

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

**Decision notice**

**Date:** 27 January 2016

**Public Authority:** Department for Environment, Food and Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

**Decision (including any steps ordered)**

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1. The complainant has requested information from the Department for Environment, Food and Rural Affairs ("Defra") relating to Prince's Consent.
2. The Commissioner's decision is that Defra has correctly applied regulation 12(4)(b) of the EIR and section 12(1) and section 12(2) of the FOIA to the request. However, Defra has breached regulation 11 as it failed to provide an internal review within 40 working days.
3. The Commissioner requires Defra to take no steps.

**Request and response**

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4. On 27 October 2015, the complainant wrote to Defra and requested information in the following terms:

*"My request concerns the issue of 'Prince's Consent' which is a process whereby Ministers and or their departments consult the Prince of Wales and or his representatives on bills and aspects of policy which are likely to have implications for him as the Duke of Cornwall and or his Duchy of Cornwall estate (including its holdings and assets). Please note that I am interested in information which relates to the period 1 January 1999 to 1 January 2000.*

*Please note that the reference to legislation should be taken to mean white papers, green papers, draft bills, actual bills, statutory instruments, other legislative instruments and Government policy.*

*Please note that I have chosen to make the request under the EIRs because the information concerned is likely to touch upon environmental information.*

*1. During the aforementioned period did any member of the Ministerial team and or any member of staff from the Minister's private office meet with the Duke of Cornwall to discuss legislation which could have implications either for him as the Duke of Cornwall and or the Duchy of Cornwall estate and its holdings and assets and employees. If the answer is yes could you please state the date, time and venue of the meeting(s). Could you also provide a full list of those present, If relevant could you please provide details of the legislation and or policy under discussion. Could you please detail any other issues under discussion.*

*2. During the aforementioned did any member of the Ministerial team meet with any representative and or employee of the Prince of Wales/Duke of Cornwall to discuss legislation which could have implications for either the Duke of Cornwall and or the Duchy of Cornwall estate, its holdings, assets and employees. If the answer is yes could you please state the date, time and venue of the meeting. Could you also provide a full list of those present. If relevant could you please provide details of the legislation and or policy under discussion.*

*3. During the aforementioned period did any Minister and or any member of staff in the Minister's private office exchange communications and or correspondence (including emails) with the Prince of Wales/Duke of Cornwall and or his Principal Private Secretary about legislation. If the answer to the above question is yes can you please provide copies of all correspondence and communications including emails.*

*4. During the aforementioned period did any Minister and or any of staff in the Minister's private office exchanged communications and or correspondence including emails with any law firm and or employee and or representative who was acting on behalf of the Duke of Cornwall and or the Duchy of Cornwall estate. If the answer to this question is yes could you please provide copies of all this correspondence and communications including emails.*

*5. Can the department please outline any changes to legislation and or policy which were made following consultation with the Duke of Cornwall and or his representatives."*

5. Defra responded on 2 December 2014 and applied regulation 12(4)(b) to the request.
6. Following an internal review Defra wrote to the complainant on 17 April 2015. After reviewing the request, Defra determined that the request may cover information falling under both the EIR and the FOIA. It subsequently upheld its application of regulation 12(4)(b). It also considered that section 12(1) and section 12(2) of the FOIA applied.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 27 July 2015 to complain about the way his request for information had been handled.
8. The complainant was dissatisfied with Defra's refusal to provide the requested information. He was also concerned with the time it took Defra to respond to his internal review request.
9. The Commissioner has had to consider whether Defra was correct to apply regulation 12(4)(b) of the EIR and section 12(1) and section 12(2) of the FOIA to the request. He has also had to consider whether Defra complied with regulation 11 of the EIR.

## **Reasons for decision**

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### **What access regime does the information fall under?**

10. In its internal review response and in its submissions to the Commissioner, Defra considered that the information requested fell under the EIR and the FOIA.
11. 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..."*

12. 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.
13. The Commissioner is satisfied that some of the requested information is environmental as the information would be an measure set out in (c) that is likely to affect an element set out in (a).
14. The Commissioner is also satisfied that some of the requested information, if held, is likely to fall under the FOIA.
15. The Commissioner is therefore satisfied that the request would fall under the EIR and the FOIA. The Commissioner will first consider whether Defra handled the request in accordance with the EIR. He will then consider whether the request was handled correctly under the FOIA.

### **Regulation 12(4)(b)**

16. 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.
17. In the Commissioner's view, "manifestly" means that there must be an obvious or tangible quality to the unreasonableness. In this case, Defra has argued that the request is manifestly unreasonable on the grounds of costs.
18. 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.
19. Defra explained for the period covered by the request (January 1999 to January 2000), it operated a manual (i.e. paper) filing system and any

searches for the requested information, or, to ascertain whether the information is held by Defra would have to be undertaken manually and not by computerised or other electronic searches.

20. Defra confirmed that it can identify paper files by entering key words into an electronic search facility in its records management system, but any searches though the files for the requested information would have to be undertaken manually. Defra further confirmed that the files would not be categorised on the basis of whether Prince's consent was or was not required for any particular draft legislation. Therefore, Defra explained that the list of files generated by an electronic or manual search would not identify only those files where the Prince's consent was required.
21. During its internal review of the request, Defra explained that it had carried out a thorough analysis of the costs and time that would be involved in determining whether the information was held and in locating, retrieving and extracting the information.
22. To identify the files that may hold the requested information, Defra entered the following terms into its electronic search facility as detailed in paragraph 20:
  - "prince" – returned 310 files
  - "statutory" – returned 1856 files
  - "consent" – returned 3324 files
  - "bill" and "act" – returned 5000+ files
23. The search that was carried out by Defra returned over 10490 files. An electronic search for the terms "Duchy" and "Cornwall" was also carried out. Defra confirmed that this search did not return any files that were relevant to the request.
24. Defra emphasised that the burden to search these files to determine whether they contained any of the requested information would be manifestly unreasonable. Defra explained that if it were to make a conservative estimate that it would take two minutes of one member of staff's time to check each file to determine whether the file contains the requested information, it would take approximately 350 hours (£8750) to check all of the files. Defra stated that this would clearly place a significant and unreasonable financial and resource burden on the department, taking staff away from their duties and far exceeds the appropriate cost limit of compliance that applies to requests that are refused on the grounds of costs under the FOIA. It therefore considered that the request was manifestly unreasonable on the grounds of costs.

25. The Commissioner considers that Defra's estimate of the time and costs that would be incurred if it complied with the request is reasonable. He further considers that even if it took Defra 30 seconds to review each file, it would still place a disproportionate burden on Defra. The Commissioner is satisfied that the request is manifestly unreasonable and regulation 12(4)(b) is engaged.
26. 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.
27. Defra recognised that there is a public interest in disclosure of information concerning the issue of 'Prince's Consent', since it provides for transparency in the legislative process and facilitates the public's understanding and participation. Defra explained that 'Prince's Consent' is required for Bills that expressly mention the Duchy of Cornwall or otherwise have a special application to it; the Duchy consists of 53,000 hectares of land in 23 counties and as such, matters affecting it can have an impact on a significant number of people.
28. On the other hand, Defra argued that there is a strong public interest in withholding the information because of the unreasonable and disproportionate diversion of resources from the provision of public services, i.e. the Department's core functions.
29. 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.
30. 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.
31. 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.

32. 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.
33. The Commissioner has therefore determined that Defra was correct to apply regulation 12(4)(b) to the request.

### **Section 12(1) and 12(2) of FOIA**

34. Defra considers that the majority of information requested would be environmental information. However, some of the requested information if held, would not be environmental and therefore fall under the FOIA. To the extent that some of the requested information fell under the FOIA, Defra considered section 12(1) and 12(2) applied to this information.
35. 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.)
36. Section 12(2) allows a public authority to refuse to confirm or deny whether it holds information of the nature requested if simply to do so would in itself exceed the appropriate limit.
37. 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 effectively imposes a time limit of 24 hours in this case and a cost of £600.
38. 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.
39. The four activities are sequential, covering the retrieval process of the information by the public authority.
40. Defra relied up on the same arguments as set out under paragraphs 19-24 to apply section 12(1) and 12(2) to the request.
41. Defra considered that to even confirm whether some of the requested information fell under the FOIA, it would exceed the appropriate cost limit of compliance. Defra explained:
- "As you will appreciate, unless we were to undertake a search for the information and locate it, we cannot be more precise about the information to which section 12(2) applies and we cannot undertake such a search within the FOIA cost limit.*
42. Even if the information was held, Defra stated that to locate, retrieve and extract it would exceed the appropriate cost limit of compliance.
43. Similarly to paragraph 25, the Commissioner is satisfied that the time and costs that would be incurred if Defra confirmed whether any of the requested information fell under the FOIA would exceed the appropriate cost limit of compliance. In addition to this, if Defra confirmed that some of the requested information was held, the process of locating, retrieving and extracting the information would exceed the appropriate cost limit. This is because even if it took Defra 30 seconds to review each of the 10490 files, it would take over 87 hours. The fees regulations set a limit of £600 which equates to 24 hours for Defra. Therefore the estimate of 87 hours significantly exceeds the appropriate cost limit allowed under section 12.
44. The Commissioner is satisfied that Defra was correct to apply section 12(1) and section 12(2) to the request.

## **Regulation 11**

45. Regulation 11 states:

*"an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request".*



46. In other words, the EIR includes a statutory right for applicants to request an internal review, so long as they submit it within 40 working days of receiving the response. The public authority then has 40 working days in which to carry out its internal review.
47. In this case, the complainant asked Defra to undertake an internal review on 2 December 2014. Despite several emails from the complainant chasing a response to his internal review request, Defra did not respond until 17 April 2015. Defra has therefore breached regulation 11 of the EIR by failing to carry out an internal review within 40 working days.

## Right of appeal

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48. 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 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**