

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

Decision notice

Date: 20 August 2015

Public Authority: Department for Environment, Food and Rural Affairs (DEFRA)

Address: Area 4C
Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested DEFRA to disclose submissions between the Environment Agency and DEFRA in relation to the Somerset Levels and the issue of dredging that were referred to in the media in late 2013/early 2014.
2. DEFRA released some information but refused to disclose certain elements of the requested information citing regulation 12(4)(e) of the EIR.
3. The Commissioner's decision is that DEFRA has incorrectly relied on regulation 12(4)(e) of the EIR in this case.
4. The Commissioner requires DEFRA to take the following steps to ensure compliance with the legislation:
 - DEFRA should disclose the withheld information to the complainant.
5. DEFRA 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.

Request and response

6. On 13 February 2014, the complainant wrote to DEFRA and requested information in the following terms:

“I should be grateful if you would send me a copy of the submission officials sent to DEFRA ministers on the subject of the flood mitigation options relating to the Somerset Levels. This is the one that has recently been referred to in the media and dealt with the issue of dredging.”
7. DEFRA responded on 9 April 2014. It stated that it had identified two submissions made to Ministers in 2013 which include information on the Somerset Levels and dredging. It confirmed that it was willing to release some information in these documents but not all, as it considered some of the information is exempt from disclosure under regulation 12(4)(e) of the EIR.
8. The complainant received redacted versions of the two submissions and requested DEFRA to carry out an internal review of its decision to withhold some elements of these submissions on 12 May 2014.
9. DEFRA carried out an internal review and notified the complainant of its findings on 5 February 2015. It informed the complainant that it had now decided to interpret his request more widely and had also decided that further information could now be released due to the passage of time. DEFRA released revised copies of the submissions in question but still decided to withhold certain information under regulation 12(4)(e) and 13 of the EIR.

Scope of the case

10. The complainant contacted the Commissioner on 24 February 2015 to complain about the way his request for information had been handled. He stated that he had no complaint about the application of regulation 13 of the EIR or the delays incurred in relation to the responses DEFRA issued. However, the complainant confirmed that he wished the Commissioner to review DEFRA's application of regulation 12(4)(e) of the EIR to the remaining information withheld under this exception.
11. The only exception applied by DEFRA which the Commissioner has reviewed in this case is regulation 12(4)(e) of the EIR, in line with the complainant's requirements.
12. Although the complainant made no complaint about the delays he incurred in receiving DEFRA's refusal notice and internal review

response, the Commissioner has reviewed how this request was handled and will record the procedural breaches he has identified later in this notice.

Reasons for decision

13. 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.
14. This exception is also subject to the public interest test outlined in regulation 12(1)(b) of the EIR. So, in addition to demonstrating that the requested information falls within the definition of 'internal communications', DEFRA 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.
15. DEFRA is reminded that under regulation 12(2) of the EIR it must apply a presumption in favour of disclosure. In addition, Directive 2003/4/EC, incorporated into UK law by the EIR, requires (Article 2) that the grounds for refusal shall be interpreted in a restrictive way. Furthermore, when applying the internal communications exception, Article 1(e) requires that the public interest served by disclosure be taken into account.

Does the remaining withheld information constitute 'internal communications'?

16. DEFRA confirmed that the requested information is a communication between the Environment Agency and senior ministers at DEFRA concerning the Somerset Levels and the issue of dredging. It explained that the Environment Agency is an executive non-departmental public body (NDPB) accountable to the Secretary of State for Environment, Food and Rural Affairs and DEFRA is its sponsoring department.
17. DEFRA further explained that the Environment Agency has a statutory duty to provide advice and information to the Secretary of State, upon request, on matters for which it has responsibility including flood risk and management.
18. DEFRA referred the Commissioner to a previous decision he had made on a very similar request relating to communications between the Environment Agency and DEFRA (FER0461745, March 2013 available on the Commissioner's website) and argued that the same approach should be taken here. However, the Commissioner notes that the information in dispute in that case included internal Environment Agency

communications and communications between government departments, which are specifically brought into the definition of "internal communications" by regulation 12(8).

19. The Commissioner therefore considers that his decision in FER0461745 is clearly distinguishable, although in any event he is not strictly bound by his previous decisions. The Commissioner's current guidance on the application of regulation 12(4)(e) of the EIR has been updated and can be accessed via the following link:

https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

20. The Commissioner's view is that communications between a public authority and a NDPB are not internal communications for the purposes of regulation 12(4)(e) of the EIR. They are not covered by regulation 12(8). The statutory duty on the Environment Agency to advise and inform DEFRA ministers on matters such as flood risk and management, upon request, is not a determining factor. The Environment Agency was purposefully set up as an NDPB to carry out specific functions at arm's length from DEFRA as a separate legal entity with its own staff and governing statute.
21. The Commissioner's decision in this case is that the Environment Agency is a distinct public authority in its own right, separate from DEFRA, with its own powers and functions. It follows that communications simply between the Environment Agency and its sponsoring department are not 'internal communications' for the purposes of the EIR.
22. For the above reasons, the Commissioner has concluded that regulation 12(4)(e) of the EIR does not apply in this case. As he does not, there is no need to go on to consider the public interest test.

Procedural breaches of the EIR

23. The Commissioner notes in this case that the complainant's request was made on 13 February 2014 and DEFRA took until 9 April 2014 to issue its refusal notice. Although DEFRA kept the complainant up to date, it is clear that it took more than 20 working days to respond to the request and so the Commissioner finds DEFRA in breach of regulation 14(2) of the EIR.
24. The Commissioner also finds DEFRA in breach of regulation 11(4) of the EIR in this case. Regulation 11(4) of the EIR states that a public authority must carry out an internal review no later than 40 working days after the date of receipt of the request for an internal review. It is clear in this case that DEFRA took almost nine months to complete this

process. The Commissioner finds such delays excessive and unacceptable and a clear breach of regulation 11(4).

Right of appeal

25. 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

26. 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.
27. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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Water Lane
Wilmslow
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SK9 5AF