

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 21 January 2014

**Public Authority:** The Environment Agency  
**Address:** Horizon House  
Deanery Road  
Bristol  
BS1 5AH  
CO13 0DL

#### **Decision (including any steps ordered)**

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The complainant has requested information from the Environment Agency relating to coastal erosion. The Environment Agency provided information in response to some parts of the complainant's request but refused to disclose information in relation to other parts, applying regulation 12(4)(b) (manifestly unreasonable) of the EIR as a basis for non-disclosure. The Commissioner considers that the Environment Agency has correctly applied regulation 12(4)(b) to the relevant parts of the complainant's request, however it has breached regulation 5(2) by providing the information outside the statutory time limit. The Commissioner requires no steps to be taken.

## Request

**15 July 2012**

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1. "I make a FOI/EIR request for all sites listed for managed realignment in Essex and South Suffolk SMP for each site please either:
  - a) confirm you have evidence that sites chosen were vulnerable to erosion/coastal processes AND SUPPLY A COPY OF THE EVIDENCE YOU HOLD WHICH LEAD YOU TO MAKE THIS CLAIM
  - b) deny you hold evidence that sites chosen were vulnerable to erosion/coastal processes, in which case will you explain why you made this claim.
2. Where is the evidence to support the claim that there will be greater loss of intertidal habitat in epoch 2 and 3, I make an FOI/EIR request that this is produced.
3. At Holland Haven (PDZ2 C2) the defences are under pressure and a landward realignment will create a more sustainable situation by reducing the pressure on defences and moving to a more sustainable frontage..... Please supply under FOI/EIR information all evidence that supports this statement re PDZ C2.
4. It appears that Anglian region did not have anyone capable of calculating the slope of a graph and had to hire an external consultant. I should ask for your money back as the answer they gave was not only wrong, it was glaringly obviously wrong. I make an FOE/EIR request as to how much money was spent on hiring this consultant.
5. Given Pye finds sedimentation rate to saltmarsh (not just creation, but its continued health and existence) has EA or NE conducted any sedimentation studies at proposed managed realignment sites and existing saltmarsh locations. I make an FOI/EIR request for details of any such surveys and the results if any surveys have taken place.
6. How about surveys of sulphides or other pollutants, again I make an FOI/EIR request for details of any such surveys and the results if any surveys have taken place.
7. I make an FOI/EIR request for the information EA holds which caused it to state it wouldn't be feasible to carry out detailed enough study to assess the sole effect of crabs.

## Response

1. The Environment Agency acknowledged the complainant's correspondence of 15 July 2012 on 18 July 2012. The Environment Agency provided a response to the letter of 15 July 2012 on 3 September 2012, however that response did not deal with the complainant's request under the EIR. The complainant wrote to the Environment Agency's Data Protection Officer on 16 September 2012 stating that the Environment Agency had not dealt with his requests for information properly under the EIR.
2. Following a complaint to the Information Commissioner the Commissioner corresponded with the Environment Agency and issued a decision notice (FER0469276) in relation to the Environment Agency's response to part 1 of the complainant's request of 15 July 2012, which it provided to the complainant on 20 February 2013. That response was a refusal notice under the EIR, based on the exception at regulation 12(4)(b) of the EIR (manifestly unreasonable). This was applied on the grounds of cost. The Commissioner's decision was that the exception had been applied correctly.
3. The complainant appealed the Commissioner's decision as he had not received responses to all 7 parts of the request in his letter of 15 July 2012. Following correspondence between the First Tier Tribunal, the Commissioner and the Environment Agency, the Environment Agency on 18 October 2013 provided responses to the remaining 6 parts of the request in that letter. For the purposes of this decision notice and the forthcoming appeal hearing, the Commissioner has aggregated together the 7 parts of the request and will treat these as if they had all been answered at the same time.
4. The complainant was satisfied with the Environment Agency's response to parts 5, 6 and 7 of his request, and he is satisfied that the Environment Agency holds no further information in relation to part 2, however he has asked the Commissioner to investigate the Environment Agency's handling of parts 3 and 4, as he is not satisfied with the responses to those questions.
5. The Environment Agency provided the complainant with some information in relation to parts 2, 3 and 4 of his request, however it indicated that it held other information which it was not providing to him. It cited regulation 12(4)(b) of the EIR (manifestly unreasonable) as a reason for non-disclosure of that information. This was cited both on grounds of cost and on grounds that the complainant's request was vexatious.

6. The Commissioner asked the Environment Agency to clarify to which information it was applying regulation 12(4)(b). It informed the Commissioner that it had provided the complainant with all information it held in response to parts 2 and 4 of his request, however it held some further information in relation to part 3, which it was not providing on the grounds that this would be manifestly unreasonable in terms of both cost and the request being vexatious.
7. The Commissioner has not considered part 2 of the complainant's request, as the complainant has informed the Commissioner that he is satisfied that the Environment Agency holds no additional information in relation to that part.

### **Scope of the case**

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8. The Commissioner has considered the Environment Agency's handling of the complainant's request, in particular its assertion that it does not hold any further information within the scope of part 4, and its application of the exception under regulation 12(4)(b) of the EIR to part 3 of the complainant's request. This is being considered in conjunction with the Commissioner's earlier decision notice, referenced in paragraph 2 of this notice, which dealt with part 1 of that request.

### **Reasons for decision**

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#### **Is the remaining requested information held by the Environment Agency?**

##### **Regulation 5**

9. Regulation 5(1) of the EIR states that:-  
    "...a public authority that holds environmental information should make it available on request".
10. The Commissioner has considered whether the Environment Agency has complied with regulation 5(1) of the EIR.
11. In considering whether or not the information is held by the Environment Agency, the Commissioner is mindful of the Tribunal's decision in the case of Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072) in which it was stated that "there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records". The Tribunal clarified that it was applying the application of

the balance of probabilities test required a number of factors to be considered, i.e:-

- the quality of the public authority's initial analysis of the request
- the scope of the search that it decided to make on the basis of that analysis and the thoroughness of the search which was then conducted.
- the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light.

It was therefore clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.

12. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office (EA/2007/0110)*, in which case the complainant expected that the information would be held as it was extremely important, however the Tribunal concluded that it was not held. Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
13. During the course of the Commissioner's investigation, the following questions were put to the Department to determine what information is held relevant to the scope of the complainant's request:
  - Does the Environment Agency hold any recorded information relevant to the scope of the complainant's request?
  - What steps were taken to determine what recorded information is held relevant to the scope of the request? The Environment Agency must provide a detailed account of the searches that it has conducted to determine this.
  - If the information were held would it be held as manual or electronic records?
  - Was any recorded information ever held relevant to the scope of the complainant's request?
  - If recorded information was held but is no longer held, when did the Environment Agency cease to retain this information?

- Does the Environment Agency have a record of the document's destruction?
  - What does the Environment Agency's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the Environment Agency describe the way in which it has handled comparable records of a similar age?
  - Is there a business purpose for which the requested information should be held? If so what is this purpose?
  - Are there any statutory requirements upon the Environment Agency to retain the requested information?
  - Is there information held that is similar to that requested and has the Environment Agency given appropriate advice and assistance to the applicant?
14. The Environment Agency responded to the Commissioner's questions as detailed at paragraph 26 above.
15. The Environment Agency has explained to the Commissioner that it does not hold, and never has held, any further recorded information within the scope of part 4 of the complainant's request; therefore it cannot provide any records in relation to the creation/deletion of that information. The Environment Agency has further explained that it holds no similar comparable information, as it would not break down tasks to the level of detail requested in part 4 of the request.
16. The Environment Agency has informed the Commissioner that there is no business reason or statutory requirement for it to retain such information. If such information was to be retained, it could be by way of either manual or electronic records.
17. The Commissioner has considered the points made by the Environment Agency and accepts that it does not hold records of costs of external consultants broken down to the level requested in part 4 of the complainant's request. He accepts that the Environment Agency did not ask the external consultant to provide a breakdown of costs at that level of detail, as it is not its normal practice to do so.
18. The complainant pointed out to the Commissioner that he had previously received an e-mail from a member of staff at the Environment Agency, stating that she was awaiting information regarding the slope calculation mentioned in part 4 of the complainant's request. However, the Commissioner, having asked the Environment Agency about this,

accepts the Environment Agency's assertion that this does not indicate that the Environment Agency holds any more detailed costs information than that which has already been provided to the complainant.

19. The Commissioner has come to the conclusion that the Environment Agency complied with regulation 5(1) of the EIR in respect of part 4 of the complainant's request, as he considers that, on the balance of probabilities, there is no further recorded information held relevant to the scope of part 4 of the request and that the Environment Agency has already complied with regulation 5(1) by providing the complainant with the information which it does hold which falls within the scope of part 4 of the request. The Environment Agency has provided the complainant with the total cost of hiring the consultant over a 3-4 year period and the Commissioner accepts that it does not hold records of the specific costs incurred in the production of the graphs as part of the overall project.

### **Regulation 12(4)(b) – manifestly unreasonable**

20. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
21. At paragraph 32 of his decision on FS50440146 (Luton Borough Council), the Commissioner made it clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than simply being "unreasonable". "Manifestly" means that there must be an obvious or tangible quality to the unreasonableness.
22. Unlike FOIA and specifically section 12, the EIR does not contain a provision that exclusively covers the time and cost implications of compliance. The considerations associated with the application of regulation 12(4)(b) of the EIR are, instead, broader than with section 12 of FOIA. In particular, the Commissioner recognises that there may be other important factors that should be taken into account before a judgement can be made that environmental information can be withheld under the exception:
  - Under the EIR, there is no statutory equivalent to the "appropriate limit" – the cost limit beyond which a public authority is not obliged to comply with a request – described at section 12 of FOIA.
  - The proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority.

- The requirement, under regulation 12(1) of the EIR, to consider the public interest test.
  - The EIR's express presumption in favour of disclosure.
  - The requirement to interpret restrictively the exceptions in the EIR.
  - The individual circumstances of the case.
23. To guide him on the respective merits of the application of regulation 12(4)(b), the Commissioner has asked the Environment Agency for clarification in the following areas: the location of the information and the extent of the information that the Environment Agency considers would be covered by the request; the role and size of the business area(s) that would need to be employed to recover and extract information; the activities that the Environment Agency would need to undertake to comply with the request and an estimate of the time needed to provide the information. As the 7 questions which form the complainant's request were all put to the Environment Agency as part of one letter dated 15 July 2012, the Commissioner has treated all parts of the complainant's request as amounting to one request under FOIA, and has therefore aggregated the time estimated by the Environment Agency that it would take to deal with each part of the request.
24. In relation to part 1, which was dealt with in the Commissioner's previous decision notice referenced at paragraph 2, the Environment Agency provided details of the location and extent of the information requested in that particular question and an estimate of the time required to provide it. It was estimated at that time by the Environment Agency that it would take one staff member around 14 hours to consider and collate the information in relation to 1 site – therefore it was estimated that it would take 420 hours to consider and collate the information in respect of all 30 sites.
25. The Environment Agency has now carried out the work for 3 sites and has indicated to the Commissioner that one site took 14 hours, the second took 2.5 hours and the third took 5 hours. Therefore, the Environment Agency now estimates that it would take in excess of 200 hours to consider all 33 sites.
26. As the Environment Agency has derived this estimate from the practical knowledge obtained from carrying out the work for 3 sites, the Commissioner is prepared to accept that the Environment Agency's estimate is reasonable. The Commissioner has therefore gone on to consider the activities needed to be completed for the Environment Agency to comply with the request as a whole and the time flowing from these. According to the Environment Agency, these activities would comprise the following:



- Determining which members of staff held the information (this would involve speaking to colleagues in the Ipswich coastal team and other regions).
  - Locating the information. This would involve: large-scale searching of information held on regional/national electronic drives and speaking to colleagues who may hold some useful local information. The search would be for both aerial photographs and coastal trend analysis survey data.
  - Completing the information. This would involve a skilled employee using specialist mapping software to depict changes in coastline for areas for which there is not a complete photographic record.
27. In relation to parts 2 and 4 of the complainant's request, the Environment Agency confirmed that it had taken around 1 hour to retrieve and provide the information requested. It confirmed that it holds no further information relevant to these parts of the complainant's request.
28. In relation to part 3 of the complainant's request, the Environment Agency has informed the Commissioner that it does hold further information other than that which it has provided to the complainant, however it has not provided this, citing regulation 12(4)(b) as the relevant exception. It informed the Commissioner that it had taken over 5 hours to locate, retrieve and extract the information which it had provided to the complainant in response to that question in its letter of 18 October 2013. It estimated that it would take around 1 hour further to locate the further information it holds.
29. The Commissioner, having taken into account the estimated time taken to comply with the request, taking parts 1-7 of the request as if they had all been answered at the one time, considers that, given the hours taken and resources which would be required to fulfil the request, not only is it unreasonable to expect the Environment Agency to comply with the request, it is manifestly unreasonable on cost grounds. The Environment Agency has also informed the Commissioner that it considers that regulation 12(4) applies as the request is vexatious. Therefore, the Commissioner has gone on to consider whether the request is vexatious.
30. In arguing that the request was vexatious, the Environment Agency referred to a decision of the Upper Tribunal in *Information Commissioner v Devon CC and Dransfield*<sup>1</sup>, where Judge Wikeley

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<sup>1</sup> GIA/3037/2011

discussed factors that may be considered when deciding if a request can be characterised as vexatious:

*"It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes –(1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff)."*

31. The Commissioner has used these headings below and has set out the Environment Agency's arguments together with his own comments. However, before discussing this specific request the Commissioner considers it is important to briefly set out the background to the issues raised by the complainant and his history of dealing with the Environment Agency.
32. It is apparent from the Environment Agency's responses to this request, that the context and history of the matter is important. The Environment Agency made it clear that in determining this request was manifestly unreasonable it had taken account of the previous requests and correspondence it had received from the complainant regarding similar issues. It also outlined, for the Commissioner's benefit, the context of the requests, which relate to SMPs (Shoreline Management Plans).

## **Is the request vexatious?**

### **Burden**

33. The Environment Agency has provided details of all the requests for information it has received from the complainant since April 2011. Many of these requests are for information regarding SMPs and related matters. Having looked at these the Commissioner notes that there have been 25 separate items of correspondence by the complainant to the Environment Agency, many of which were requests regarding SMPs and related matters (including this request) since April 2011. He also notes that many of these have been very lengthy in nature, e.g. a 35 page letter on one occasion, and on others attaching lengthy e-mail chains. The Environment Agency argues that these requests are for closely linked and substantially similar information and are often repeated.
34. The Environment Agency argues that the requests from the complainant are often detailed and complex, requiring specialist understanding and input to respond to. The Environment Agency has stated that it has limited resources to respond to requests of this complex and specialist nature, particularly at a local level. It became

necessary to get a national specialist to correspond with the complainant. The national specialist spent a considerable amount of time corresponding with the complainant and a meeting was offered, in which the complainant would have had the opportunity to speak with individuals with specialist understanding and expertise in the matters raised by the complainant. As the complainant declined this offer, the Environment Agency has informed the Commissioner that it cannot continue to respond to requests of this length and nature, as the requests are complex and its specialist team is small. The Environment Agency also argues that the volume of requests has placed an excessive burden on the specialist team which they anticipate will continue in the future if they continue to respond to new requests from the complainant.

35. The Commissioner accepts that when considered in the context of the Environment Agency's previous contact with the complainant and the other requesters, the request could impose a burden in terms of time and resources, distracting the Environment Agency from its main functions. The Environment Agency has been able to clearly demonstrate the number of requests that have been made. As such the Commissioner is of the view that complying with this request is likely to lead to the complainant making future requests for information.

## **Motive**

36. The Environment Agency considers that the complainant is attempting to find out information he believes he is entitled to. It recognises that it can be appropriate for a series of requests to be made which are linked where disclosures raise further questions. However, the Environment Agency believes that it is now beyond the point when the complainant's requests are solely for the purpose of understanding SMP8 (a specific SMP) further. Indeed, the complainant has indicated that he will continue to oppose it. The Environment Agency has informed the Commissioner, by way of background, that the SMP was developed following considerable consultation and public involvement – but it is not prescriptive. It is only an initial preferred policy that in the future will be considered first in the light of information that is available at that future time. The Environment Agency does not consider that it is a valid use of its resources to continue to debate the document when at the time that any action is being considered in the future there will be evidence to assess the consequences of sea level rise, coastal squeeze and pressure on defences, etc.

### **Serious purpose or value**

37. The Environment Agency accepts that the complainant considers there is a serious purpose to his requests but the Environment Agency argues that it has provided all the information, explanations and advice that it can reasonably be required to.
38. The Commissioner accepts that the complainant's requests cover similar ground to previous requests and relate to SMP8 and related matters. He has seen the complainant's correspondence and accepts that the requests have a serious purpose, however the Environment Agency does appear to have provided everything the Commissioner could reasonably require it to provide in response to those requests.

### **Harassment or distress**

39. The Environment Agency considers that objectively there have been times when the complainant's correspondence to its officers would cause them to feel harassed, even if that was in no way the complainant's intention. There are examples in the correspondence of an officer responding in great detail to the complainant's queries, only for the complainant to very quickly send back a further lengthy e-mail, querying the information and whether a response is adequate, at times querying competence, asking for more detail or more evidence. Where the complainant does not accept a response, he repeats the question. Whilst the Environment Agency recognises that someone with a serious purpose may feel very strongly about an issue, and may be very assertive in putting their viewpoint across, it contends that, if the answers provided by it will not change (e.g. the guidance for sea level rise), then to continue to require its officers to respond would continue the feeling of harassment for them in being prevented from carrying out their main duties at work. The Environment Agency informs the Commissioner that its officers are affected by having to repeatedly consider detailed and lengthy emails from the complainant, working out whether they contain requests for information, or explanation, or just comments. This is compounded by the fact that this is a highly specialised area of work and so continually needs to involve the same officers who understand the issues.
40. Having seen evidence of the above in the bundle of correspondence provided to him by the Environment Agency, the Commissioner accepts that the Environment Agency's staff could feel harassed by the complainant's correspondence, even if he did not intend this to be the case.

41. Having taken all the circumstances into account the Commissioner is minded to accept the request is vexatious when seen in the context of all of the previous correspondence with the Environment Agency. The burden which has been clearly imposed upon the Environment Agency due to the pattern, frequency and nature of the correspondence would be likely to be categorised as vexatious if the request were considered under section 14 of FOIA. As such he accepts that the request is 'manifestly unreasonable' under the provisions of regulation 12(4)(b) of the EIR.
42. Consequently, as is the statutory requirement under the EIR, it is left for the Commissioner to assess whether the strength of the public interest arguments in disclosure are sufficient to outweigh the concerns raised in this case about the diversion of resources.

### **The public interesting in disclosing the information**

43. The Environment Agency has explained that, in relation to part 1, it considers that in general the disclosure of environmental information furthers the understanding of and participation in the public debate of issues of the day; promotes accountability and transparency by public authorities for decisions taken by them; allows individuals to understand decisions made by authorities which affect their lives, and in some cases assisting individuals in challenging those decisions. The Commissioner agrees that these are strong arguments in favour of disclosing the information.
44. The Environment Agency also considers that release of environmental information can promote accountability and transparency in the spending of public money, and bring to light issues affecting public health and safety. The Commissioner agrees that these are also strong arguments in favour of disclosure.

### **The public interest in maintaining the exception**

45. However, the Environment Agency also considers that, due to the huge volume of data regarding these issues, the time and effort involved in finding, collating and giving necessary explanations would be disproportionate to any benefit in providing the information. It would be necessary for staff from specialist technical teams to locate, retrieve and assess the documents concerned prior to any release. It believes that to fulfil the complainant's request would take up valuable technical resource that is needed to protect the environment, which would not be in the public interest. The Commissioner accepts that these are strong public interest factors in favour of non-disclosure.

## **Balance of public interest arguments**

46. The Commissioner recognises the importance of accountability and transparency in decision-making by public authorities. He further recognises that there is an express presumption of disclosure within the EIR and that public authorities should aim to provide requested environmental information where possible and practicable.
47. The Commissioner further recognises that a public authority will always be expected to bear some costs when complying with a request. For the sake of the public interest test, however, the key issue is whether in all the circumstances this cost is disproportionate to the importance of the requested information. In the Commissioner's view, in this case, it is.
48. The Commissioner accepts that the request has serious purpose and value, and that the requested information may be of benefit to the wider public. However, he also recognises the public interest in not bringing information rights legislation into disrepute by requiring public authorities to respond to manifestly unreasonable requests. This will particularly be the case where, as here, the burden on a public authority is considerable – well-exceeding, for example, the appropriate limit stated in the fees regulations associated with section 12 of FOIA.
49. The Environment Agency has informed the Commissioner that its public interest arguments for and against disclosure, which it submitted in relation to part 1, still stand in relation to part 3 of the complainant's request, and that it has nothing further to add to these.
50. The Commissioner has decided that, despite the fact that the requested information may be of benefit to the wider public, it would be unfair to expect the Environment Agency to comply with the request because of the substantial demands it would place on the Environment Agency's resources and the likelihood that it would significantly distract officials from their key responsibilities within the organisation. Therefore, in all the circumstances, the Commissioner has found that the weight of the public interest arguments favours maintaining the exception.
51. In this case, the Environment Agency has, on several occasions, offered the complainant an opportunity to meet with officials so that the relevant information he is seeking in part 1 could be explained to him. The Environment Agency has also provided the complainant with information in response to parts 2, 3 and 4 of his request, despite the fact that it had already ascertained that a response to part 1 alone would incur an unreasonable level of costs, staff time and diversion of

resources. The Commissioner therefore considers that the Environment Agency has fulfilled its obligation to advise and assist in relation to the complainant's request.

### **Regulation 5(2) of the EIR**

52. The above regulation states that:-

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

The complainant's request was made on 15 July 2012, and the Environment Agency did not provide a response to this until 3 September 2012, in which it offered a meeting to bring the matter to a conclusion. Therefore, it did not comply with the provisions of regulation 5(2) of the EIR.

## Right of appeal

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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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: <http://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 .....**

**Rachael Cragg**  
**Group Manager**  
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