

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

Decision notice

Date: 4 September 2014

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 broadly concerning documents held by the Department for Environment, Food and Rural Affairs ("DEFRA") relating to the adjournment debate called by Alison Seabeck in May 2013.
2. The Commissioner's decision is that DEFRA has correctly applied section 12 of FOIA and regulation 12(4)(b) of EIR.
3. The Commissioner requires the public authority to take no steps.

Request and response

4. On 2 January 2014, the complainant wrote to DEFRA and requested information in the following terms:

"I wonder if I can trouble you for sight of any and all documents between you and or other DEFRA officials and or its Ministers and James Cross or others at the MMO in respect to the adjournment debate called by Alison Seabeck in May 2013. This should include but not be limited to a letter written to you by James Cross addressing the issues raised in the adjournment debate, any documents, emails notes of meetings, briefing papers and or telephone conversations prior to the debate used to inform the Ministers response in the debate and any and all

documents, emails, notes of meetings on the subject subsequent to the debate”.

5. DEFRA responded under the FOIA on 13 January 2014. It provided the complainant with a copy of the letter sent from James Cross to John Robbs which she specifically sought in her request. It also explained that the amount of information requested was *“very substantial, and gathering it together would involve a significant cost and diversion of resources from the Department’s work”*. It subsequently cited section 12(1) of FOIA. However DEFRA advised the complainant that if she narrowed her request, it may be able to comply with it.
6. On 13 January 2014 the complainant asked for an internal review. In her internal review request, the complainant explained that she felt the request should have been dealt with under the EIR. She also explained:

“The information concerned is limited in its scope already in so far as it is in relation to the debate, what was briefed etc. I would be surprised to learn that this information was not centrally located and had not been kept together as its purpose would be to inform and brief the Minister and would I imagine need to be available for scrutiny if he has chosen to see the underlying information himself”.
7. Following an internal review DEFRA wrote to the complainant on 10 February 2014. It maintained its position that it was correct to deal with the request under FOIA. However it did explain that *“some of the information talked about in the debate could be deemed to be environmental”*. It further stated that *“it could only judge whether the information was truly environmental once it had been identified and examined”*.
8. DEFRA also stated that the complainant’s request was extensive as it asked for anything that informed the Minister’s response rather than just the briefing to the Minister or something else well defined.
9. DEFRA subsequently upheld its previous decision that it was correct to apply section 12 of FOIA to the requested information.

Scope of the case

10. The complainant contacted the Commissioner 11 February 2014 to complain about the way her request for information had been handled. Specifically she asked the Commissioner to consider whether DEFRA was correct to handle the request under the FOIA and to apply section 12.

11. During the investigation, DEFRA also sought to rely upon regulation 12(4)(b) of EIR.
12. The Commissioner has therefore had to consider whether DEFRA were correct to refuse to comply with the request under section 12 of FOIA and regulation 12(4)(b) of EIR.

Reasons for decision

What access regime does the information fall under?

13. Upon his initial review of the request and the adjournment debate in the Hansard, the Commissioner considered that the requested information fell under both FOIA and EIR. It is worth noting that an individual has a separate right to access information under the EIR. Therefore, although the request was refused under FOIA, as it is highly likely that the request would capture environmental information, it also needs to be considered under the EIR. The Commissioner subsequently returned to DEFRA and expressed this view.
14. DEFRA explained:

"Our pre-occupation is not with whether the information [name] wants should fall under the FOI Act or the EIRs but simply that her request is so broad it would take an inordinate amount of time to search and look at each piece of material to see whether it is relevant or not.
15. It therefore maintained its position that it was unable to determine whether the information within the scope of the request would fall under FOI or EIR as the request is too broad. However, it explained that if it were to specify an exception, it considers regulation 12(4)(b) applies as the request is manifestly unreasonable.
16. It further provided the Commissioner with a list of topics that were covered in the debate. An example of a few of the topics are:
 - How Marine Management Organisation (MMO) reports its performance
 - How MMO spend its budget
 - MMO's performance in handling FOI requests
 - Robustness of the process used to prepare those statistics
 - Delays in MMO processing data on fishing activity
 - Concerns raised by individuals about data/statistics and their accuracy.

17. From this list, the Commissioner considers that some of the requested information may be held for the purposes of FOIA. For example recorded information regarding DEFRA's handling of FOI requests and the robustness of the process used to prepare statistics.
18. 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..."*
19. 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.
20. Therefore, he considers that some of the requested information (such as data/statistics on fisheries and their accuracy) would, if held, fall under the definition of 'environmental information' as it would be an measure set out in (c) that is likely to affect an element set out in (a) and as such should be considered under the EIR.
21. The Commissioner is therefore satisfied that the request would fall under FOIA and EIR. He will therefore first consider the request under FOIA and then consider it under EIR.

Section 12 of FOIA

22. 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.)
23. 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(1) effectively imposes a time limit of 24 hours in this case.
24. 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.
25. The four activities are sequential, covering the retrieval process of the information by the public authority.
26. DEFRA has explained that it *"could not comply with the request without involving significant cost and diversion of resources or determine what information would come under the FOIA and what under the EIRs from such a loosely based request"*.
27. It further explained:

"Due to the vastness of the request and the topics discussed at the debate, we believe the information requested is a mixture of FOI and EIR – however, we would be unable to determine what category each piece of information came under prior to searching. As a result we decided to deal with the request under the FOIA as it met the requirements of section 8 of FOIA. In addition, as the cost of identifying the relevant information and determining whether it falls under the FOIA or EIRs would exceed the appropriate limit amount, we decided to refuse the request under section 12 of FOIA."

28. In support of its position, DEFRA provided the Commissioner with a spreadsheet which demonstrated the amount of information that would be covered by the request if it was taken at its face value.
29. The spreadsheet detailed searches DEFRA had undertaken to locate the requested information. DEFRA used a number of key words such as 'MMO', 'data', 'accuracy' and 'statistics' and the searches involved emails, word documents, excel spreadsheets and presentations. These searches returned 3555 documents. DEFRA further explained that this figure did not include individual documents or emails that people may not have saved onto the relevant business area's shared team site. A consequence of this is that it is likely to increase the amount of work required to locate the requested information. Subsequently DEFRA concluded that to locate, retrieve and extract each of the 3555 documents, it would take more than 42 working days for one official at a cost of over £7,000 of labour.
30. From the evidence he has seen during the course of his investigation, the Commissioner is satisfied that DEFRA has provided adequate explanations to demonstrate that it would exceed the appropriate limit to locate, retrieve and extract the requested information. The Commissioner is therefore satisfied that DEFRA was correct to refuse the request under section 12.

Regulation 12(4)(b)

31. 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.
32. In the Commissioner's view, "manifestly" means that there must be an obvious or tangible quality to the unreasonableness.
33. 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.
34. DEFRA relied upon the same reasons as set out in paragraphs 26- 29 above to apply regulation 12(4)(b) to the request.

35. Having considered the financial cost in terms of staff time that would be required to comply with the request, the Commissioner is satisfied that compliance with the request would be manifestly unreasonable on the grounds of cost and diversion of resources and therefore DEFRA correctly engaged regulation 12(4)(b).
36. 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.
37. The complainant explained that during the debate there was a discussion regarding the Western Waters scallop allocation of 2012. She explained that during the debate the minister had claimed that the UK had stayed within its limits, when in fact the UK had not and was subsequently fined. She therefore argued that *"there was a very high public interest in why, the Fisheries Minister told Parliament there was not a penalty potential for 2012 when officials knew this was not the case"*.
38. The Commissioner does appreciate this argument, the complainant's strong interest in the requested information and the purpose and value behind her request. However he has had to balance this against the burden that would be placed on DEFRA if it was to comply with the request.
39. 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.
40. 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.
41. 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.

42. 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.

Right of appeal

43. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

44. 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.
45. 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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