

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

Decision notice

Date: 5 June 2014

Public Authority: Marine Management Organisation

Address: Lancaster House
Hampshire Court
Newcastle upon Tyne
NE4 7YH

Decision (including any steps ordered)

1. The complainant made a request to the Marine Management Organisation ("MMO") for information related to the issuing of licence variations for fishing vessels. The MMO disclosed some information in respect of parts of the request and applied the exception in regulation 12(4)(a) (information not held) in respect of other parts. The complainant queries whether regulation 12(4)(a) had been correctly applied.
2. The Commissioner's decision is that the MMO has correctly applied the exception in regulation 12(4)(a) to the relevant parts of the request. However, he has determined that it breached regulation 14(2) by not providing a refusal citing the regulation 12(4)(a) within 20 working days of receipt of the request. He does not require the MMO to take any further steps to ensure compliance with the legislation.

Request and response

3. On 14 January 2013 the complainant made the following request to the MMO:

I shall be grateful, therefore, if you will supply me with the following information:

(a) why the MMO and Marine Scotland have issued licence variations on different dates with different effects for the same type of vessels fishing for the same species in the same waters under the same management rules. Was this an error on the part of the MMO? If so, how did the error occur bearing in mind all the discussion prior to Christmas, the problems that arose last year when Marine Scotland and the MMO failed to act in concert and the subsequent assurances provide by your senior team and the importance of this fishery?

(b) How does this apparent inconsistency of treatment between individual UK registered vessels square with the MMO's duties and responsibilities under the Legislative and Regulatory Reform Act 2006 in relation to the obligation to be consistent and with section 2(c) of the concordat between the fisheries administrations on the management of the UK's fish quotas and licences which states "Administrations may impose their own licence conditions, subject to these not discriminating unfairly against vessels from the other administrations".

(c) With reference to regulation 4 of the Sea Fishing (Licences and Notices) (England) Regulations 2012 when and at what time was the licence variation published or otherwise delivered?

(d) With reference to regulation 5 of the Sea Fishing (Licences and Notices) (England) Regulations 2012 when and at what time did the licence variation have effect? I am aware, of course, of the information published on the MMO website, but I struggle to understand how this is within the permitted timeframe for bringing the licence variation into effect, hence questions (c) and (d).

(e) How do (c) and (d) relate to the MMO's published guidance on its website which states "a variation will be considered as being received when it is published on our website and you will be required, as part of your licence conditions, to check our website on a weekly basis, with Fridays the suggested day, for notifications relating to your licence." It is not clear to me how owners and skippers of English registered vessels could follow your guidance and be confident that they knew about the Western Waters licence variation until Friday, 11th January. Or, does the guidance mean that any licence variation does not apply until the following Friday notwithstanding what might be stated on the document and on your website?

(f) Were all licence holders or their nominees sent notifications through an email and/or text message?

(f) I would be grateful to have sight of the operating instructions and internal guidance to staff for issuing fishing licence variations, for example the considerations they are required to take into account, the protocols they are expected to follow, the actions they are required to take to ensure that they exercise appropriate and due care, etc. I ask for sight of this since this it might help me better understand the internal processes and procedures that have led to the current situation. I am assuming that such internal guidance does exist, but if not please let me know.

4. The MMO responded on 1 March 2013. It confirmed that it was dealing with the entire request under the EIR. It provided some information.
5. On 1 March 2013, the complainant wrote to the MMO to ask it to carry out an internal review. She argued that she had not received a proper response to her request.
6. On 11 April 2013, the MMO wrote to the complainant with the result of its review. It upheld its original decision.
7. During the course of the initial investigation, following discussions with the Commissioner about its initial handling of the request, it was agreed that the MMO should provide a new revised response to the complainant in respect of the whole of her request, parts (a)-(f).
8. On 24 January 2014 the MMO issued a revised response to the complainant. It disclosed some information falling within the scope of part (a) of the request and withheld the remainder falling within part (a) under regulation 12(5)(b). In relation to parts (b)-(f) (the first part (f) of the request), it applied the exception in regulation 12(4)(a) on the basis that it did not hold any information. In relation the second part (f) of the request, it confirmed that it did not hold any further information, other than that provided to the complainant with its initial response.

Scope of the case

9. The complainant initially contacted the Commissioner on 11 April 2013 to complain about the way her request for information had been handled by the MMO, specifically, that she had not been provided with the information that she had requested. Following the MMO's new response of 24 January 2014, the complainant made a further complaint to the Commissioner on 30 January 2014 about the handling of her request, specifically its responses to parts (a)-(f) (the first part (f) of the request).

10. The Commissioner considered the MMO's response to part (a) of the request in a separate decision notice under the case reference number FER0494535.
11. The Commissioner considered in this decision notice whether the MMO complied with the EIR in its response to the complainant in relation to parts (b)-(f)(the first part (f)) of the request.

Reasons for decision

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

12. The MMO applied the exception in regulation 12(4)(a) to parts (b)-(f) (first part (f)) of the request on the basis that it did not hold any information falling within the scope of these parts of the request.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority held any further information falling within the scope of the request at the time that the request was made.
14. The MMO provided the Commissioner with detailed information about the searches that it had undertaken to try to locate any information falling within the scope of parts (b)-(f) of the request. These included searches of Microsoft Outlook and a shared network team which encompassed information held locally on personal computers, on networked resources and in emails. It also provided responses to questions that the Commissioner asked about specific parts of the request.
15. With regard to part (c) of the request, the Commissioner noted that the MMO informed the complainant that the original licence variation was issued via email at 08.01 on 7 January 2013 and that it was published on the MMO's website shortly afterwards, at some point before midday on 7 January 2013. He went on to note that regulation 4 of the Sea Fishing (Licence and Notices) (England) Regulations 2012 provides for when a licence or notice of variation is to be treated as delivered or given. This varies depending on the form of communication used. Under regulation 4(5), a notice of variation communicated by publication on a website is treated as given immediately it is published.

16. The Commissioner explained to the MMO that the complainant had raised concerns about the MMO having no record of the time that the notice of variation about which she made her request was published on its website. This was on the basis that it would suggest that the MMO was unable to establish precisely when the relevant notice was given for the purpose of the above regulations. He therefore asked the MMO to provide him with any recorded information that it held which existed at the time of the request and which related to the time at which the notice was published on its website, including any information that related to the MMO's statement that the licence was published on its website at some time before midday on 7 January 2013.
17. The MMO informed the Commissioner that, following a search of its records, it had been unable to identify any information which would confirm the precise time the licence variation was published on its website. The MMO went on to explain that its website was a manually constructed website and it did not use a content management system that would allow for things like version control, history settings or rolling back to previous versions of files. It was therefore not possible to confirm the exact time that a licence variation was published via a search of this system.
18. The MMO did however provide the Commissioner with a copy of a 'Tweet' published via Twitter, which confirmed that the variation was published by 09:53 on 7 January 2013. The MMO explained that the procedure for vessel licence variations was that the variation and its associated documents were posted to the website and then a link was posted on Twitter. The Twitter post happened within 2 or 3 minutes of the variation going live and was the current method used by the MMO as a time indicator for when it was published.
19. In relation to part (d) of the request, the Commissioner noted that the MMO had informed the complainant that the licence variation had effect from 00.01 on 8 January 2013. The complainant had pointed out that, if it was published on the MMO's website at some point after 08.01, this would appear to be inconsistent with regulation 5(c) of the Sea Fishing (Licence and Notices) (England) Regulations 2012 which provides that a notice takes effect 24 hours after it is treated as given under regulation 4(5) by publication on a website.
20. The Commissioner asked the MMO if it could confirm whether it held any recorded information which existed at the time of the request which related to when the licence variation was to take effect. The MMO confirmed that, following a search of its records, it had been unable to identify any information falling within scope of this area of the complainant's request, which existed at the time her request was made.

21. In relation to part (e) of the request, the Commissioner asked the MMO if it could confirm whether it held any recorded information which existed at the time of the request which concerned how its guidance on the notification of licence variations related to the licence variation which was the subject of the request, for example any email discussions about this issue. The MMO confirmed that, following a search of its records, it had been unable to identify any information falling within scope of this area of the complainant's request, which existed at the time her request was made
22. In relation to part (f) (the first part (f)), the Commissioner asked the MMO if it could confirm whether it held any recorded information which existed at the time of the request which related to emails or text messages sent to licence holders or their nominees concerning the licence variation which was the subject of the request. For example, whether it held records of individual emails or texts sent to licence holders or their nominees.
23. The MMO informed the Commissioner that, following a search of its records, it had located an email, a copy of which it provided, which was sent to MMO staff, fisheries administrations and representatives from fish producer organisations at 08:01 on 7 January 2013. In addition, it also provided a screen shot which confirmed the licence numbers which received a text message and/or email notice confirming the publication of the variation.
24. With regard to the mailing sent to licence holders, the MMO explained that the purpose of these was to alert licence holders to the publication of a new licence variation on its website. It informed the Commissioner that it was under no legal obligation to issue these alerts as the onus to check its website for licence variations rested entirely with the licence holders. It confirmed that these mailings did not constitute formal delivery of the licence variation as outlined within regulation 4 of the Sea Fishing (Licence and Notices) (England) Regulations 2012.
25. Based on the details of the searches provided to the Commissioner by the MMO and the explanations that it has also provided to the specific questions that he asked, the Commissioner is satisfied that, on the balance of probabilities, it does not hold any information falling within the scope of parts (b)-(f) (the first part (f)) of the complainant's request and that it has therefore correctly applied the exception in regulation 12(4)(a) to these parts of the request. Consequently he does not require the MMO to take any further steps to ensure compliance with the EIR.

Regulations 14 – Refusal to disclose information

26. Regulation 14(2) requires that a refusal to disclose information is to be made by a public authority no later than 20 working days after the date of receipt of the request. By not issuing a refusal relying on the exception in regulation 12(4)(a) within 20 working days of the request, the MMO breached regulation 14(2).

Other matters

27. The Commissioner notes that, in its original response to the complainant, the MMO confirmed that it was dealing with the entire request under the EIR. It provided her with an explanation as to circumstances surrounding the issues raised in part (b)-(f) of her request. However, it was not until the MMO provided a revised response to the complainant in January 2014 that it confirmed that it did not hold any information falling within these parts of her request.
28. As the Commissioner similarly noted in the "Other matters" section of the decision notice in relation to part (a) of the request (FER0494535), he appreciates that, in some circumstances, a public authority may be unsure as to whether a requester is seeking to obtain an explanation related to a particular issue or whether they are seeking to obtain copies of information that is held. In such a situation, it is clearly advisable to seek clarification from the complainant. This may result in the saving of a considerable amount of time in avoiding having to deal with the issues that subsequently arise and may also help to avoid a complaint to the Commissioner.

Right of appeal

29. 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: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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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