

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 February 2020

Public Authority: Environment Agency
Address: Horizon House
Deanery Road
Bristol
BS1 5AH

Decision (including any steps ordered)

1. The complainant submitted a three part request for information relating to the Strategic Monitoring Review (SMR) carried out by the Environment Agency (EA). The EA refused parts one and two of the request under regulation 12(4)(b) of the EIR (manifestly unreasonable).
2. The Commissioner's decision is that the EA has failed to demonstrate that complying with parts one and two of the request would be manifestly unreasonable in all the circumstances of the case. She therefore finds that the EA was not entitled to rely on regulation 12(4)(b) to refuse those parts of the request. The Commissioner also finds that the EA failed to provide a refusal notice within 20 working days and failed to carry out an internal review within 40 working days and as a result it breached regulations 14(2) and 11(4) of the EIR respectively.
3. The Commissioner requires the EA to take the following step to ensure compliance with the legislation.
 - Issue a fresh response to parts one and two of the request which does not rely on regulation 12(4)(b).
4. The EA must take this step 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

5. On 9 January 2019 the complainant wrote to the EA and requested information in the following terms:

"I would be most grateful if you could provide me with the following information that is associated with the Strategic Monitoring Review that the Environment Agency is currently undertaking.

- 1. Copies of minutes of meetings of the Strategic Monitoring Review from the commencement of the Review to date.*
 - 2. Minutes of meetings of any sub groups that are associated with the Strategic Monitoring Review, including, but not confined to, the Scientific Advisory Group and the Sentinel Project Group.*
 - 3. Details of the membership of the Scientific Advisory Group."*
6. On 4 February 2019 the EA wrote to the complainant. At this stage it did not issue a valid refusal notice. Instead, it told the complainant he had requested a substantial amount of information and it estimated it would take 140 hours to comply with the request in its current form. The EA asked the complainant if he would be able to reduce the scope of the request to focus on the precise information he was seeking, in order to bring the request "within reasonable bounds".
7. The complainant responded on the same day, 4 February 2019. He commented on his surprise at the EA's estimate. He said that he had anticipated that minutes of meetings would be readily available and incur very little workload to provide.
8. On 5 February 2019 the EA explained to the complainant that the request covered a time period of five years and related to a significant piece of work. It confirmed that the estimate of 140 hours remained the same. It asked the complainant to confirm how it should proceed.
9. The complainant replied on the same day, 5 February 2019. He stated:
- "Although I do not know the precise internal arrangements that operate within the Agency with regard to the SMR, my understanding was that there is a specific group and a lead person associated with the Review. I assume that this group has held*

regular meetings that would have been minuted, and that various sub-groups or working groups would have been formed, and that they too would have had minuted meetings.

At present all I am asking for is the minutes of these meetings."

10. The EA responded on 8 February 2019. The EA complied with part three of the request by providing a link for the complainant to access the information online. In relation to the other parts of the request, it refused to provide the requested information citing regulation 12(4)(b) of the EIR, on the grounds that the request was manifestly unreasonable.
11. On 18 February 2019 the complainant wrote to the EA to express his concerns with its refusal of the request and the EA interpreted this as a request for an internal review.
12. The EA wrote to the complainant on 26 April 2019 to provide the outcome of its internal review. It maintained its refusal of parts one and two of the request under regulation 12(4)(b).

Scope of the case

13. The complainant contacted the Commissioner on 2 July 2019 to complain about the way his request for information had been handled. Specifically, he disputed the EA's refusal of his request under regulation 12(4)(b).
14. The complainant did not express any dissatisfaction with the EA's response to part three of the request. The Commissioner notes that the information which is accessible via the link the EA provided on 8 February 2019 appears to satisfy part three of the request.
15. The scope of the following analysis is to consider whether the EA was correct to rely on regulation 12(4)(b) as its grounds for refusing to comply with parts one and two of the complainant's request. The Commissioner will also consider whether the EA responded to the request and the internal review request within the statutory time limits.

Reasons for decision

Regulation 2 – Is the requested information environmental?

16. The EA dealt with the complainant's request under the provisions of the EIR on the grounds that the requested information satisfies the

definition of environmental information provided by regulation 2 of the EIR.

17. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"
18. The request in this case is for information relating to the Strategic Monitoring Review (SMR) and associated sub groups. The SMR is a review of the EA's approach to monitoring water. The Commissioner is satisfied that the requested information is a measure that would or would be likely to affect the elements listed in regulations 2(1)(a), namely water. The Commissioner therefore agrees with the EA that it was appropriate to consider the request under the terms of the EIR.

Regulation 12(4)(b) – Manifestly unreasonable

19. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
20. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious, or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case the EA argued the latter and asserted that complying with the request would place a disproportionate burden on its resources.
21. Under the EIR there is no specific limit set beyond which a request is considered manifestly unreasonable. This is in contrast to section 12 of the Freedom of Information Act 2000 (FOIA) under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the "appropriate limit", as defined by the Freedom of Information and Data Protection (Appropriate Limit Fees) Regulations 2004 (the fees regulations).
22. The fees regulations state that a public authority's estimate that compliance would exceed the appropriate limit can only take into account the costs it would reasonably expect to incur in:
 - determining whether the information is held;
 - locating the information, or a document which may contain the information;

- retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.
23. The fees regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour of staff time. For non-central government public authorities such as the EA the appropriate limit is set at £450, which is the equivalent of 18 hours work.
24. Although the fees regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference where public authorities cite regulation 12(4)(b) due to the time and cost of complying with a request. However, they are not a determining factor in assessing whether the exception applies.
25. In the Commissioner's published guidance¹ on manifestly unreasonable requests, paragraph 19 states that in assessing whether the cost or burden of dealing with a request is too great, public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. The Commissioner considers this will mean taking into account all the circumstances of the case including:
- the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
26. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

information. This was confirmed by the Information Tribunal in the DBERR case² where the tribunal considered the relevance of regulation 7(1), which provides for a time extension in relation to complex or voluminous requests, and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be 'to the widest extent possible'. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

27. The complainant told the Commissioner that his understanding was that the SMR was a major piece of work undertaken by the EA and it was led by a specific officer or team. He expected there to be a degree of records management commensurate with the importance of the review. The complainant believed that the information he requested was readily available in electronic files and there was no need for the EA to undertake the tasks it had described. The complainant's view was that the time scale quoted by the EA was excessive.
28. He went on to say that the public interest in disclosing this information was very high. He stated:

"This is an important project that will fix the way that the EA carries out one of its fundamental roles, namely to assess the quality of English Rivers and where and how to address problems with that quality. Disclosing this information would be the readiest way that the public can understand the factors that the EA consider the most and least important in deciding to draw up and implement a new scheme that will last a generation and will be taking a considerable quantity of the Agency's public funding to carry out. The public would also be re-assured that the programme is being carried out expeditiously, economically and properly managed and disclosure would help the public understand any difficulties encountered with it and the way the EA overcomes them."

² Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

29. In its initial response the EA stated that the request was manifestly unreasonable in that it would take 140 hours to comply with it in its current form. It said this was based on *“staff time locating, retrieving, editing and copying data from e.g. paper files/electronic records in a number of databases/offices/several parts of the business”*.
30. In line with her standard approach, the Commissioner wrote to the EA to ask it to revisit the request and send her its full and final arguments as to why it believed the exception applied.
31. The EA responded and maintained its position that the request was manifestly unreasonable under regulation 12(4)(b). It stated that the request was unreasonable in terms of the time it would take to comply with the request, as it would be diverted from carrying out its other statutory duties and the effective running of the EA would be prejudiced.
32. The EA explained to the Commissioner that the SMR was a significant review of its approach to monitoring water. It has taken over five years to complete with many different projects and sub-projects, covering topics ranging from governance and finance to technical considerations on water quality and quantity monitoring.
33. To determine the estimate of the time it would take to comply with the request, the EA initially identified each of the types of meeting held as part of the SMR and the file locations of the meeting notes. In total, 333 sets of meeting notes were located. The EA made an assessment of the average number of pages per set of notes and the average time it would take to read each document to identify whether any redactions were required. It estimated that it would take 45.4 hours to comply with the request. It stated that this was a conservative estimate, but provided no explanation or evidence to support this assertion.
34. With reference to the four activities set out above at paragraph 22, the Commissioner asked the EA to provide a detailed estimate of the time or cost required to provide the requested information. The EA provided the following breakdown:

SUMMARY	hours
Time taken to date to process the request, identify, query, fill gaps from previous phases & compile spreadsheet	7.4
Average of 4.1 min to read each doc & identify anything to redact, re-save new version (assumes non-stop)	23
Estimated time to query anything that may need redacting - assume 50% of 920 pages need a redact of some kind taking a minute each = 7.6	7.6

hours	
Time to extract 333 documents from a variety of folders (held by year & date), collate, package up and get sign-off to send	7.4
Total:	45.4

35. The EA used a sample of 29 documents when calculating the time taken to read each document to check whether any information needed redacting. It confirmed that on average this took 4.1 minutes per document. However, the EA did not provide any further details regarding the sampling exercise, or what type of information might need redacting.
36. Aside from confirming that it conducted a sampling exercise, the EA did not provide the Commissioner with any other details regarding how it arrived at these estimates.

The Commissioner's decision

37. Where a public authority has refused a request under regulation 12(4)(b), the Commissioner expects it to be able to provide appropriate evidence to support its assertion that a manifestly unreasonable burden would be placed on it.
38. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is manifestly unreasonable, rather than simply being unreasonable. The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.
39. Having considered the explanations provided by the EA, the Commissioner is not persuaded that responding to the request would incur a manifestly unreasonable cost to the EA.
40. Although regulation 12(4)(b) of the EIR differs from section 12 of the FOIA the Commissioner considers that estimates relating to regulation 12(4)(b) should contain the same level of detail as those submitted regarding section 12 of the FOIA. That is, she requires public authorities to provide sufficient detail of their estimate of the costs of complying with the request so that it can be determined whether their estimate is reasonable.
41. The Commissioner notes that the EA's estimate that it would take 45.4 hours to comply with the request is significantly reduced from its original

estimate of 140 hours. However, the EA did not provide any explanation regarding the discrepancy in its estimates.

42. The Commissioner is concerned about what the EA considered were appropriate tasks to include in its estimates, these can be seen in the table above at paragraph 34. In particular, it included the time taken on tasks it referred to as "*fill gaps from previous phases*", "*compile spreadsheet*" and "*collate, package up and get sign off to send*". The Commissioner's view is that it is not reasonable to include the time spent on its own EIR processes or on providing submissions for her investigation in its estimates for complying with the request.
43. A considerable portion of the EA's estimate (30.6 hours) is time it considers it would need to spend identifying and querying information that may need redacting, but the EA did not explain which exemptions it considered were likely to apply to the information or why.
44. While the Commissioner accepts that a large number of documents (333 sets of meeting notes) fall within the scope of the request, she has not been provided with sufficient evidence to be convinced that it would be particularly challenging for the EA to locate, retrieve or extract them. According to the spreadsheet provided by the EA all of the information is stored in the same electronic file location and is held by year and date. Although the EA has not stated the exact time it took to locate the information, given this evidence about how it is stored and indexed it is not clear why location would be anything more than a reasonably straightforward task.
45. It is important to keep in mind that all information requests will impose some burden and public authorities must accept this in order to meet their underlying commitment to transparency and openness.
46. In this case the Commissioner is not satisfied that the EA has provided her with adequate evidence to support its position that the request is manifestly unreasonable. Therefore, her decision is that the EA has failed to demonstrate that complying with parts one and two of the request would be manifestly unreasonable in all the circumstances of the case. It is therefore not entitled to rely on regulation 12(4)(b) to refuse those parts of the request.
47. As the Commissioner has determined that the exception is not engaged it is not necessary to go on to consider the public interest test. The EA is now required to issue a fresh response that does not rely on regulation 12(4)(b).

Regulation 14(2) – Refusal to disclose information

48. Regulation 14(2) of the EIR states that a public authority wishing to withhold information in response to a request is required to provide the requester with a refusal notice stating that fact *“as soon as possible and no later than 20 working days after the date of receipt of the request”*.
49. In this case, the complainant submitted his request to the EA by email on 9 January 2019. The EA provided its refusal notice on 8 February 2019, 22 working days after the request was received.
50. The Commissioner has therefore determined that the EA has breached regulation 14(2).

Regulation 11 – Representations and reconsideration

51. Regulation 11(4) of the EIR states that once a public authority has received a request for an internal review it must respond as soon as possible and no later than 40 working days after it receives the internal review request.
52. From the evidence provided to the Commissioner in this case, the EA provided the outcome of its internal review 46 working days after it received the request for a review. In failing to carry out an internal review within 40 working days the EA has breached regulation 11(4) of the EIR.

Right of appeal

53. 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@justice.gov.uk

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

54. 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.
55. 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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