Information Commissioner's Office

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **26 March 2013**

Public Authority: **Foreign and Commonwealth Office**
Address: **King Charles Street**
London
SW1A 2AH

Decision (including any steps ordered)

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1. The complainant has requested information concerning the environment of the British Indian Ocean Territory (BIOT). The Foreign and Commonwealth Office (FCO) originally mistakenly responded to the request under the FOIA by the use of Section 12 (cost of compliance exceeds appropriate limit). The FCO rectified this error at internal review and substituted Regulation 12(4)(c) (request formulated in too general a manner) under the EIR 2004 as the basis for refusing the request. The complainant subsequently submitted a refined request which was treated as a new request by the FCO and which was refused on the basis of Regulation 12(4)(b) (manifestly unreasonable).

2. The Commissioner's decision is that the FCO application of Regulation 12(4)(c) to the initial request was invalid. The Commissioner also finds that Regulation 12(4)(b) was not engaged with regard to the complainant's subsequent refined request.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Issue a fresh response to the complainant's refined request of 5 January 2012, that does not rely upon the exception at regulation 12(4)(b).

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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Information Commissioner's Office

Request and response

5. On 1 September 2011, the complainant wrote to the FCO and requested information in the following terms:

'Having extensively searched the Foreign and Commonwealth Office website I have been unable to find any information (or links to information) which has been published on the British Indian Ocean Territory (BIOT) concerning the environment as required by Regulation 4 of the EIR 2004

Please would you provide me with access to all information concerning the environment of the BIOT as follows:

A. Information held in the United Kingdom – (to also include information held by the Director of Fisheries and the BIOT Conservation Advisors and any other persons covered by Regulation 3(2)(b).

(1) In respect of information produced since 1 January 2005 Full details of the website giving access to this information, or in the alternative, electronic copies of all information. In particular I note the requirement that at the minimum this should, in accordance with the Information Commissioner's guidance ('Routinely publishing environmental information' – Version 3 dated 1 January 2009), include:

- *Legislation, treaties and conventions relating to the environment*
- *Policies, plans and programmes relating to the environment*
- *Progress reports prepared or held by public authorities on the implementation of environmental legislation or policies*
- *Reports on the state of the environment*
- *Data derived from monitoring activities which affect or are likely to affect the environment*
- *Authorisations with a significant impact on the environment*
- *Environment agreements*
- *Environmental impact studies and risk assessments*

In respect of information produced prior to 1 January 2005 a full list of all such information or details of the List or Register and how and where I may view it.

B. Information held in the BIOT Territory by the Commissioner's Representative or any person under the control of the said Representative, or by persons under the control of the Director of Fisheries, or such other persons under the direct control of the BIOT administration in London.

The same categories as stated in A, above.

C. *Information held in the BIOT Territory or elsewhere by United States authorities and which relates to the environment of the BIOT in relation to functions which would normally be expected to be discharged by the BIOT authorities concerning the territory. The same categories as stated in A, above'*.

The complainant requested a response within 20 working days or that he be notified if the FCO reasonably believed that the complexity and volume of the information necessitated an extension to 40 working days. In the event of any part of the request being refused under Regulation 14 the complainant requested that the refusal notice specify to which part of the request the refusal notice refers and why.

6. The FCO responded substantively to the request (Ref: 0893-11) on 29 September 2011. It (mistakenly) stated that the request had referred to both the FOIA and the EIR, and that as neither information access regime apply to information held in the BIOT Territory the FCO could not assist with sections B and C of the request. The FCO stated that it was unaware of any voluntary dissemination of environmental information by the Government of the BIOT and that it could not therefore hold any information in respect of this part of the request. The FCO applied Section 12 of the FOIA to section A of the request on the basis that it was *'widely-framed'* and that it had been estimated that to locate, retrieve and extract the information would exceed the appropriate costs limit.

7. On 29 September 2011 the complainant requested an internal review of the FCO refusal notice. He correctly stated that he had made no reference to the FOIA in his request, which had been wholly framed under the EIR. Indeed, this had been explicitly acknowledged by the FCO in an email to him on 2 September. The complainant noted that the FCO refusal in relation to Part A of his request (Section 12) were not applicable as there is no equivalence in the EIR to the appropriate limit under the FOIA. The complainant directed the FCO to the Information Commissioner's guidance on this point.

8. The FCO provided the complainant with the internal review decision on 8 November 2011. It found that Section 12 had been misapplied to the request and Regulation 12(4)(c) was applied in its place. The internal review acknowledged that the FCO had failed to comply with Regulation 9 (advice and assistance) which is required for reliance on Regulation 12(4)(c). The complainant was then invited to provide *'particulars'* in order to narrow the scope of Part A of the request.

9. On 8 November 2011 the complainant wrote to the FCO and explained that when he originally framed his request, he was not in a position to assess what information may be held. The complainant had framed his request with reference to a website on the basis that information of the type requested should be proactively disseminated under Regulation 4(1)(a) (progressively make the information available to the public by electronic means which are easily accessible). In the absence of any such website the complainant wanted the details of any other proactive electronic dissemination undertaken by the FCO.

10. The complainant explained that he had relied upon the Information Commissioner's list of the minimum information that should be proactively disseminated (if held) by the FCO. The complainant noted that, *'I appreciate that a comprehensive search might be required to ascertain what material exists, in the absence of any centralised electronic or paper filing record, nonetheless the topics are quite specific and as such the search should be perfectly achievable, albeit time consuming'*. In the event of the FCO still being of the view that the request was too general, the complainant proposed a way forward which followed advice given in the Code of Practice to the EIR. The complainant listed the following four proposals:

    1) 'an answer to the website question, and either

    2) a search for the information originally requested based on at least the heads provided together with other obvious categories, or

    3) a list or copy of any detailed catalogue or index or file list if available (for both time periods), or

    4) *an outline of the range of environmental material that is held concerning the BIOT'*.

11. The complainant added that, *'once we have exhausted these options, it may then be necessary to consider an alternative approach perhaps based upon a more detailed listing drawn up by me'*. In view of more than two months having elapsed since the request being made, the complainant requested that, *'the search for an agreeable solution be dealt with promptly'*.

12. After encountering a lack of response from the FCO to his emails and telephone calls chasing up a response to his proposals of 8 November 2011, the complainant received a written response from the FCO on 19 December 2011. The FCO provided a list of files of BIOT information for the years 2010 and 2011 and addressed each of the complainant's four proposals for progression. The FCO confirmed that there is no website disseminating BIOT related information and they do not accept that the

BIOT Government has to proactively publish such environmental information because of the EIR.

13. The FCO advised the complainant that, *'during the search that we conducted in response to your initial request for information we established that your question was too general. We upheld this decision at internal review, citing Regulation 12(4)(c) of the EIR and any further searches based on the same search criteria will elicit the same response'*. The FCO added that, *'as you can see from the file lists attached, our files on the environment cover a very wide range of issues: CITES permits; Overseas Territories Environment Programme applications; briefings on RAMSAR; specific problems like bringing in cut flowers; specific projects like rat eradication; meetings with NGOs'*.

14. On 5 January 2012, based upon the information in the file lists provided by the FCO, the complainant made a refined request for information as follows:

    'Please would you provide me with copies of information (in electronic format, or where not so available, as printed copy) concerning the environment of the Chagos Archipelago and the surrounding sea area out to 200nm (to include information held by MRAG Ltd and the BIOT Conservation Advisors and any other persons covered by EIR Regulation 3(2)(b), contained in the following file titles on the 2011 File List, "Environment"; "FISH"; "MPA Implementation"; "OTPF": and on the 2010 File List, "Fisheries General"; "Illegal Fishing"; "BIOT IOTC"; "British Seychelles Fisheries Commission"; "Environment General"; "OTEP"; "PEW Trust"; "Marine Protected Area".

    The complainant asked that any exempt information be listed accordingly and requested File Lists for the other years within scope of his original request (i.e. going back to January 2005).

15. The FCO acknowledged the complainant's refined request on 6 January 2012 and stated that it was treating the request as a new request. The complainant was asked to consider clarifying the scope of his request as it was too general as currently drafted and thus fell within Regulation 12(4)(c).

16. The complainant responded to the FCO on the same day and advised that he viewed the request as an existing request (i.e. that made on 1 September 2011) which was being progressed following an internal review rather than a new request. The complainant stated (in view of the FCO contention that the refined request was still too general) that it would be helpful if the FCO could give advice and assistance, in accordance with the Code of Practice, so that he might clarify or particularise the request. The complainant suggested that this could

perhaps be best achieved by his posing a series of questions to the FCO about the information requested and he proceeded to ask seven questions.

17. The FCO provided answers to the complainant's questions in an email of 6 January 2012 and stated that, *'we do not consider this as an existing request because we replied to that question (Ref: 0893-11) on 29 September and completed our internal review of that decision on 8 November 2011'*.

18. The complainant again responded promptly to the FCO on the same day and reminded the FCO of the following chronology of his request:

    'The Internal Review concluded that (name redacted) had incorrectly applied FOIA Section 12 in his refusal of my request # 0893-11, thereby accepting that the request remained to be fulfilled by the FCO. I was accordingly invited "to provide more particulars in order to narrow the scope of the request you originally made in Section A of your email of 1 September". The subsequent correspondence including this is in furtherance of that invite'.

    The complainant also addressed the answers that the FCO had given to the seven questions posed in his previous email.

19. On 10 January 2012 the complainant was informed that his new request had been given a reference number (#0001-12) and on 6 February 2012 the complainant was provided with a substantive response to the request which confirmed that it was being refused on the ground that it was manifestly unreasonable (Regulation 12(4)(b).

20. Following a request for an internal review of the FCO's decision the complainant was provided with the same on 19 April 2012. The review concluded that the refined request had been correctly recorded as a new request and concluded that Regulation 12(4)(b) had been appropriately applied.

21. The complainant contacted the Commissioner on 20 April 2012 to complain about the way his request for information had been handled. The complainant provided the Commissioner with a detailed and very helpful 22 page chronology of his request of 1 September 2011, some of which has been detailed by the Commissioner in the preceding paragraphs of this decision notice.

22. The scope of the Commissioner's investigation has been to examine the FCO application and validity of Regulation 12(4)(c) to the initial request of 1 September 2011 and Regulation 12(4)(b) to the refined request of 5 January 2012.

Reasons for decision

The request of 1 September 2011

23. Following its internal review decision of 8 November 2011, the FCO withdrew its erroneous reliance on Section 12 of FOIA and substituted Regulation 12(4)(c) of the EIR in its place.

24. Regulation 12(4)(c) states that:

    'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that the request for information is formulated in too general a manner and the public authority has complied with regulation 9'.

25. The phrase *'too general a manner'* means a request that is unclear or non-specific, rather than one that is too large or extensive in coverage. At the same time of issuing a refusal notice under Regulation 12(4)(c) the public authority should ask the requester to clarify the meaning of the request, and provide reasonable advice and assistance to help him do so.

26. When it applied Regulation 12(4)(c) to the complainant's request of 1 September 2011 the FCO invited him to 'provide more particulars in order to narrow the scope of the request you originally made in section A of your email of 1 September'.

27. The Commissioner considers that part A of the request of 1 September 2011, although extremely wide ranging, was actually a clear request. Essentially it was a request for 'all information concerning the environment of the BIOT held in the United Kingdom'. The FCO response did not indicate that it was unable to understand what information the complainant was asking for, and it did not ask the complainant to clarify any of the wording (e.g. to explain what was meant by the term 'environment') . Rather, it asked the complainant to 'narrow' the scope of the request, and stated that regulation 12(4)(c) was the EIR equivalent of section 12 of FOIA.

28. From this response, and from subsequent correspondence with the FCO, it seems clear that the reason the FCO refused the request was not that it considered the request to be unclear, but that it considered the request to be too large or extensive in coverage.

29. As the Commissioner has found that the FCO was able to understand what the complainant was asking for, he concludes that regulation 12(4)(c) was not engaged.

30. However, ultimately, the complainant agreed to submit a refined request and did not pursue the provision of the information covered by this original request with the FCO. The Commissioner has not therefore considered the provision of this information any further and does not order any steps in relation to this original request.

The refined request of 5 January 2012

31. In its initial response to the refined request of 5 January 2012 the FCO asked the complainant to *'consider clarifying the scope of your request'* stating that as currently drafted it was too general as described in Regulation 12(4)(c). On 10 January 2012 the FCO changed its position and refused the request under regulation 12(4)(b) because it was manifestly unreasonable.

32. The Commissioner will now address the issue of whether the FCO were correct to process the complainant's refined request as a new request and allocate it a new reference number. The complainant has contended that the FCO were wrong to treat his refined request as a new request because the internal review of the FCO response to his request of 1 September 2011 had found that Section 12 of the FOIA had been misapplied to the same. This is correct, but in acknowledging that Section 12 had been wrongly applied, the FCO internal review of 8 November 2011 had instead applied Regulation 12(4)(c) to the original request.

33. As the Commissioner has explained above, he is not satisfied that the wording of the complainant's original request of 1 September 2011 was formulated in too general a manner and he therefore considers that the FCO were not entitled to apply Regulation 12(4)(c) to this request. However, by virtue of the complainant's own subsequent enquiries he was able to obtain the File List information from the FCO which enabled him to submit the refined request of 5 January 2012.

34. Regardless of how the complainant became able to submit his refined request, the Commissioner considers that this refined request was a new request and that the FCO were correct to identify and process it as such. In submissions to the Commissioner the FCO noted that it was only as a result of their provision of the file lists for 2010 and 2011 that the complainant was able to make his refined request. This is correct as the complainant's refined request asked for specific file titles from those contained in the file lists. The Commissioner's specialist guidance on refined and clarified requests (LTT137) confirms the position as regards such requests (although the guidance refers to the position where a request is initially refused under Section 12 of FOIA, it has similar application to where a request is refused under Regulation 12(4)(c)

which is similar but not identical in its operation). The guidance states that:

'Where a public authority refuses a request under s12, and the applicant forms a refined request (potentially following advice and assistance under s16), the refined request should be treated as a new request, and the statutory time period for compliance commences on the date of receipt of that new request'.

The Commissioner therefore finds that the FCO were correct to treat the complainant's refined request of 5 January 2012 as a new request.

The use of Regulation 12(4)(b) – manifestly unreasonable

35. In its substantive response to the complainant's refined (new) request of 5 January 2012 the FCO confirmed that the request was being refused on the ground that it was manifestly unreasonable.

36. Regulation 12(4)(b) EIR states that:

    'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable'.

37. The Commissioner accepts that the principles to be considered when looking at section 14 cases under the FOIA can also be applied to cases involving Regulation 12(4)(b). However, there is no direct equivalence between the two and the term, *'manifestly unreasonable'*, is a wider concept than the term, *'vexatious'*, under the FOIA. Regulation 12(4)(b) may also apply to cases involving costs issues. The Commissioner would note at this juncture that the FCO were therefore wrong to refer (in the internal review of 8 November 2011) to Regulation 12(4)(c) as being *'the corresponding exception in the EIR'* to the Section 12 costs limit under FOIA. The closest EIR equivalent to Section 12 is actually Regulation 12(4)(b).

38. *'Manifestly'* means more than being simply unreasonable, rather there must be an obvious or clear quality to the unreasonableness referred to. The Commissioner considers that this regulation provides an exception to the duty to comply with a request for environmental information in two (non-exhaustive) circumstances. One is where the request is vexatious and the other is where the request would incur unreasonable costs for the public authority or an unreasonable diversion of resources. The Commissioner has considered the FCO response letter of 6 February 2012 (as upheld by the subsequent internal review of 19 April 2012) in order to ascertain the rationale for the FCO application of Regulation 12(4)(b).

39. From the wording of the 6 February 2012 request refusal notice it is clear that the FCO regarded the complainant's refined request as vexatious and that in reaching this conclusion they had taken into consideration other requests made by the complainant. Precisely which other requests had been taken into account was not clear but the FCO referred to 22 requests for BIOT-related information which the complainant had made in 2011, stating that 10 of these requests had been made in October of that year. The FCO added that the requests *'should also be placed in the context of the already extensive e-mail and telephone traffic generated by you with the Overseas Territories Directorate (OTD) which are BIOT related and which have been treated as Business As Usual'*. The refusal notice noted that the complainant had attended a meeting at the FCO on 23 November 2011 where his views on *'the issue of unreasonableness concerning your FOIA/EIR correspondence with the FCO over recent months'* were sought.

40. The FCO advised the complainant that they had reached the conclusion that his refined request of 5 January 2012 was manifestly unreasonable after considering the Commissioner's criteria for helping public authorities to determine whether a request is vexatious under section 14(1) of FOIA. The Commissioner does not consider that these are the only criteria by which a request can be found to be vexatious or manifestly unreasonable, but he accepts that they can be relevant to cases involving Regulation 12(4)(b). The five criteria are as follows:

- Can the request fairly be seen as obsessive?
- Is the request harassing the authority or causing distress to staff?
- Would complying with the request impose a significant burden in terms of expense and distraction?
- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

41. In this case, the FCO have employed four of the five criteria, which the Commissioner will examine in turn.

Obsessive

42. In its response to the complainant of 6 February 2012 the FCO advised that it considered his requests to be obsessive, *'because of the high number of requests and emails to this department and because of the similarity of their subject matter'*.

43. In submissions to both the FCO and the Commissioner the complainant has noted that between 7 February 2010 and 20 January 2011 he

corresponded with the BIOT Administration about 10 discrete topics, of which 6 were treated as FOI requests (the others being dealt with informally). At that time the complainant states that his requests were dealt with promptly and politely, with the average time for the provision of information being 12 days. In total, the complainant records that the requests and their resolution involved 22 emails from him to the BIOT Administration, including the initial emailed request in each case. Following a change of senior staff at the BIOT Administration in around April 2011, the complainant states that, *'from the outset, any information request became immeasurably more difficult'* due to what the complainant considers inexperience, *'an apparent inability to answer straightforward questions'* and a lack of response leading to *'excessive delays and unnecessary email traffic'*.

44. The complainant noted that in the 9 month period between the end of April 2011 and the request for an internal review of the decision to treat his request as manifestly unreasonable in February 2012, the BIOT Administration (the part of the FCO dealing with BIOT related information) received a total of 17 requests, the last four of which (including the request which is the subject of this notice) were refused as vexatious or manifestly unreasonable. The complainant contended that since the actual workload on the BIOT Administration amounted to 10 requests over 6 months, *'this alone can hardly be considered excessive, nor to amount to evidence that this or any other request can be characterised as 'obsessive''*.

45. The complainant further asserted that, *'the number of emails in each case is directly related to how the requests have been handled by the BIOT Section, rather than a function of the requests themselves. Frequently, statutory deadlines have been missed and emails unanswered, requiring yet further enquiries'*. In the complainant's view, *'much of the correspondence is a result of the disregard for FOI procedures and obligations, together with a misunderstanding or misapplication of the legislation and guidance'*.

46. Addressing the subject matter of his requests, the complainant accepted that there is a similarity in that they all relate to the Chagos

Archipelago. This British Indian Ocean Territory is situated in the Indian Ocean halfway between Africa and Indonesia and comprises six atolls and individual islands, amounting to a total land area of 60 square kilometres. The complainant made the point that this was the geographical area of interest and the subject of his researches, but that the area was also of particular public interest, following a public consultation into the creation of a Marine Protected Area in 2010 and a

then pending case before the European Court of Human Rights concerning the expelled Chagossian Islanders and their attempts to secure the right to return to their former home.

Distress to staff

47. In its response to the complainant of 6 February 2012 the FCO stated that:

'The large number of emails and the extra workload that they have entailed has caused distress to staff in OTD and in the other departments that have dealt with your requests. In the emails there has been a mingling of requests with complaints which has contributed to the distress these communications have caused, and there are instances where the tone has been abrasive'.

The complainant noted that the FCO wording appeared to rely on the Commissioner's own criterion of whether the request has the effect of harassing the public authority or its staff. The complainant contended that the number of emails generated by his requests is in large part the consequence of a failure to comply with its EIR obligations by the FCO. By way of illustration the complainant contrasted the low level of email traffic which had occurred with his requests under the BIOT Administration's former management with the much higher level of email traffic which was occurring under the current BIOT Administration management (one request alone having generated 32 emails).

48. In submissions to both the FCO and the Commissioner the complainant has argued that many of his emails were necessitated by a failure on the part of the BIOT Administration to reply to his request emails or questions and that, *'it is disingenuous to suggest that the workload and any distress can be attributed to the manner in which I have made my requests; to the contrary it has been largely self-imposed'*.

49. The complainant refuted the suggestion that his information requests were *'mingled'* with complaints. He acknowledged that at times there had been *'polite disagreement'* and requests for clarification, but no complaints as such. Regarding the suggestion that his emails had occasionally been abrasive, the complainant considered this to be *'a gross overstatement'*, with his correspondence having been polite in each instance, but in some circumstances *'necessarily firm'*.

Significant burden and disruptive to staff

50. The complainant was informed by the FCO in its response to him of 6 February 2012 that:

'When set against the high number of emails which have been sent by you these requests constitute a significant burden to both OTD and to the FCO. In our discussions with OTD about your requests we have established that dealing with them has diverted and distracted staff from their usual work because of the extra burden that they impose. They have been disruptive'.

In response to this assertion the complainant made the following two main points.

51. Firstly, he considered the FCO statement *'to be no more than a logical statement'*. The complainant made the obvious point that any request for information will necessarily be disruptive to staff in the sense that it requires them to be diverted from their normal duties. The complainant did not consider that the number of BIOT-related requests which he had submitted over the passage of time was unreasonable although he did acknowledge that over shorter specific time periods he had submitted a higher number of requests for which the FCO had required an extension to 40 working days. The complainant stated that there was no evidence that his requests had been designed to cause disruption and indeed that had never been his intention. He argued that each of his requests had served a serious purpose of enquiry.

52. Secondly, in terms of the FCO claim that his requests had constituted a significant burden, the complainant argued that this had been largely as a consequence of how the present BIOT Administration had chosen to deal with his requests and not as a result of the requests themselves or his correspondence. The complainant again drew a contrast between his positive experience of the previously staffed BIOT Administration and the difficulties he had encountered with the present Administration.

Finding

53. The Commissioner has considered and taken into account all the relevant evidence provided by the FCO and the complainant to decide whether the FCO were correct to apply the manifestly unreasonable exception to the complainant's refined request of 5 January 2012. It is important to note that in making this determination the FCO were entitled (if appropriate) to take into account other requests made by the complainant up to and including the refined request of 5 January 2012.

54. In determining whether a request can fairly be seen as obsessive the Commissioner considers a number of factors including the volume and frequency of correspondence, requests for information the requester has already made and whether there is a clear intention to use a request to reopen issues that have already been debated and considered.

55. Whilst it is clear that the complainant has submitted a large number of BIOT-related requests for information to the FCO in the last few years the Commissioner is satisfied that none of the requests are for information previously provided to the complainant and none are clearly intended to reopen issues previously addressed. Given that the complainant has both a scientific and legal background his interest in environmental information surrounding the Chagos Archipelago is both reasonable and legitimate. More importantly, there is a strong public interest attached to the conservational importance of the region and the nature and level of human activity associated with the BIOT.

56. Given this public interest the Commissioner considers it both surprising and unfortunate that there is currently very little environmental information published by the FCO about the BIOT. Unfortunate because, as the complainant pointed out in his correspondence with the FCO, a more proactive approach to the dissemination of such information (in accordance with Regulation 4 of EIR) might have obviated the need for many of the complainant's requests. In the absence of such publically available information it would neither be fair nor reasonable to describe the complainant's interest in this area as 'obsessive'. Consequently the Commissioner does not find this particular criteria to be applicable to the complainant's refined request of 5 January 2012.

57. In terms of the alleged distress to staff caused by the complainant's BIOT-related requests the Commissioner has seen written evidence (internal emails) from the FCO from around August – December 2011 which indicate that the current Head of the BIOT Administration considered that the complainant's requests were causing increasing distress to staff and that the FCO was giving active consideration to the issue of vexatiousness. The Commissioner therefore considers that it is reasonable for the FCO to argue that the refined request of 5 January 2012 was the latest in a series of related requests, which, taken collectively, had the alleged effect of distressing the staff of the BIOT Administration. But whether the internal emails constitute compelling evidence of such distress when the history and context of the complainant's requests are considered is a different question.

58. The Commissioner has seen no evidence to substantiate the FCO claim that on occasions the tone of the complainant's requests or communications has been 'abrasive'. On the contrary, the complainant's request and subsequent correspondence can be characterised as consistently courteous and commendably clear. The Commissioner has seen no instances of abusive or offensive language of the type that would be likely to cause genuine distress to staff or an unreasonable fixation on an individual member of staff.

59. The Commissioner concurs with the complainant's own assessment of his correspondence, that it has been polite, but in some circumstances, necessarily firm. The Commissioner is entirely satisfied that there is no basis for finding that the complainant's request and correspondence could conceivably have caused distress to staff on account of the language and tone alone.

60. It is clear from the FCO refusal notice of 6 February 2012 that the FCO's main argument and ground for applying Regulation 12(4)(b) is the volume of the complainant's requests and the distraction, disruption and burden that these have allegedly caused. As the Commissioner has not found the FCO's other arguments compelling it is also clear that the outcome of this case will rest upon this issue.

61. In reaching his decision on this issue the Commissioner has been mindful of recent comment and guidance issued by the First Tier Tribunal in Independent Police Complaints Commission v IC (EA/2011/0222). That case shared certain characteristics with the present case in that both involved requesters with a keen interest in the public authorities concerned. In the IPCC case the Tribunal observed that the pattern of the requests *'focussed on no particular topic but appeared to range widely, even indiscriminately, over the whole spectrum of complaints that the IPCC investigates'*. The Commissioner notes that the present complainant's EIR requests (particularly that of 1 September 2011) could be similarly considered to range over a wide spectrum of BIOT-related environmental information.

62. In its judgement the Tribunal made it clear that although the Commissioner's guidance criteria for vexatious/manifestly unreasonable requests is very helpful as a reference point, it may (where appropriate) be that the burden which complying with a request or requests would place upon a public authority is sufficient *in itself* to warrant an application of Section 14(1) or Regulation 12(4)(b). Specifically the Tribunal held that, *'a request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester'*. It therefore follows that a real potential exists for requests from a frequent requester for information of a similar or wide nature to be found to be vexatious/manifestly unreasonable on the grounds of burden caused alone. This position was endorsed by the Upper Tribunal in the case of Craven vs the Information Commissioner and DEFRA (GIA/786/2012)

63. However, whether that potential is realised will necessarily depend upon exactly how much of a burden complying with the request or requests would place upon the particular public authority. A large number of requests for non-complex and easily accessible information would be unlikely to constitute such a burden, whereas a large number of

requests (or even a single request in some cases) for complex information which might not be readily retrievable or which might require careful checking to ascertain whether any exceptions apply might well be rightly regarded as being burdensome.

64. Whilst the Commissioner acknowledges that it is possible that the pattern and nature of the BIOT-related requests made by the complainant would, if complied with by the FCO, impose a significant burden such that they would be manifestly unreasonable, he does not consider that the FCO has presented clear or sufficiently strong evidence to support such a contention. For example, at no point (either in its correspondence with the complainant or the Commissioner) has the FCO explained or demonstrated why complying with the requests would impose an unreasonable burden (other than simply stating that they would). It is conceivable that the complexity of the information sought in some requests or the format in which it is stored by the FCO could present problems in terms of the amount of time and resources that would need to be expended to comply with the requests, but it may also be the case that most of the requests were for relatively straightforward information which would not impose such a burden and would be relatively easy to process. In relation to the request of 5 January 2012 the FCO has given the Commissioner no indication of how large the five files concerned actually are, or of whether the content of the files suggests that extensive time considering exceptions may be required.

65. Ultimately, on the basis of the responses provided to the complainant and submissions to him by the FCO, there is simply not sufficient evidence for the Commissioner to find that this request would impose a grossly oppressive burden on the FCO. The Commissioner is therefore unable to uphold the manifestly unreasonable exception on this basis.

66. As the Commissioner has found that the FCO has not demonstrated that Regulation 12(4)(b) is engaged he has not gone on to consider the public interest test.

ico. Information Commissioner's Office

Right of appeal

67. 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

68. 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.

69. 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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SK9 5AF