

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: 2 February 2015

Public Authority: Department for Regional Development
Address: Clarence Court
10 – 18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant requested information from the Department for Regional Development relating to weed control activity carried out by external contractors. The Commissioner's decision is that neither the contractor nor the Department itself holds the requested information. No steps are required.

Request and response

2. On 11 June 2014 the complainant requested the following information from the Department:

*"Ref - BM Contract – Northern Division weed control applications.

Under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004, please can you forward all applications as recorded per section for years 2010, 2011, 2012, 2013."*
3. DRD responded to the complainant on 25 June 2014 stating that it did not hold the requested information.

Scope of the case

4. The complainant contacted the Commissioner on 8 July 2014 to complain about the Department's response to his request. In this letter the complainant alleged that the Department was unlawfully concealing the requested information from him. The complainant thus asked the Commissioner to investigate his complaint as an alleged offence under

regulation 19 of the EIR. The Commissioner has seen no evidence to suggest that the Department was in fact concealing any information. Therefore the Commissioner has treated the complaint as an application for a decision under regulation 18 of the EIR.

5. The Commissioner is not required to make a decision unless the complainant has exhausted a public authority's internal review process, particularly as the EIR contains statutory provision for internal reviews. However in this case the Commissioner noted that the complainant had submitted numerous linked requests and complaints, and in the Commissioner's view the Department had had ample opportunity to review its position. Therefore the Commissioner accepted the complaint as valid, and determined that the scope of the case was to consider whether the Department actually held the requested information.

Reasons for decision

Is the requested information held?

6. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when the request is received.
7. The Commissioner's published guidance states that when considering whether information is held, the Commissioner uses the civil standard of proof, i.e. whether it is likely or unlikely on the balance of probabilities.¹ In assessing such cases the Commissioner will consider the extent and quality of the authority's search for the requested information, any other explanations provided, and the complainant's reasons for believing that the information is held.
8. The Department has stated that it does not physically hold the requested information. The Commissioner also understands that the Department has contracted out responsibility for weed control to a third party (the main contractor). Therefore if the requested information existed it would be physically held by the main contractor rather than the Department. Regulation 3(2) of the EIR says that information is held by a public authority if it is held by another person on behalf of the Department. Therefore, if the main contractor held the requested

¹ https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

information the Department would be required to decide whether it could be disclosed under the EIR.

9. The Commissioner's decision in this case is informed by a decision notice issued in October 2014 dealing with an almost-identical request made by the complainant to the Department.² In that case the Department obtained confirmation from the contractor that it did not physically hold the requested information, nor was there any contractual requirement to hold that information. The Commissioner found, on the balance of probabilities, that the Department did not therefore hold the requested information.
10. In this case the Department confirmed to the Commissioner that it had asked the main contractor to check whether it held the requested information, and was advised that it did not. The Department also confirmed that the relevant contract did not specify a requirement for numbers of weed spray applications to be recorded. Therefore the Department was satisfied that the requested information did not exist and could not be generated in order to respond to the request.
11. The complainant referred the Commissioner to a First-tier Tribunal decision relating to one of the complainant's previous, similar requests.³ At paragraph 6 the Tribunal commented:

"The Tribunal holds that the main Contractor would hold this information on behalf of the Public Authority, the DRD, as per Regulation 3(2)(b) of the EIR".
12. The complainant interpreted this finding to mean that the requested information did exist and was in fact held, and that this extended to his request which is the subject of his complaint. However the Commissioner considers this finding to relate only to the question of whether the Department would "hold" information physically held by a third party, in line with regulation 3(2) of the EIR. The Tribunal allowed the appeal but did not specify any steps.
13. In any event the complainant has not provided the Commissioner with any concrete evidence that the requested information in this case exists, or indeed that it was ever held, either by the main contractor or by the Department. In the absence of any such evidence the Commissioner has

² Decision notice FER0536254, issued 2 October 2014

³ Appeal no EA/2011/0306, issued 12 June 2012

no justifiable reason not to accept the Department's and the main contractor's position that the requested information is not held because it does not exist.

14. Therefore the Commissioner finds, on the balance of probabilities, that the requested information is not held and that the Department was entitled to rely on the exception at regulation 12(4)(a) of the EIR. The Commissioner notes that the Department failed to cite this exception in its refusal notice dated 25 June 2014, which is a technical breach of regulation 14(3) of the EIR. However, since the Department does not hold the requested information there is no further action the Commissioner can require it to take.

Right of appeal

15. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

16. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
17. 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

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