

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 March 2016

Public Authority: Department for Culture Media and Sport (DCMS)
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information about advocacy letters and correspondence to and from HRH the Prince of Wales relating to the statutory listing of buildings. The Department for Culture Media and Sport (DCMS) has stated that it does not hold the requested information. The Commissioner's position is that DCMS, on the balance of probabilities, does not hold the requested information and finds that it should have cited the exception at EIR Regulation 12(4)(a) rather than advising the complainant that the information is not held in order to discharge its duty under section 1(1) of the Freedom of Information Act (FOIA). The response to the request was issued outside of the statutory 20 day time limit and therefore DCMS has breached Regulation 14(2) EIR.
2. The Commissioner does not require the public authority to take any steps.

Request and response

3. On 21 July 2015, the complainant wrote to DCMS and requested information in the following terms:

"I wish to obtain the following information regarding advocacy letters and correspondence to and from HRH the Prince of Wales regarding applications for statutory listing of buildings etc. from 2005 onwards, not including the ones already disclosed in the Evans case."

1. What are the texts of any "advocacy" letters and correspondence from HRH Prince of Wales regarding applications for statutory listing of buildings etc. from 2005 onwards, not including the ones already disclosed in the Evans case?

2. What are the texts of any departmental replies to any "advocacy" letters and correspondence from HRH Prince of Wales regarding applications for statutory listing of buildings etc. from 2005 onwards, not including the ones already disclosed in the Evans case?

3. Are the letters and/or replies retained in a separate complete file, or retained in files pertaining to each separate subject matter?

I make this application under regulation 5(1) of the Environmental Information Regulations 2004."

4. DCMS responded on 21 September 2015. It stated that it did not hold the requested information. It also stated that it did not consider that the request fell to be considered under the EIR but acknowledged that it had erroneously handled a previous, similar request from the complainant under the EIR.
5. Following an internal review, which was requested on 25 September 2015, DCMS wrote to the complainant on 23 October 2015. It upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 1 November 2015 to complain about the way his request for information had been handled. Specifically he asked that the Commissioner issue a decision regarding the appropriate legislation as he did not accept that the request fell to be dealt with under the Freedom of Information Act (FOIA). He also stated that he was sceptical regarding the DCMS response that it did not hold any information relevant to the request.
7. The Commissioner considers the scope of the case was to determine both the appropriate access regime and whether DCMS was correct to assert that it did not hold any information falling within the scope of the request.

Appropriate legislation

8. The Commissioner must first determine whether the request should be considered under the Freedom of Information Act (FOIA) or the Environmental information Regulations (EIR).
9. Regulation 2 EIR provides the definition of environmental information for the purposes of the Regulations. It defines environmental information as:
 - (1) *"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 or activities designed to protect those elements;*
10. The request relates to information about the statutory listing of buildings and DCMS has asserted that the decisions on the statutory listing of buildings is:

"too far removed from any effect on the state of the elements and therefore we do not consider this to fall within the EIRs".
11. In its submission to the Commissioner, DCMS has asserted that the request did not fall to be considered under the EIR. DCMS has correctly acknowledged that it is the information held by a public authority within scope of a request which properly determines whether the FOI or EIR regime should apply. However, where a public authority states that no information is held in relation to the request then the request itself must be the benchmark used to determine, on the balance of probabilities, the appropriate regime. This will allow the Commissioner to consider the

public authority's handling of the request in accordance with the appropriate legislation.

12. Having carefully considered the nature of the requested information, it is the Commissioner's position that it is not necessary for information to have a direct impact on factors or elements of the environment under Regulations 2(1)(a) or (b) in order to be caught by the EIR. He considers that it is sufficient to show that the planning legislation which drives the application process is a measure affecting factors and elements of the environment (or is designed to protect factors and elements of the environment).
13. The legislation governing Statutory Listings (the Planning (Listed Buildings and Conservation Areas) Act 1990) makes provision for buildings to be given a certain level of protection from alteration or demolition – in effect the legislation places restrictions on the use/further development of the land on which that building stands.
14. It is the Commissioner's view therefore that the Planning (Listed Buildings and Conservation Areas) Act 1990) is an administrative measure likely to affect the factors and elements in Regulations 2(1)(a) and (b). By extension therefore, any material which relates to applications for Statutory Listing will also be information on a measure likely to affect the environment under Regulation 2(1)(c) because it is information about the implementation of the Planning (Listed Buildings and Conservation Areas) Act.
15. Accordingly, the Commissioner considers that the appropriate legislation in this case is the EIR and that the Regulation under consideration is Regulation 5 –Duty to make available environmental information on request. This is because, for the reasons set out in the preceding paragraphs, he considers that in this particular case the balance of probabilities weighs heavily in favour of handling the request under the EIR rather than FOIA. He notes however that each case must be considered on its merit and that his conclusion as to the correct regime in this case is not intended to set any precedent in relation to future requests.

Reasons for decision

Regulation 5 – Duty to disclose environmental information

16. Regulation 5 of the EIR requires public authorities to provide environmental information within 20 working days of receipt of a

request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.

17. In this case the complainant is sceptical about DCMS' assertion that it does not hold any information falling within the scope of the request.
18. In scenarios where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
19. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
20. To assist with this determination, the Commissioner approached DCMS with a number of standard questions.
21. In its submission to the Commissioner, DCMS has set out that all correspondence addressed directly to the Secretary of State and/or Ministers is recorded on a particular system within DCMS. This system was searched for any correspondence from HRH the Prince of Wales between 2005 and 2015. DCMS also set out that the search was not for correspondence solely falling within the scope of the request but was for any/all correspondence. DCMS confirmed that this system would also identify correspondence sent to HRH the Prince of Wales from DCMS.
22. With regard to specific search terms, DCMS set out the search terms which were used in its search. The Commissioner then asked DCMS to broaden those search terms slightly. Having broadened the search terms DCMS confirmed that no information falling within the scope of the request had been located. The Commissioner is satisfied that the search terms would have been sufficient to produce a return of any correspondence falling within the scope of the request.
23. DCMS has also asserted that no correspondence falling within the scope of the request has been either deleted or destroyed. It has also confirmed that it has not previously held relevant recorded information which it no longer holds.
24. In setting out its retention policy for appropriate records, DCMS has explained to the Commissioner that listing records are retained for 15 years whilst correspondence on the system referred to at paragraph 21 goes back to before 2005; therefore if any information falling within the

scope of the request were held it would show up on these records. At the Commissioner's request, DCMS has clarified that it was not necessary to check all of the listing records as information falling within the scope of the request would be held on the correspondence system. In its submission, DCMS made the point that checking all of the listing records would not only have been unnecessary but would have meant that the request would exceed the cost limit.

25. Based on the submissions provided by DCMS, the Commissioner is satisfied that, on the balance of probabilities, the requested information is not held by DCMS.

Right of appeal

26. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.
28. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF