

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 March 2013

Public Authority: Natural England
Address: Foundry House
3 Millsands
Riverside Exchange
Sheffield, S3 8NH

Decision (including any steps ordered)

1. The complainant has requested information relating to a meeting between the Cabinet Office, the Environment Agency and Natural England.
2. The Commissioner's decision is that Natural England has correctly applied the exception provided by regulation 12(4)(e) (internal communications) of the EIR.
3. The Commissioner does however require Natural England to disclose the information it identified as appropriate for disclosure during his investigation as outlined in paragraph 18 of this notice.

Request and response

4. On 6 February 2012, the complainant wrote to Natural England (NE) and requested information in the following terms:

1. This is a request for information under the Freedom of Information Act and the Environmental Information Regulations about a meeting between the Cabinet Office, the Environment Agency and Natural England. The details of the meetings are below:

12.01.12 – Cabinet Office – Oliver Letwin; Environment Agency; Natural England.

Please supply any information held by the Environment Agency relating to the meeting, which includes, but is not limited to:

- *Place of meeting*
- *Full lists of those in attendance, including names of senior members of staff (in accordance with the DPA)*
- *Minutes*
- *Agenda*
- *Any other form of notes taken at the meeting*

2. Please provide details of any correspondence (from 01/12/11 to 31/01/12) between Natural England, The Cabinet Office and The Environment Agency regarding the restructuring or revision of UK environmental regulation guidance in line with the Red Tape Challenge.

By correspondence I mean:

- *Emails*
- *Letters*
- *Briefing documents*
- *Notes taken during/after phone calls*
- *Any other form of correspondence used by your office*

My request is only for correspondence between 01/12/11 and 31/01/12

5. NE responded on 1 March 2012. It provided some of the information requested at part 1, confirming that a meeting took place on 12 January 2012 between Cabinet Office, Defra, The Environment Agency and Natural England. It also confirmed the attendees at the meeting, aside from the junior officials.
6. NE stated that in relation to the other information requested, it considered that it should not be disclosed under the EIR and cited regulations 12(3); 13; 12(4)(e), 12(5)(f).
7. Following an internal review NE wrote to the complainant on 30 May 2012. It provided the location of the meeting and the organisations that each of the attendees represented. NE stated that it does not hold any information relating to the agenda or minutes of the meeting. Therefore regulation 12(4)(a) applied – information not held.
8. NE further stated that a note was drafted of the meeting for Senior Natural England staff, however, it maintained its position that it had correctly withheld this citing regulation 12(4)(e).

9. NE went on to explain that it had incorrectly applied regulation 12(3) and 13 relating to details of other attendees as it did not hold information relating to the junior officers. It stated that it should have used regulation 12(4)(a), and that it was now claiming this exception.
10. With regard to the second part of the request, NE stated that it did not hold any correspondence between itself, the Cabinet Office or the Environment Agency regarding the restructuring or revision of UK environmental regulation guidance in line with the Red Tape Challenge between 1 December 2011 and 31 January 2012. Therefore, regulation 12(4)(a) applied.
11. NE stated that the other information requested was correctly withheld under regulation 12(4)(e) and that it was no longer relying on regulation 12(5)(f).

Scope of the case

12. The complainant contacted the Commissioner on 18 September 2012 to complain about the way his request for information had been handled.
13. In its response to the Commissioner NE stated that it considered all of the withheld information engaged the exception at regulation 12(4)(e). It further stated that having reviewed the request, the exceptions at regulation 12(4)(d) and 12(5)(d) were also engaged.
14. The Commissioner considers the scope of this case to be to determine if NE correctly applied regulation 12(4)(a), 12(4)(d), 12(4)(e) and 12(5)(d) of the EIR.

Background

15. The complainant requested information relating to The Red Tape Challenge. This is a government led initiative on which it states
"this government has set a clear aim: to leave office having reduced the overall burden of regulation."
<http://www.redtapechallenge.cabinetoffice.gov.uk/about/>
16. The Red Tape Challenge covers regulations on various areas including health and safety, pensions, equalities and the environment.
17. NE explained that the meeting in January 2012 discussed emerging Defra proposals on making it easier for those who have to comply with

environmental regulations that apply across different areas of environmental policy.

18. During the Commissioner's investigation NE reconsidered its position. Subsequently it advised that having reviewed the withheld information it believed that it correctly applied to exceptions at the time of the request. However, with the passage of time some of the information is now less sensitive. NE stated that it would now release some further information to the complainant but did not identify it to the Commissioner at the time of this decision notice. However, NE stated that it would provide copies when it had been sent to the complainant.

Reasons for decision

19. Regulation 2 of the EIR defines what environmental information is. The first step for the Commissioner is to consider whether the information falling within the scope of the request is environmental in accordance with this definition and if so whether NE correctly dealt with this request under the EIR.

20. Environmental information is defined in regulation 2(1) of the EIR as follows:

"any information in written, visual, aural, electronic or any other material form on -

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances energy noise, radiation or waste emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures designed to protect those elements."

21. As outlined by NE, the information requested relates to a meeting that took place to discuss environmental policies. Therefore the Commissioner considers that the requested information is environmental information and NE was correct to respond to the request under the EIR.
22. Regulation 12(4)(e) of the EIR provides that a public authority may refuse a request for environmental information if the request involves the disclosure of internal communications. Consideration of this

exception is a two stage process; first the Commissioner will consider whether the request would involve the disclosure of internal communications. Secondly, this exception is a qualified exception subject to the public interest test. This means that the information must be disclosed if the public interest in maintaining the exception does not outweigh the public interest in disclosure.

23. With regard to whether this request would involve the disclosure of internal communications, regulation 12(8) is specific that internal communications for the purposes of EIR includes communications between government departments. The information in question consists of emails between NE officials and between NE and Defra.
24. NE is an executive non-departmental public body accountable to the Secretary of State for Environment, Food and Rural Affairs and Defra is NE's sponsoring department. NE has a statutory duty to provide advice and information to the Secretary of State on matters for which it has responsibility.
25. It is the Commissioner's view that the requested information constitutes internal communications. The exception provided by regulation 12(4)(e) is therefore engaged.

Public interest arguments in favour of disclosure

26. NE has acknowledged the public interest in favour of disclosure. It stated that it strongly supports transparent decision making by public bodies and believes that openness encourages public involvement in public affairs by furthering understanding of policy issues. It also acknowledges that transparency promotes official accountability and that transparency ensures that proper use is made of public money.
27. In addition, NE acknowledged the public interest in understanding the Red Tape Challenge, especially the environmental strands of that process.
28. The complainant has presented several arguments however the Commissioner has not detailed them all in this Decision Notice. The complainant argued that the Red Tape Challenge proposes to make radical and lasting changes to the regulation of the environment in the UK. The government is seeking to remove regulation, which currently protects: air quality; biodiversity, wildlife management, landscape, countryside and recreation; energy labelling and sustainable products; industrial emissions and carbon reductions; noise and nuisance; waste; and environmental permits, information and damage.

29. For each area of the Red Tape Challenge the public have been invited to participate in the process by submitting ideas for reducing environmental 'red tape'.
30. The complainant further argued that the public has so far registered disagreement with the proposals and frustration that their voices are not being listened to in the online forum hosted on the Red Tape Challenge website.
31. The complainant provided a sample of comments from the forum and stated that the public had expressed clear and direct disagreement to the Red Tape Challenge's proposals. Therefore, it ought to be clear that more information is urgently needed to be disclosed so that the public can build a more informed view of the policy proposals.
32. The complainant considered that there was a very strong public interest in facilitating accountability and transparency of the policy making and consultation processes at NE.
33. The complainant stated that disclosing the information would introduce a further measure of accountability in the policy process and work to reassure the public that their opinions are considered. This is particularly important in this specific context because the Red Tape Challenge has sought to engage public opinion but now appears not to be listening. Disclosure would help to dispel disillusion with the democratic process if it is demonstrated that government must be open and accountable on issues of public interest.

Public interest arguments in favour of maintaining the exception

34. The complainant acknowledged the public interest in giving officials a private thinking space to formulate good policy.
35. In its response to the Commissioner NE explained that the proposal to revise the Directive on access to environmental information acknowledged that it was in the public interest "that public authorities should have the necessary space to think in private". The exceptions at regulation 12(4)(d) and 12(4)(e) give effect to this public interest subject to countervailing public interests.
36. NE further stated that the Tribunal and the Commissioner have in the past recognised the importance of maintaining the confidentiality of policy formulation and development because of the contribution the confidentiality of these discussions makes to good government. In this case, at the time of the request the policy development process was and remains at a formative stage and is 'live'. The contents of the information within the scope of the request remain sensitive and subject to further discussions between NE Defra, Minister for Government Policy

(MGP) and the Cabinet Office. The disclosure of the requested information, both now and at the time of the request, would pre-empt ministerial deliberations and prejudice their discussions with officials and other advisers. It would also usurp the Government's right to determine how to conduct policy discussion with relevant departments and other agencies and when to consult the public.

37. NE noted that ministers are rightly answerable for the decisions they take. However, they are entitled to exercise their discretion about the procedures they adopt in reaching those decisions. Disclosure of information still under active ministerial consideration before ministers have determined how to take the policy debate forward would undermine the presumption of confidentiality that underpins ministerial policy making. It would distort the conduct of their deliberations and influence the conduct of ministerial deliberations in the future.
38. NE argued that if ministers and their advisers have constantly to 'look over their shoulders' for what the public reaction would be, there would be an unwarranted concern with the presentation at a very early stage of policy formulation which must be driven by detailed consideration of options, even extreme or unrealistic options. Consideration of what some would call objectionable proposals can serve to clarify issues, even when there is no prospect of them being adopted.
39. NE further argued that over the long term concern with appearances would have a tendency to restrict consideration to options that can be presented as reasonable by the standards of the time, and exclude from consideration other options that might prove unacceptable to vocal interest groups. If these early stages of the policy formulation process were disclosed, it is likely that ministers (and the public) would be distracted from consideration of real and viable policy options by having to defend options that ministers and officials considered but discarded. There would also be pressure to return to some of these discarded options and ministers would, in effect, be required to repeat in public the consideration of policies that had not met the high standards required by public policy formulation. Ministers and officials would be held accountable for the process of policy development rather than for policies: this would be corrosive of democracy.
40. NE explained that ministers discuss policy with officials and other advisers in the expectation that their detailed consideration of policy options will remain private unless there is a very strong countervailing public interest in disclosure. No such public interest is present in this case. Rather there is a very strong public interest in allowing ministers to continue their deliberations on how to take forward the deregulation agenda. The public has an important place in the policy making process, and the Coalition Government is committed to the widest possible

debate of policy options. This is one of the objectives of the Red Tape Challenge however, it is not in the best interests of policy formulation, and therefore not in the public interest, that every contribution to policy formulation should be made accountable via public disclosure before minister's own thoughts have matured with the benefit of discussion with their colleagues.

Balancing of the public interest

41. The Commissioner recognises there is a public interest in transparency, openness and accountability in relation to decisions made by government to instigate change. In forming a conclusion the Commissioner has taken into account the specific factors in this case and in relation to the requested information. This includes the arguments presented by the complainant and NE.
42. The Commissioner acknowledges the safe space argument and recognises that part of the reason for needing safe space is to allow free and frank discussion. In this regard he notes that the First Tier Tribunal in a recent DfE¹ case found that ministers and officials were entitled to time and space to agree policies by exploring safe and radical options without the threat of media involvement or external scrutiny. Therefore the Commissioner accepts that the need for safe space to debate and reach decisions without external comment is a valid argument.
43. In addition, the Commissioner notes that the request was made on 6 February 2012, less than a month after the meeting took place. This increases the strength of the 'safe space' argument as the policy formulation process is at the very early stage.
44. The Commissioner notes that discussion about changes in legislation relating to the restructuring or revision of UK environmental regulation was on-going at the time of the request, and is still a live issue. The Commissioner therefore considers that disclosing copies of correspondence between NE officials and Defra before final agreement has been reached could have a detrimental effect on the public authorities in their ability to have frank exchanges.
45. The Commissioner has carefully balanced the arguments for maintaining the exception against the arguments in favour of disclosure. He accepts that there is a strong public interest in assisting the public in understanding decisions made. However, he also accepts that there is a

¹ Information Tribunal reference EA/2006/0006

stronger public interest in maintaining the safe space for proposals to be developed and discussed.

46. The Commissioner has therefore decided that the public interest in maintaining the exception outweighs the public interest in disclosure. Accordingly, NE has correctly applied the exception at 12(4)(e) to withhold the information.
47. As all the information is covered by the exception at regulation 12(4)(e) the Commissioner has not gone on to consider the application of 12(4)(d) and 12(5)(d).

Regulation 12(4)(a) – information not held

48. 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 a request is received.
49. In cases where there is some dispute as to whether a public authority holds information falling within the scope of the request the Commissioner has been guided in his approach by a number of Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held². In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate any other reasons offered by the public authority to explain why the information is not held.
50. The Commissioner has therefore considered whether NE's responses that it does not hold some of the requested information as outlined in paragraphs 9 and 10 above is correct on the balance of probabilities. NE advised that it only had one attendee at the meeting. The individual was spoken to and he did not record all attendees. Therefore, NE had no record of attendance.
51. NE also advised that it understood that no minutes of the meeting existed, consequently it would be unable to refer to these for a list of attendees. Additionally, this also meant that it was unable to provide a copy of any minutes as none existed.

² See *Bromley v Information Commissioner* [EA/2006/0072].

52. Finally, NE advised that in relation to details of any correspondence as detailed in part 2 of the request, only a small number of staff were involved with the Red Tape Challenge. All of them had been spoken to regarding this request. NE stated that they would have looked in paper files, email accounts, personal drives and shared files spaces and all had confirmed that no such correspondence existed.
53. NE further confirmed that no documents were deleted or destroyed in the course of preparing its response to the complainant, as stipulated in its records management policy.
54. After considering the representations of NE, the Commissioner is satisfied that, on the balance of probabilities, NE does not hold any information relating to other attendees, minutes of the meeting or correspondence between NE, the Cabinet Office and the Environment Agency regarding the restructuring or revision of UK environmental regulation guidance in line with the Red Tape Challenge.

Right of appeal

55. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

56. 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.
57. 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

Pamela Clements
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