

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

Date: 8 February 2018

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

Decision (including any steps ordered)

1. The complainant submitted two requests to the Foreign and Commonwealth Office (FCO) seeking lists of correspondence exchanged between it and two other public authorities about the Policy Review and Feasibility Study into the Resettlement of the Chagos Archipelago. The FCO refused both requests on the basis of regulation 12(4)(b) (manifestly unreasonable) of the EIR. The complainant complained to the Commissioner about the FCO's failure to provide him with advice and assistance to allow him to submit refined requests. The Commissioner has concluded that no advice and assistance was provided and therefore the FCO breached regulation 9(1) of the EIR. It also breached section 16(1) of FOIA as part of the requested information also fell under that access regime. Following the Commissioner's intervention, advice and assistance has been provided to the complainant and therefore no steps are required by the FCO as a result of this notice.

Request and response

2. The complainant submitted the following request to the FCO on 6 March 2017:

'Environmental Information Regulations 2004 - List/Schedule of Correspondence with DFID

Please could I be supplied with a List/Schedule of all correspondence between (1) the Foreign and Commonwealth Office (FCO), (2) the British Indian Ocean Territory Administration (BIOTA), and the Department for International Development (DFID) concerning the Policy Review and Feasibility Study into the Resettlement of the Chagos Archipelago (BIOT) between 31 January 2015 and 16 November 2016.

'Correspondence' is intended to include e-mails, telegrams, signals, and other electronic messages; letters, internal memoranda, minutes, and other documents; spreadsheets; other attachments. If the information is held separately by the FCO and the BIOTA please could separate lists be supplied for each. Please could the lists be either in MS Word document or PDF format and sent to me by e-mail.

'DFID' includes the Department itself and any contractor, agent, organisation, or other body or individual working for or on behalf of the Department.'

3. He also submitted a similar request to the FCO on the same day seeking correspondence with the MOD.
4. The FCO contacted the complainant on 22 March 2017 and asked him to *'confirm precisely what information you would like the list/schedule to contain'*.
5. The complainant responded on the same day in the following terms:

'As the Information Commissioner's advice makes clear, there is no duty for a public authority to create new information, and on this basis therefore the content of the list may vary according to what your records system and the documents contain.

As a guide may I therefore suggest that the List would where possible contain the following information:

1. File Reference Number
2. Folio Number
3. Date of document
4. Author/from
5. Recipient/to
6. Document Type (e-mail, ledger, etc)
7. Classification (Secret, Confidential, etc)
8. Description/title/content

Alternatively if the folios are all from the same file then these could be grouped accordingly and the file reference number would only then needed at the beginning of each sequence.

Clearly I do not know how these records are now stored by the FCO. I presume this to be in an electronic database. I enclose an example of a List compiled from an old hard copy file that has previously been supplied by Hanslope Park [ie the location of the FCO's Archive Management Team] in response to an FOIA request. This type of format and content would be fine in this case.'

6. The FCO responded to both requests on 3 April 2017. The FCO explained that it potentially held information falling within the scope of the requests but it did not hold a list/schedule of the documents concerned. The FCO argued that due to the volume of material concerned, determining which of the documents meet the EIR criteria, and then creating a list/schedule of those documents would place an unreasonable burden on the FCO's resources, particularly taking into account both requests were submitted on the same day. The FCO therefore explained that it was seeking to refuse to comply with both requests on the basis of regulation 12(4)(b) of the EIR.
7. The complainant contacted the FCO on 5 April 2017 and asked it to conduct an internal review of its decision to refuse to comply with the requests on the basis of regulation 12(4)(b). Furthermore, the complainant explained that he was dissatisfied with the FCO's failure to provide him with any advice and assistance to allow him to refine his requests arguing that at the least an indication of the likely costs incurred in complying with the requests should have been provided.
8. The FCO informed him of the outcome of the internal review on 5 May 2017. The review upheld the application of regulation 12(4)(b) to both requests. In relation to the alleged failure to provide advice and assistance, the FCO explained that:

'You explained that no costs have been given in our letter of 03 April of 2017. However, given your request is vague we would be unable to accurately calculate the full cost. In my review, I note that [name redacted] contacted you [on 22 March 2017] asking for additional search parameters to help identify the information you require. You replied on 22 March with a guide list of what the search should include but unfortunately were unable to narrow down the search criteria.'

Scope of the case

9. The complainant contacted the Commissioner on 8 May 2017 in order to complain about the FCO's handling of his requests. He explained that his primary point of complaint concerned the FCO's failure to provide him with advice and assistance to allow how to submit refined request(s). In addition, he also disputed the FCO's application of regulation 12(4)(b) to refuse these requests.
10. Regrettably, due to the volume of complaints she had received, the Commissioner did not commence her investigation of this complaint until late August 2017. The Commissioner was involved in discussions with the FCO and complainant about this complaint during September and December 2017. As a result of these discussions the Commissioner reached the following provisional conclusions:
 - The requests covered both environmental information and non-environmental information;
 - In terms of the environmental information the FCO had a legitimate basis upon which to refuse the requests on the basis of regulation 12(4)(b) of the EIR and in terms of the non-environmental information the FCO had a legitimate basis upon which to refuse the requests under section 12(1) (cost limit) of FOIA.
 - The FCO had an obligation under regulation 9(1) of the EIR, and an obligation under section 16(1) of FOIA, to provide the complainant with advice and assistance when it initially refused these requests but this was not done.
 - Following the Commissioner's intervention, the FCO provided the complainant with sufficient advice and assistance to allow him to submit a refined request in January 2018.
11. Following the conclusion of the Commissioner's investigation, the complainant explained that he still wanted a decision notice to be issued with regard to the FCO's failure to provide advice and assistance at the time of its initial refusal of these requests.

Reasons for decision

Advice and assistance

12. Regulation 9(1) of the EIR states that:

'A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.'

13. Regulation 9(3) of the EIR states that:

'Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.'

14. Therefore, the Commissioner takes the view that if a public authority conforms to the Code of Practice¹ as regards giving advice and assistance in a particular case, it will be taken to have complied with regulation 9(1) of the EIR.

15. As the Commissioner's guidance on regulation 12(4)(b) explains, when a public authority has refused a request on basis of this exception because of the cost of complying with it, then she would expect advice and assistance to be given to allow a refined request to be submitted:

'When refusing a request for environmental information under regulation 12(4)(b) on the grounds of cost, public authorities should provide the requester with appropriate advice and assistance.

This will usually involve setting out the costs involved in answering the request and explaining how it might be refined to make it more manageable and therefore, not manifestly unreasonable. The aim of advice and assistance should be to help the requester to submit a new, more manageable, request.²

¹ https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

² <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf> - See paragraphs 27 and 28.

16. The complainant argued that the FCO had failed to provide him with any such advice and assistance when refusing his requests and therefore breached regulation 9(1) of the EIR. More specifically the complainant made the following points:
- The FCO wrongly claimed in its internal review that it had contacted him asking for *'additional search parameters to help identify the information'* he had requested. The complainant argued the e-mail exchange between him and the FCO demonstrated that no such request was made. Therefore, no attempt was made by the FCO to advise him how his request could be refined. Furthermore, the complainant argued that it would have been hard for him to see how he could have advised on search parameters since he had no internal knowledge of the workings of the FCO's electronic filing systems and how searches are conducted.
 - The complainant argued that contrary to what is claimed in the internal review response that: *'given your request is vague we would be unable to accurately calculate the full cost'*, both requests were quite precise. He noted that neither is there a requirement for an accurate calculation of the full cost of complying with requests to be provided by a public authority when offering advice and assistance as was claimed by the FCO. Instead the complainant explained that an approximate setting out of costs would more than suffice to illustrate what is involved and allow him to refine his requests, e.g., by restricting the dates, or the scope of the material to be searched. Moreover, the complainant emphasised that during the course of the Commissioner's investigation the FCO provide her with detailed estimates of the costs of complying with the requests thus undermining its claim in the internal review that it was *'unable to accurately calculate the full cost'*.
 - No consideration has ever been given to advising him that one or other of the requests might be manageable on their own thus allowing him this choice.
 - In advising him that the FCO no longer maintains manual file registers such as the example that he had provided, the complainant suggested that what may have been perfectly achievable within cost and effort in the past in responding to such a request would now appear to have become too onerous with the new electronic filing systems. The complainant suggested that to employ such arguments is both an irony and an indication that the new systems are not fit for purpose, not solely for FOI requests but also for internal information handling. The expectation would be that such electronic searches would be fast and efficient.
17. In light of the requirements of regulation 9 of the EIR, and given the comments in her guidance quoted above, the Commissioner is satisfied

that in this case there was an obligation on the FCO to provide the complainant with advice and assistance when refusing these requests on the basis of regulation 12(4)(b). Moreover, prior to her invention, the Commissioner is satisfied that the FCO had failed to discharge this duty. It follows that the FCO breached regulation 9(1) in handling these requests.

18. In reaching this conclusion, having considered the exchange of correspondence between the complainant and the FCO she does not accept the FCO's suggestion in the internal review that the complainant had already been invited (on 22 March 2017) to provide additional search parameters, presumably in an attempt to narrow the scope of his request. It is clear from the email of 22 March 2017 that complainant was simply asked to provide an indication of what the requested list should contain.
19. The Commissioner would also emphasise the point made in her guidance, and as noted by the complainant, that in providing advice and assistance it is not necessary for a public authority to provide an accurate and specific set of costs. Rather, an estimate of these costs and advice on how the requests could be refined to bring these down would be sufficient.
20. The Commissioner welcomes the fact that following her intervention the FCO has now provided sufficient advice and assistance to the complainant. However, in her view it is regrettable that this was not provided at the point the requests were refused as this led to a considerable delay on the complainant being able to submit refined requests. This delay could clearly have been avoided if the FCO had complied with its obligations under regulation 9(1) of the EIR when refusing these requests. The Commissioner would also add that the FCO is well versed in handing EIR requests and she would not have expected it to have failed to comply with one of the more straightforward requirements of the legislation, namely the provision of advice and assistance in a case such as this. Such a failure to do so is, in the Commissioner's opinion, more surprising given the fact that the complainant had clearly identified this error when submitting his request for an internal review and indeed quoted the Commissioner's own guidance to support his point.
21. As noted above, although the FCO originally handled these requests under the EIR, part of the requested information should also have been considered FOIA. As a result the FCO was technically under an obligation to provide advice and assistance under section 16(1) of FOIA as well as under regulation 9(1) of the EIR. It follows that the FCO's handling of these requests also constitutes a breach of section 16(1) of FOIA.

Right of appeal

22. 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

23. 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.
24. 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

Jonathan Slee
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