

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

Date: 23 July 2024

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information, over a specified time period, about Legionella risk assessments, water sample test results and disinfection reports relating to the Bibby Stockholm accommodation barge. The Home Office disclosed some of the requested information with redactions under section 31(law enforcement), section 40 (personal information) and section 43 (commercial interests) of FOIA. During the course of the Commissioner's investigation, the Home Office reconsidered the request under the EIR, said it had provided the incorrect document for part 1 of the request, which it rectified at internal review and disclosed further information. The Home Office relied on Regulations 12(5)(a) (international relations), 12(5)(e) (confidentiality of commercial or industrial information), 12(5)(f) (interests of the person who provided the information to the public authority) and 13(1) (personal data) of the EIR to withhold some of the information in the disclosed Legionella Risk Assessment. However, as set out in the 'Scope' section of this notice, the excepted information was not held at the time of the request and so cannot be considered by the Commissioner. The complainant also raised concerns that she had not been provided with all the information in scope of her request.
2. The Commissioner's decision is that the request falls under the EIR. He finds, on the balance of probabilities, that the Home Office does not hold any further information in scope of the request and, therefore, it complied with Regulation 5 of the EIR. By failing to provide its internal

review result within the statutory 40 working days, the Home Office has breached Regulation 11(4) of the EIR.

3. No steps are required as a result of this notice.

Request and response

4. On 14 August 2023, the complainant wrote to the Home Office and requested information in the following terms:

“Please provide me with any and all:

1. Legionella Risk Assessments carried out on the Bibby Stockholm accommodation barge since January 1 2021 to date.
2. Water sample test results carried out on the Bibby Stockholm accommodation barge since January 1 2021 to date.
3. Disinfection reports relating to the water system on the Bibby Stockholm accommodation barge since January 1 2021 to date.”

5. The Home Office responded on 12 September 2023 and provided a document for **part 1** of the request with section 40(2) redactions (personal information). For **part 2**, the Home Office suggested the complainant contact Dorset Council as it said the Council had been responsible for arranging the water sample tests. For **part 3**, the Home Office said it did not hold this information.
6. The complainant requested an internal review on 8 October 2023, stating that she had not been provided with the specific information requested, and had instead been given “theoretical procedures” for **parts 1** and **3** of her request. She also objected to being referred to Dorset Council and asked the Home Office to provide the information it held in relation to **part 2** of her request.

Scope of the case

7. The complainant contacted the Commissioner on 17 December 2023 to complain about the way her request for information had been handled. At that time, she had not received any response to her request for an internal review. The case was accepted by the Commissioner without an internal review having been completed.

8. Subsequently, during the course of the Commissioner's investigation, the Home Office carried out its internal review and wrote to the complainant (copied to the Commissioner) on 12 April 2024. However, due to technical issues with sending the disclosed information as attachments, neither party received the internal review result until 16 April 2024.
9. Following its internal review, the Home Office partly revised its position as follows:
 - It said that the incorrect document had been provided in relation to **part 1** of the request, explaining that, at the time of the request, the information at **part 1** was not held. The Home Office confirmed that the information at **part 1** is now held and released a 21 page document entitled "Legionella Risk Evaluation Assessment for the Domestic Hot and Cold Water Services on the Bibby Stockholm" (the 'Legionella Risk Assessment') with redactions under sections 40(2) – the exemption for personal information and 43(2) of FOIA – the exemption for commercial interests.
 - For **part 2** of the request, the Home Office now provided the Bibby Stockholm water sample test results it held. Additionally, (and in response to the complainant's comments raised at internal review about water sample test results on the Bibby Stockholm), the Home Office advised that this information is now publicly available and provided the URL¹, directing the complainant to the Portland Port "Is the vessel safe?" subheading. Finally for **part 2**, the Home Office said that the Legionella test results are published on Dorset Council's website following previous FOIA requests and it provided the relevant URLs².
 - For **part 3** of the request, the Home Office said it had now found that this information was held by the service provider on behalf of the Home Office. It provided a redacted copy of the information held, namely the Bibby Stockholm Flush and

¹ <https://www.gov.uk/government/collections/asylum-accommodation#is-the-vessel-safe>

² Freedom of information FOI requests - Dorset Council (disclosure-log.co.uk)
Freedom of information FOI requests - Dorset Council (disclosure-log.co.uk)
Freedom of information FOI requests - Dorset Council (disclosure-log.co.uk)

Disinfectant Schedules, with some information withheld under section 31(1)(e) – the FOIA exemption for law enforcement.³

10. The Commissioner contacted the complainant for her view following the disclosure of some of the requested information.
11. On 21 April 2024, the complainant replied and raised concerns about some of the information referred to in the disclosures not having been provided to her. She also objected to the extent of the redactions and argued that disclosure is “very much in the public interest”. She reiterated her concerns about the Home Office’s handling of her request and the delay with the internal review.
12. The Commissioner asked the Home Office to consider the complainant’s comments on 22 April 2024. The Home Office responded on 13 May 2024. The Commissioner relayed its response to the complainant on 14 May 2024. She confirmed she remained dissatisfied and requested the Commissioner to investigate her complaint.
13. The Commissioner sent his further investigation letter to the Home Office on 20 May 2024. He also asked the Home Office to consider whether the request should have been handled under the EIR and notified the complainant of this step.
14. On 20 June 2024 the Home Office wrote to both the complainant and the Commissioner setting out its final position. It said it had reconsidered the request as falling under the EIR and disclosed a previously withheld contractor name from the Legionella Risk Assessment (**part 1 of the request**), together with a further copy of one of the previously disclosed Flush and Disinfect Schedules (**part 3**) as the complainant had said she had not received it in full.
15. The Home Office said the redactions in the disclosed Legionella Risk Assessment (**part 1**) were now being withheld under the following EIR exceptions:
 - Regulation 12(5)(a) - (international relations)
 - Regulation 12(5)(e) - (confidentiality of commercial or industrial information)

³ This exemption was applied to disclosed information since deemed out of scope (see ‘Scope’ section of this notice).

- Regulation 12(5)(f) - (interests of the person who provided the information to the public authority) and
 - Regulation 13(1) – personal data.
16. On reviewing all the case correspondence in detail in order to reach his decision, the Commissioner noted that the document referred to as the Legionella Risk Assessment issued at internal review for **part 1** of the request is out of scope of his consideration. This is because the Commissioner must assess if a public authority dealt with a request in accordance with Part I of FOIA or the EIR based on how matters stood:
- either at the date of the authority's actual response to the request **or**
 - the statutory date by which the authority was required to respond

whichever came earlier.

17. This means the Commissioner must assess requests by reference to a **single point** in time:
- if the claimed exemptions or exceptions are engaged;
 - the balancing of the public interest when the authority claims a qualified exemption. If the exemption is also prejudice-based, the time for carrying out the public interest test and the prejudice test is **the same**;
 - any balancing exercise in-built in absolute exemptions (eg the legitimate interest assessment in the first condition of section 40 or the public interest defence in section 41);
 - any procedural breaches.

18. The time of the internal review is **not** included.

19. In the three-judge panel decision in [Montague](#)⁴, the Upper Tribunal decided that internal reviews are **not** part of an authority's decision on a request because FOIA does not oblige the authority to review its refusal decision.

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https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_2020_000324_000325_GIA.pdf

20. This point was not challenged at Court of Appeal level and the UT Montague decision is binding authority in FOIA cases.
21. The Commissioner takes the same position under the EIR, even though the Regulations require public authorities to conduct an internal review if requested.
22. This means that the Commissioner cannot consider the information provided for **part 1** of the request. The Home Office said it had provided the incorrect information in its substantive response to **part 1** and by the time it had rectified it at internal review, it was out of time for inclusion in his investigation as explained above.
23. Following further enquiries by the Commissioner, the Home Office confirmed that the document labelled 'Schedule 5' associated with the Disinfection Reports in **part 3** was out of scope. It explained that this document is a site map of the Bibby Stockholm which had not been requested by the complainant. Furthermore, this was the document to which the Home Office had relied on section 31(1)(e) of FOIA (see third bullet under paragraph 10 of this notice). The Commissioner accepts that this document is out of scope of the request. No exceptions were applied to the remaining in-scope disclosed Disinfection Reports.
24. The Commissioner has considered whether, on the balance of probabilities, any further recorded information is held in scope of the request. He will first examine whether the request falls under the EIR. If it does, he will also consider the Home Office's handling of the internal review request which is a statutory requirement under the EIR.

Reasons for decision

Is the requested information environmental?

25. Regulation 2(1) of the EIR defines environmental information as being information 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;
 - (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)...as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

26. The Home Office said:

“We have deemed that your request clearly falls under more than one of the definitions; in particular, (a), (b) and (c), as it relates to water samples and the water system on the barge.”

- 27. The Commissioner is satisfied that the requested information is environmental and he has therefore assessed this case under the EIR.
- 28. The complainant raised her concern during the latter stage of the Commissioner's investigation that she had not been provided with all the information held by the Home Office.
- 29. The Commissioner has therefore considered whether, on the balance of probabilities, the Home Office holds any further information in scope of the request.

Regulation (5)– information not held

- 30. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
- 31. Regulation 5(2) of the EIR allows a public authority that holds environmental information to be made available no later than 20 workig days after the date of receipt of the request.
- 32. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.

33. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
34. The Commissioner finds the representations provided by the Home Office, as set out above, sufficiently explains why it does not hold the requested information.
35. In reply the Home Office said that all information relevant to this request is held electronically. It advised that Home Office online records were searched for information and the Provider was requested to produce the relevant documents related to this request. It also advised:

"All relevant information is kept on the Share Point online filing systems for security and audit reasons. No search terms were needed as data is stored in relevant folders.

Information has certain classifications which prevents it from being deleted if it is significant on Home Office systems. All relevant records are kept for auditing and contract management/compliance purposes. The Home Office follow the DPA and GDPR legislation which means there are statutory and legal requirements to retain the information for a maximum of 6 years and that it should be stored securely.

The Home Office does not hold other information similar to that requested."

36. The Home Office told the Commissioner it has no records of any documents in scope being held that have since been deleted or destroyed.
37. The Commissioner recognises that the Home Office's handling of this request has been poor and that the intermittent disclosures during his investigation may have resulted in the complainant's view that she might not have received all the information in scope of her request. However, the Commissioner has had several discussions with the Home Office, some followed up in writing, during his investigation to determine exactly what information is in scope and what information has been disclosed and at what stage. setting out what the Home Office was required to do in this case. He is therefore aware that the Home Office has had to revisit and examine the recorded information held.

38. Based on the evidence available to him, and in particular the searches undertaken and the other explanations provided by the Home Office, the Commissioner finds that, on the civil standard of the balance of probabilities, the Home Office does not hold any further recorded information relevant to the request.

Regulation 11 – Representations and reconsideration

39. Regulation 11 of the EIR provides that, if a requester is dissatisfied with a public authority's response to a request, the requester can ask for a review. Regulation 11(4) provides that a public authority should respond promptly and no later than 40 working days after the date of receipt of the request for review.

40. The complainant requested an internal review on 8 October 2023. The Home Office did not provide its internal review outcome until 12 April 2024. It told the Commissioner:

“In this case, further time was required to ensure that [the complainant's] points of complaint were investigated thoroughly, and this took longer than anticipated. In addition, the further disclosure of information required additional clearance.”

41. The Commissioner is satisfied that the Home Office breached Regulation 11(4) of the EIR by failing to comply with the prescribed time limit for providing the internal review. He has made a separate record of this breach for monitoring purposes.

Other matters

42. Although the Commissioner acknowledges that the Home Office, by the nature of the recorded information it holds, does not regularly encounter EIR requests, he has found it necessary in this case to query its responses on several occasions. This has been due to issues with the Home Office identifying exactly what information it holds that is in scope, which parts of that information it considers excepted and under which EIR Regulations. This has led to a long and protracted investigation which should not have been necessary in the Commissioner's view - the applicable legislative regime should not impact what information is held and what is in scope of the request.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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.

Carol Scott
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