

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

Decision notice

Date: 6 November 2012

Public Authority: Foreign and Commonwealth Office
Address: Old Admiralty Building
Whitehall
London
SW1A 2PA

Decision (including any steps ordered)

1. The complainant requested information about the deployment of the British Indian Ocean Territory ('BIOT') fishery protection/patrol vessel, the Pacific Marlin, over a specified period. He later made an associated request under the Environmental Information Regulations 2004 (the 'EIR') asking what steps had been taken by the BIOT to disseminate environmental information such as that in his original request. The Foreign and Commonwealth Office (FCO) advised it held no information in respect of either request and that the EIR do not apply to overseas territories. The FCO maintained that the government of the BIOT is constitutionally separate from the government of the United Kingdom and that any information about the deployment of the Pacific Marlin is held only by the government of the BIOT and not by the FCO.
2. The Information Commissioner has investigated and accepts that the governments of the BIOT and the United Kingdom are constitutionally separate and that therefore any information held only by the BIOT would not be held by the FCO for the purposes of the EIR. However, he has also found that, in practice, the work of the government of the BIOT and the work of the FCO BIOT geographical desk are not always separated, and that the requested information for request 1 is held, at least to some extent, by the FCO itself. The FCO breached the EIR in its handling of the complainant's requests. The Information Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

- Provide the complainant with the information falling within the scope of request 1 detailed in the Schedule at Annex A, or issue a valid refusal notice indicating why it is exempt from disclosure.
3. 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 Information Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. The requests detailed below both relate to the British Indian Ocean Territories or BIOT.
5. The BIOT is one of the United Kingdom's 14 Overseas Territories. The Foreign and Commonwealth Office (the 'FCO') explained that the BIOT has no permanent population but hosts a large US naval base on Diego Garcia, which is an atoll within the Indian Ocean. The FCO has responsibility within the UK government for the security and good governance of all the Overseas Territories. The BIOT Administration (also referred to as the BIOT government) consists of a range of officials and specialists, headed by HM Commissioner for BIOT.
6. In addition, the FCO explained that it has a BIOT Section based in London consisting of three FCO staff who carry out the same duties as other geographical desks in the Overseas Territories Directorate. These three staff also form part of the BIOT government with responsibility for matters such as managing the Marine Protected Area and organising science and other expeditions. The staff of the BIOT government consists of the BIOT Commissioner (usually an FCO official) and Deputy BIOT Commissioner, also based in London; specialist advisers and the BIOT Commissioner's representative and 40 further staff who are based in the BIOT itself.
7. The complainant submitted two separate but closely associated requests in this case, both of which the Information Commissioner has considered in this notice.
8. All references in this notice to the 'BIOT Commissioner's Representative' refer to the individual who is based in the BIOT itself on Diego Garcia.

Requests and responses

9. On 29 April 2011 the complainant wrote to the FCO and requested the following information:

Request 1

"For each financial year separately (1 April - 31 March) between 1 April 1994 and 31 March 2011 for the BIOT Fishery Protection Vessel/ Patrol Vessel – Pacific Marlin or equivalent:

- (1) Number of days at sea in BIOT EPPZ - operational on fisheries/BIOT patrol duties*
- (2) Number of days at sea in BIOT EPPZ- operational in support of scientific expeditions, or other duties and not available for patrol under (1) above*
- (3) Number of days undergoing crew rest, storing or maintenance at Diego Garcia*
- (4) Number of days undergoing crew rest or maintenance elsewhere (please specify port)*
- (5) Number of days outside BIOT EPPZ sea area on transit to or from (4) above*
- (6) Identity of operator (e.g., Swire Group etc) and name of patrol vessel*

In any year, totals of (1) to (5) should equal 365 (or 366 in leap year) - if not, please explain discrepancy and give further details, e.g., vessel grounding/ breakdown etc."

10. The FCO responded on 25 May 2011 stating that it held no information. It explained that day-to-day management of the Pacific Marlin is operated by Swire Pacific Operations Singapore and carried out by the BIOT Commissioner's Representative in Diego Garcia and his team, with information in respect of this being held by the BIOT Administration. The FCO explained that these offices are an office of the Government of the Territory which is constitutionally separate to the United Kingdom. It confirmed its view that FOIA does not apply to information held by the administrations in the UK's Overseas Territories and therefore does not apply to any information held by the BIOT Administration.
11. The complainant responded on 25 May 2011 expressing some dissatisfaction with the response, which resulted in a chain of correspondence by email. In particular the complainant made the point that his requests had been submitted to the FCO not to the BIOT government and that therefore the FCO itself had a duty to provide him with any information that it held in its own right.

12. As part of the email exchanges the FCO advised the complainant of the following on 8 June 2011:

"As I have explained, Swires and the Commissioner's Representative's team keep us informed as necessary of what the patrol boat is doing. So there will certainly be some references in e-mails held in London to the duties of the Pacific Marlin. However the systematic recording of these tasks is held in DG (Diego Garcia). Any search in London would show discrete events rather than a full record. DG tell me in broad terms the Pacific Marlin's plans and report when there has been any significant change e.g. after an arrest for illegal fishing."

13. The complainant submitted his second request for the following information as part of a chain of correspondence on 12 June 2011. The complete request can be found at Annex B.

Request 2

"... would request further information on what steps have been taken or are being taken by the BIOT to disseminate environmental information which it holds, including information such as I have requested here concerning the enforcement of the EPPZ [Environment Preservation and Protection Zone] and newly proclaimed Marine Protected Area."

14. The FCO acknowledged this request on the same day, indicating that it would need to seek advice on all of the matters raised. In the absence of any further reply, the complainant contacted the FCO again on 7 July 2011 and 19 July 2011.
15. On 22 July 2011 the FCO advised the complainant that it would raise the question of the dissemination of environmental data with the BIOT Scientific Advisory Group ('SAG') at their next meeting which was not scheduled until November 2011.
16. The complainant replied in the following terms:

"...I note your intention to raise this matter at the next SAG. However, I would also point out that this issue goes much wider than matters on which the SAG might be qualified or willing to offer their advice. As such it requires that BIOT/FCO responds to its obligation under section 4 of the Regulations;

*4.—(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—
(a) progressively make the information available to the public by electronic means which are easily accessible; and*

(b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information."

17. In the absence of any further correspondence, the complainant again contacted the FCO on 12 August 2011. The reply did not directly address the matter but instead referred to an ancillary matter concerning his original request about the Pacific Marlin, namely that the FCO considered that the EIR did not apply to information held overseas in the BIOT.
18. The complainant wrote again to the FCO which resulted in a reply on 28 September 2011, in which the FCO confirmed its view that the EIR do not apply to the BIOT and as a result no steps had been taken to disseminate environmental information.
19. The complainant requested an internal review on 2 October 2011. The internal review upheld the FCO's original decision in respect of this request.

Scope of the case

20. The complainant contacted the Information Commissioner to complain about the way his requests for information had been handled.
21. The complainant asked the Information Commissioner to consider whether the FCO was correct to maintain that it held no information and also to consider whether the EIR apply to information held by the government of BIOT. As the requests were made to the FCO and not to the government of the BIOT, and a notice issued under section 50 of FOIA or regulation 18 of the EIR must relate to a specific request, this notice only considers the first of these issues.
22. At the outset of his investigation, the Information Commissioner explained that any notice issued would not consider the duty to proactively disseminate environmental information, as this falls outside his remit in respect of FOIA/EIR section 50 complaints. The Information Commissioner clarified that the 'duty to disseminate' was a matter for his Enforcement Department, who were informed accordingly.

Reasons for decision

Is the information environmental?

23. The Information Commissioner has first considered whether the requested information would, if held, be environmental information and therefore whether the EIR was the correct access regime to apply. Environmental information is defined in regulation 2(1) of the EIR of which the relevant sections provide that:

"environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures designed to protect those elements."

24. The Information Commissioner considers that the requested information, if held, would fall under the definition at regulation 2(1)(c). He considers that it would be information on a measure, the deployment of the Pacific Marlin vessel, designed in part to protect the state of the elements of the environment, namely coastal and marine areas. In reaching this view the Information Commissioner considers that the phrase "*any information...on*" contained in regulation 2(1) should be interpreted widely and in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC which the EIR enact.

Is any of the requested information held by the FCO?

25. Regulation 5(1) of EIR states that:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

26. Regulation 12(4)(a) of EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.

27. In the course of the Information Commissioner's investigation, the FCO maintained its stance that any information falling within the scope of request 1 was held solely by the BIOT government, which is constitutionally separate from the UK government, and not to any extent by the FCO itself.

28. The complainant disputed this position and argued that the government of the BIOT was not constitutionally separate from the government of the BIOT and that therefore any information held by the government of the BIOT was in fact held by the FCO.

29. The complainant also argued that, even if the government of the BIOT and the UK government were constitutionally separate, the staff who were employed in dual roles (as both BIOT government officials and FCO officials) did not, in practice, differentiate between their BIOT work and their FCO work. He argued that the filing and administration systems used by those staff did not separate FCO information from BIOT government information.

30. The Information Commissioner accepts the FCO's argument that the government of the BIOT and the UK government are constitutionally separate and that therefore any information that is held solely by the government of the BIOT is not held by the FCO. He accepts that any information that might be held by the BIOT Commissioner's staff in Diego Garcia would be held solely by the BIOT government and not to any extent by the FCO and that this information would not therefore be held by the FCO for the purposes of the EIR.

31. However, the Information Commissioner also accepts the complainant's arguments about the lack of differentiation between the information held in the FCO's London offices by BIOT officials for BIOT government purposes and by FCO geographical desk staff for FCO purposes. In the Commissioner's view the staff with dual roles do not, in practice, draw a clear distinction between the work they do and the information they

have access to as BIOT officials and the work they do and the information they access as FCO officials.

32. In addition to the complainant's submissions on the above point, the Information Commissioner has also considered the following comments made by the FCO in response to his enquiries in a letter dated 30 March 2012 :

"In London, papers held by BIOT section are not separated according to whether they are held for the BIOT Administration or the FCO "geographical desk". This is the case for reasons of general administrative convenience."

"Environmental information is held **primarily** for the BIOT government" (emphasis added).

33. The Information Commissioner considers that information that is held to any extent for the FCO's own purposes is held by the FCO for the purposes of the EIR. In this case, although the FCO may be able to argue that the primary reason that this information is stored in its London offices is for the use of BIOT government staff, it seems clear that staff are able to access and use BIOT related information regardless of whether they acting in their capacity as FCO officials or in their capacity as BIOT government officials. It also seems clear that the FCO has some control over the storage, retention and archiving of BIOT related information. The Information Commissioner therefore concludes that any information falling within the scope of this request which is stored at the FCO's offices in London is held at least to some extent for the FCO's own purposes, and that therefore it is held by the FCO for the purposes of the EIR.
34. Having reached the conclusion that any information falling within the scope of request 1 and held in London would be held by the FCO for the purposes of the EIR, the Information Commissioner issued an information notice to the FCO on 29 May 2012. The information notice required the FCO to provide the Information Commissioner with information held in its London offices relating to the duties of the Pacific Marlin between 1 April 1994 and 31 March 2011 and with details of the searches carried out by the FCO in order to locate this information.
35. Initially the FCO failed to comply with the information notice but, following further correspondence from the Information Commissioner's lawyers, the FCO complied with the notice on 25 September 2012.
36. As part of its response to the information notice the FCO confirmed it had carried out searches on the i-Records system (its long term electronic records system), the shared drive (where Directorate,

Departmental and Team level information is sometimes stored), personal drives, Share Point sites and Outlook email accounts.

37. The FCO advised that it had made checks for information it holds on the duties of the Pacific Marlin, its repair and maintenance, with the search terms being '*Pacific Marlin*', '*BIOT Fishery Protection Vessel*', '*BIOT Fishery Patrol Vessel*', '*BIOT EPPZ*' and '*Swire Group*'. It explained that its Desk Officer had also searched 72 paper files from 1994 to 2011 and had assessed some 1200 documents.
38. The Information Commissioner accepts that the above searches made by the FCO were adequate and that, on a balance of probabilities all the information it holds which falls within the scope of request 1 has now been sent to the Information Commissioner. The FCO also provided the Information Commissioner with other information, not falling within the scope of the request, in order to assist the Information Commissioner in his deliberations. For example it provided full pages or documents where only part of the page or document falls within the scope of the request
39. The Information Commissioner has reviewed all the information sent to him by the FCO and has identified the information that he considers falls within the scope of request 1 in Annex A to this notice. Annex A has only been sent to the FCO, and not to the complainant, as it reveals the content of the requested information which the FCO may now wish to except.
40. The Information Commissioner accepts the FCO's explanation that, because it considered BIOT to be constitutionally separate from the UK, and not subject to the EIR it had made no arrangements for BIOT to proactively disseminate information under regulation 4 of the EIR and that therefore it holds no information falling within the scope of request 2.
41. The FCO did not provide a substantive response to the complainant's second request of 12 June 2011 until 28 September 2011. Regulation 5(2) and regulation 14 of the EIR require public authorities to respond within 20 working days of receiving a request. Further, the FCO did not issue a formal refusal notice nor specify which exception it was relying on in relation to either request.

Other matters

42. As detailed in paragraph 21 of this notice, the duty for public authorities to 'proactively disseminate' environmental information is not part of a section 50 FOIA investigation. The Information Commissioner has made

his Enforcement department aware of the issue and has updated it in light of his findings in this case.

43. The Information Commissioner has noted that the FCO handled both the associated requests as one request and that it therefore considered the internal review result of 2 November 2011 to have addressed the complainant's concerns. The Information Commissioner's view is that the requests should have been handled separately and that the complainant's dissatisfaction expressed on 25 May 2011 in relation to Request 1 should have been dealt with as a separate internal review.

Right of appeal

44. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. 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
Group Manager Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex A

47. The Information Commissioner has reviewed all the information sent to him by the FCO and has identified the information that he considers falls within the scope of request 1 in Annex A to this notice. Annex A has only been sent to the FCO, and not to the complainant, as it reveals the content of the requested information which the FCO may now wish to exempt.

Annex B

The request of 12 June 2011 in its entirety is as follows:

"Thank you for this most recent reply.

I have been reconsidering this request in light of the Environmental Information Regulations 2004 and whether or not the information sought is 'environmental information' as defined under the Regulations, thereby being exempt from the FOIA but falling under the provisions of the EIR.

Section 2(1) defines 'environmental information' in several categories as

any information which is written, aural, electronic or any other material form 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;

and (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 designed to protect those elements.

It would seem clear to me that the information relating to the patrol duties of the BIOT Fishery Patrol Vessel is information which falls within the scope of 2(1)(c), namely 'measures or activities designed to protect those elements.' In this respect section 3 applies to make information held 'by another person on behalf of the authority' as falling within the scope of the Regulations, viz:

3.-(1) Subject to paragraphs (3) and (4), these Regulations apply to public authorities.

(2) For the purposes of these Regulations, environmental information is held by a public authority if the information-

(a) is in the authority's possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the authority.

Noting that there is no provision in the Regulations to exempt such information merely because it has been recorded at a place outside the United Kingdom, I therefore consider that such information as held by your representatives on Diego Garcia or elsewhere in the BIOT would fall within the intended scope of these Regulations.

Furthermore I note the requirement of section 4 of the Regulations, namely:

4. -(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds-

(a) progressively make the information available to the public by electronic means which are easily accessible; and

(b) take reasonable steps to organise the information relevant to its functions with a view to the active and systematic dissemination to the public of the information

and would request further information on what steps have been taken or are being taken by the BIOT to disseminate environmental information which it holds, including information such as I have requested here concerning the enforcement of the EPPZ and newly proclaimed Marine Protected Area."