

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 27 March 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)**

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1. The complainant requested evidence to support DEFRA's decision to launch a non-formal consultation on proposals for a new English Scallop Order. DEFRA identified three pieces of information within the scope of the request and withheld them on the basis of regulation 12(4)(d), 12(4)(e) and 12(3).
2. The complainant agreed not to pursue the release of the personal data withheld under regulation 12(3). The Commissioner's decision is that DEFRA has incorrectly applied the internal communications and unfinished documents exceptions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information with redactions for any third party personal data.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 25 February 2011, the complainant wrote to DEFRA and requested information in the following terms:

*“Could you please explain why this is a non-formal consultation as opposed to a formal one and what the next steps will be after the closure of the consultation?”*

*Could you please advise where we might find the basis on which the premise for the consultation has been derived from – where has the idea come from?*

*Could you please advise where the supporting evidence / advice has come from and where it may be seen, to reach the conclusion that this measures / consultation is necessary?*

*Could you please advise what if any consulting is being conducted with member states with regard to measures outside of 12nm or is it the intention if found appropriate to curtail current activities that this would only effect UK vessels?”*

6. The Commissioner understands that a meeting took place between the complainant and DEFRA in March 2011 but following this the complainant wrote to DEFRA to ask for an internal review. As DEFRA had not provided a formal refusal notice at this point, it did so on 15 April 2011.
7. In its refusal notice, DEFRA provided a brief overview of the reasons for considering proposals for a new Scallop Order and explained that the advice received in discussions with the Centre for Environment, Fisheries and Aquaculture Science (“CEFAS”) and the Marine Management Organisation (“MMO”) formed part of the consultation document. DEFRA indicated that some of this information would be included in any subsequent Impact Assessment. With regards to the last limb of the request DEFRA stated that the measures it was considering could be introduced on a domestic level.
8. Following this the complainant reiterated her request for an internal review on 19 April 2011. DEFRA and the complainant engaged in correspondence about this issue until an internal review response was sent to the complainant on 6 June 2011.
9. In this response DEFRA explained that it considered that information that fell within the scope of the request was covered by the EIR rather than the Freedom of Information Act 2000 (“FOIA”) as information on scallop stocks would be information on the state of the elements and

proposals to safeguard scallop stocks would be a measure likely to affect those elements of the environment.

10. DEFRA explained that it considered only the third limb of the request to be a valid request for information under the EIR but, in any event, had answered the questions asked in relation to the other parts of the request. In terms of the supporting evidence used to determine the consultation was necessary, DEFRA disclosed a number of documents to the complainant. These included email chains between DEFRA, the Marine Fisheries Agency ("MFA"<sup>1</sup>) and CEFAS and statistics produced by the MMO. DEFRA did redact the names of staff in the MFA and CEFAS under regulation 12(3) of the EIR (third party personal data).
11. DEFRA had identified other information which was within the scope of the request but withheld this on the basis that it constituted internal communications (regulation 12(4)(e)).

### Scope of the case

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12. The complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant has expressed dissatisfaction with DEFRA's response that disclosure of any information used as evidence may impact on policies that are still being formulated. The complainant considers that to be able to contribute constructively to a consultation, respondents need to be fully aware of the evidence used to inform any proposals.
13. In the course of the Commissioner's investigation DEFRA sought to rely on a new exception, 12(4)(d) the exception for material in the course of completion, unfinished documents and incomplete data. The complainant has also agreed not to pursue the disclosure of the information withheld under regulation 12(3). The Commissioner therefore considers the scope of his investigation to be to determine whether DEFRA correctly applied the exceptions at regulation 12(4)(d) and 12(4)(e) to withhold relevant information under the third limb of the request.

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<sup>1</sup> The Marine and Fisheries Agency was replaced by the MMO on April 1 2010

## Background

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14. On 21 February 2011 DEFRA launched a non-formal consultation<sup>2</sup>, asking for views on a proposed package of scalloping measures that would form part of a new or revised English Scallop Order.

## Reasons for decision

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15. The withheld information in this case is three documents. The first of which is an email chain between DEFRA, CEFAS and MMO. The second document is a draft proposal document and the third is a discussion paper. DEFRA has applied the exception relating to information comprising internal communications (regulation 12(4)(e)) and the exception relating to unfinished documents to withhold the requested information.

### *Access regime*

16. The Commissioner is of the view that the requested information in this case is environmental information within the meaning of regulation 2 of the EIR. This is because the content of the requested information relates to measures to safeguard scallop stocks. The Commissioner considers this would fall under the definition of environmental information at regulation 2(1)(c) which states that environmental information is any information in any material form on:

*"Measures (including any 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;"*

17. The Commissioner considers information on scallop stocks to be information on the state of the elements of the environment (as defined in regulation 2(1)(a)) and proposals for new or revised scallop measures to be a measure likely to affect the elements of the environment.

18. In light of the above, the Commissioner has gone on to consider DEFRA's application of the EIR exceptions to the requested information.

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<sup>2</sup> <http://archive.defra.gov.uk/environment/marine/documents/interim2/20110221-scallop-consult-doc.pdf>

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

19. 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.
20. 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.
21. Based on the broad description of what constitutes a “communication”, the Commissioner accepts that the requested information would be ‘communications’. The issue is then whether these documents can be deemed to be internal communications.
22. The email chain contained emails sent between DEFRA and CEFAS and copied to officials at the MMO. CEFAS is an executive agency of DEFRA and would be deemed to be part of the same public authority for the purposes of the EIR. The MMO is a non-departmental public body (“NDPB”), which means it is not a Government department or part of one. The MMO is therefore a third party.
23. DEFRA has also explained that it considers the internal communications exception to be applicable to the all of the documents as they were drafted for consideration by DEFRA, CEFAS and the MMO.
24. Regulation 12(8) states that internal communications include communications between government departments. Any emails sent between DEFRA and CEFAS would therefore be likely to constitute internal communications as they would be between central Government departments i.e. DEFRA and its executive agency. However, as MMO is a NDPB it is not considered a central government department and the Commissioner considers that any emails and discussion documents sent to the MMO as well as CEFAS would therefore fall outside the scope of the internal communications exception.
25. As the Commissioner is not satisfied that regulation 12(4)(e) is engaged in relation to these documents, he has not gone on to consider the public interest test associated with this exception.

*Regulation 12(4)(d) – material still in the course of completion*

26. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
27. Regulation 12(4)(d) is subject to the public interest. Therefore, in addition to demonstrating that the withheld information falls within the definition of the exception, the public authority must also demonstrate that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
28. DEFRA has applied this exception to all of the withheld information but the Commissioner does not consider that the email chain or the discussion document fall within the definition of an unfinished or draft document. He therefore finds that this information should be disclosed.
29. DEFRA considers that the draft proposal document identified as being within the scope of the request engages the exception as it constitutes an unfinished document. The Information Tribunal<sup>3</sup> has previously determined that draft versions of a report fall within the definition of this exception and continue to constitute unfinished documents or information in the course of completion even when a final version is completed and issued.
30. The Commissioner has reviewed the draft documents and, whilst the document appears to be a near finalised draft, he accepts DEFRA's argument that the document is an unfinished document. Taking into account the view of the Tribunal, the Commissioner therefore considers that regulation 12(4)(d) is engaged in relation to this document. He has now gone on to consider the public interest test.

Public interest arguments in favour of disclosure

31. DEFRA has not provided any arguments in favour of disclosure. However, the complainant has argued that there is a public interest in disclosure so that the public can be fully informed of the reasons for proposed legislative change and contribute to meaningful debates on the issue. The complainant has put to the Commissioner that as consultation is about gaining wider views from the public, there is a strong public interest in information which contributed to the development of proposals to be consulted on being made available to the public.

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<sup>3</sup> *Secretary of State for Transport v Information Commissioner (EA/2008/0052)*

### Public interest arguments in favour of maintaining the exception

32. DEFRA has indicated that at the time of the request the policy was still under consideration and there was a need to secure a 'safe space' for discussion and consideration of these issues. DEFRA argued that disclosure of the draft proposal document could have an adverse affect on the Government's ability to effectively develop policy.
33. DEFRA also argued that disclosure of a draft document that was being prepared for a consultation would lead to ill-informed assumptions being made and the diversion of staff resources to deal with responding to any queries.

### Balance of the public interest arguments

34. The Commissioner received very limited arguments from DEFRA in relation to its consideration of the public interest test. In particular the Commissioner noted that DEFRA had originally advanced the argument that the information should be withheld because it was a "draft document being prepared for the consultation" in relation to a separate request the complainant had made for "a copy of the impact assessment". As it appeared to the Commissioner that the argument had been copied and pasted from a response to another request he asked DEFRA to confirm that the draft proposal document (as opposed to the impact assessment document) was actually being prepared for external consultation. DEFRA failed to provide this confirmation despite being allowed a calendar month to do so. The Commissioner would like to point out that it is not his role to argue a point on a public authority's behalf. It is the responsibility of the public authority concerned to provide the necessary arguments and, where necessary, evidence to support its view. Having received no further representations from DEFRA the Commissioner has gone on to make his decision on the basis of the information he was provided with.
35. The Commissioner recognises there is a public interest in transparency, openness and accountability in relation to decisions made by government to instigate legislative change. In this case he considers the public interest is strong due to the potential impact any changes may have on the scallop fishing industry and scallop stocks.
36. 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 representatives of the affected industries based on the full knowledge of the evidence base behind the consultation is a valid argument which the Commissioner recognises and gives considerable weight to. The release of this information would

assist the public in understanding more clearly how DEFRA reached its decision to consult on new proposals and the basis for the proposals that it put forward.

37. DEFRA has argued that the release of the draft document could lead to ill-informed assumptions being made. Whilst the Commissioner considers this argument to be relevant to regulation 12(4)(d) he has not been able to give it as much weight as he might have been able to, had DEFRA confirmed that the draft document was being prepared for the consultation and that a final version would therefore be made available for external comment as part of the consultation process.
38. DEFRA also argued that if it released the information there would be a clear risk of it being drawn into a public debate on policy which is still being formulated and developed in preparation for a public consultation where it would be open to all sides to comment on the proposals. At the time of the request the Commissioner recognises that the formulation of any new or amended legislation was ongoing. The next stage in the process was to review the responses to the non-formal consultation before considering whether a formal consultation was needed. As the non-formal consultation was still 'live' at the time of the request the Commissioner is satisfied the process was still ongoing. However, the Commissioner considers that DEFRA's argument that it needs to preserve a safe space in which to develop policy is somewhat at odds with the fact that, as at the date of the request, it was inviting external comment via the informal consultation.
39. 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 both DEFRA's decision to informally consult on proposed legislative change and the basis for the proposals it was consulting on. Whilst he acknowledges that there is a public interest in maintaining a safe space for proposals to be developed and discussed away from external involvement, he considers that there cannot be the same expectation that such a safe space be preserved once external comment has been actively invited.
40. In this case, DEFRA has not provided any compelling arguments to demonstrate that the public interest in maintaining this exception outweighs the public interest in disclosing this information. The Commissioner considers the complainant's argument, that in order for interested parties to provide informed comment on the proposals for the new legislation they need to understand the reasoning behind them, to be compelling in the circumstances of this case and to outweigh the arguments DEFRA has presented in favour of maintaining this exception.



41. The Commissioner has therefore decided with regards to the draft proposal document that the public interest in maintaining the exception is outweighed by the public interest in disclosure and he now requires DEFRA to disclose this information.

## Right of appeal

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42. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. 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.
44. 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** .....

**Lisa Adshead**  
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