Commissioner has viewed this document and notes that it was sent by a member of staff at DEFRA to other DEFRA employees summarising the main points of a conversation with the CLA on the issue of the public forest estate.
31. Based on the broad description of what constitutes a “communication” the Commissioner accepts that this information would be a

communication as it is an email summarising a phone call, written with the intention of being communicated to others. The Commissioner has next considered whether the information can be deemed to be an internal communication.

32. The email in this case was sent only within DEFRA and as such the Commissioner is satisfied it is an internal communication and regulation 12(4)(e) is engaged.
33. As the Commissioner has found the exception to be engaged in relation to each of the four documents he has next gone on to consider the public interest test.

Public interest arguments in favour of disclosure

34. DEFRA has stated that it recognises there is a public interest in disclosure of information concerning government meetings and discussions about the future of England's public forest estate.
35. The complainant argues that whilst it is accepted that the principle of 'safe space thinking' has some validity in relation to this exception it is not relevant in this case as DEFRA had, by 29 October 2010, already published a letter sent to MPs outlining DEFRA's intention to reform the public forestry estate with diminished public ownership.

Public interest arguments in favour of maintaining the exemption

36. The main arguments put forward by DEFRA in support of maintaining the exception relate to the information contributing to the formulation and development of government policy. DEFRA argues that the development of policy on the future of the public forest estate in England is continuing and still live.
37. DEFRA considers that disclosure of information at an early stage of policy development would result in diverting staff resources to handle any media issue and campaigning.
38. DEFRA also states that there is a clear public interest in preserving a safe space to formulate policy, debate 'live' issues and reach decisions without being hindered by external comment. The withheld information constitutes internal notes written up subsequent to informal exploratory conversations with a number of non-government organisations. The notes were made for internal purposes and reflect the level of interest in owning or managing land currently falling within the Forestry Commission England's public forest estate.
39. DEFRA acknowledges it is difficult to predict the adverse effect that would arise from disclosure of any of the internal notes but it has

demonstrated the potential issue by highlighting that during the public consultation stories were reported in the media based on incorrect assumptions, which required DEFRA to divert resources to respond to.

40. On 27 January 2011 DEFRA opened a consultation on the future of the public forest estate and the consultation was ended early as on 17 February 2011 the Secretary of State announced an independent panel was to be formed to advise on the future direction of forestry and woodland policy. DEFRA therefore argues that the policy is still live and will be until the Government has received and responded to the Panel's advice.

Balance of the public interest arguments

41. The Commissioner recognises there is a public interest in transparency, openness and accountability in relation to decisions made by government to instigate change. In this case he considers the public interest is strong due to the potential impact of any decisions on the future of England's public forests. However, he also notes that the specific content of the withheld information is likely to be of limited value to assisting in the public's understanding of the decisions. The information consists mostly of notes on discussions with third parties on their potential interest in managing or owning parts of the public forest estate. These notes reflect partial accounts of the discussions and were tentative discussions to gauge interest prior to any policy decisions being made.
42. The Commissioner also considers there is a public interest in the public being informed on this issue to enable them to engage in debate and discussion. The argument that legislative changes can best be made by informed contributions from interested parties based on the full knowledge of the evidence base behind policies and consultations is a valid argument which the Commissioner recognises and gives weight to.
43. However, at the time of the request the Commissioner accepts that the formulation of new policy in this area was ongoing. The Commissioner is aware that a letter was sent to MPs on 29 October 2010 and that this stated that DEFRA was seeking powers for modernisation of forestry legislation in order to make reforms to the forest estate. Following this the Government publicly announced the intention to reduce the amount of publicly owned forest estate, with the intention to open a consultation seeking views on proposed options for future ownership and management of England's public forest estate.
44. This consultation was launched on 27 January 2011 but was cancelled following widespread public disagreement with the proposals. The Commissioner understands that at this time the independent forestry

panel was established to advise government on the future direction of forestry and woodland policy in England and on the role of the public forest estate. The independent panel had not provided any views or recommendations at the time the request was made and the Commissioner therefore accepts that the government policy on the options for future management and ownership of the public forest estate is still being developed. Therefore, arguments in favour of withholding the requested information have not diminished over time.

45. The Commissioner acknowledges the 'safe space' argument and recognises that part of the reason for needing a safe space is to allow free and frank discussion; the need for a safe space exists regardless of any impact on the candour of debate. The Commissioner has therefore gone on to consider the safe space arguments relevant to this request.
46. The Information Tribunal in the *DfES*² case found that ministers and officials were entitled to time and space to agree policies by exploring safe and radical options without the threat of media involvement or external scrutiny. Therefore, the need for a safe space to debate and reach decisions without external comment is a valid argument.
47. The Commissioner recognises the public interest in preserving a safe space in which proposals can be put forward and discussed to allow the development of new legislation or policies leading to new or amended legislation. He considers that to release internal notes detailing accounts of conversations and discussions with third parties which show their provisional positions with regard to management or ownership of the public forest estate may erode the 'safe space'. The Commissioner considers there is a public interest in maintaining a safe space to allow ministers and officials to provide clear views and to debate issues arising from the discussions it has with third parties which may influence the development of policy.
48. The Commissioner has carefully balanced the arguments for maintaining the exception against the arguments in favour of disclosure. He considers that there is a strong public interest in assisting the public in understanding decisions made by DEFRA in this area and enhancing public debate on this issue. However, he also recognises there is a public interest in maintaining a safe space for proposals to be developed and discussed.
49. The Commissioner considers the policy in relation to the future of England's public forest estate was still ongoing at the time of the request and the content of the internal notes, providing summaries of frank discussions with third parties about their potential interest in

² Information Tribunal reference EA/2006/0006

managing or owning parts of the public forest estate, is such that if it were to be disclosed it could have a detrimental impact on DEFRA and its ability to record frank conversations in this way for debating internally.

50. The Commissioner has therefore decided that the public interest in maintaining the exception outweighs the public interest in disclosure. Accordingly DEFRA has correctly applied the exception to withhold the information.

Other Matters

51. The complainant submitted her request on 29 July 2011. However, it was not until 6 October, almost 50 working days later, that Defra issued its substantive response. Under regulation 7(1) a public authority may extend the 20 working day deadline for responding to a request to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable to comply with the request within the original deadline. By failing to respond to the request within the extended 40 working day deadline DEFRA breached regulation 7(1) of the EIR.
52. After receiving the response to her request the complainant asked DEFRA to carry out an internal review on 28 November 2011. However, it was not until 26 January 2012 that DEFRA presented its findings. Regulation 11 of the EIR provides for an applicant to make representations to a public authority if it appears to him that the authority has failed to comply with a requirement of the EIR. The public authority is obliged to consider the representations and decide if it has complied with the requirements of the EIR. However, under regulation 11(4) a public authority must notify the applicant of its decision as soon as possible and no later than 40 working days after receipt. Therefore, by failing to respond to the complainant's request for an internal review within 40 working days DEFRA breached regulation 11(4) of the EIR.

Right of appeal

53. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

54. 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.
55. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF