

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

Date: 26 November 2021

Public Authority: Department for Environment, Food & Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant requested copies of all responses submitted to a consultation. The Department for Environment, Food & Rural Affairs ("DEFRA") refused the request as manifestly unreasonable.
2. The Commissioner's decision is that the request engages Regulation 12(4)(b) of the EIR and that the balance of the public interest favours maintaining the exception.
3. The Commissioner does not require further steps.

Request and response

4. On 22 March 2021, the complainant wrote to DEFRA and requested information in the following terms:

"Under the Freedom of Information Act/Environmental Information Regulations, I am seeking copies of all submissions in response to Defra's consultation on 'The regulation of genetic technologies.'"
5. DEFRA responded on 7 April 2021. It relied on Regulation 12(4)(b) of the EIR to refuse the request as it considered the request to be manifestly unreasonable and the public interest favoured maintaining the exception.

6. Following an internal review DEFRA wrote to the complainant on 8 June 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 9 June 2021 to complain about the way her request for information had been handled.
8. The Commissioner considers that DEFRA set out, in both its refusal notice and internal review, a clear and detailed rationale as to why the request would be burdensome. The Commissioner considered that seeking a formal submission from DEFRA would add little additional value and, mindful of the current burden on all public authorities, she considered that it would be disproportionate to seek a further formal submission from DEFRA on this matter. She did however ask DEFRA if there was anything that it wished to add to its earlier responses. DEFRA had not replied at the date this notice was issued.
9. The scope of the Commissioner's investigation is to determine whether DEFRA was entitled to rely on Regulation 12(4)(b) of the EIR to refuse the request.

Reasons for decision

Would the requested information be environmental?

10. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*

- (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
11. Although she has not seen the requested information, as it is information relating to legislation on genetically modified organisms, the Commissioner believes that the requested information is likely to be information on a "measure" affecting the elements of the environment. For procedural reasons, she has therefore assessed this case under the EIR.

Regulation 12(4)(b) – Manifestly Unreasonable (burden)

12. Regulation 5(1) of the EIR states that:

"a public authority that holds environmental information shall make it available on request."

13. Regulation 12 of the EIR states that:

(1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*

(a) *an exception to disclosure applies under paragraphs (4) or (5); and*

(b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) *A public authority shall apply a presumption in favour of disclosure.*

(4) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*

(b) *the request for information is manifestly unreasonable;*

14. The Commissioner considers that a request can be manifestly unreasonable for two reasons: firstly, if it is vexatious and secondly

where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources.

15. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOI Act 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". This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as £600 for central government departments and £450 for all other public authorities.
16. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
17. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - 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.
18. One key difference between Regulation 12(4)(b) of the EIR and Section 12 of the FOIA is that, as the Regulations do not apply to the EIR, a public authority may take account of any time that it would need to spend considering redactions.

DEFRA's position

19. In its refusal notice, DEFRA noted that it had received in excess of 6,000 responses to its consultation. It argued that it could not disclose any of the submissions until it had satisfied itself that any personal data or commercially sensitive information had been redacted. It stated that five minutes per response was a "conservative estimate" of the amount of time that would be required to carry out the necessary work and therefore it estimated that complying with the request would require over 500 hours of work.
20. DEFRA also noted that it intended to publish a summary of the responses along with the Government's response to the consultation

later in the year – meaning that the public interest in disclosure would not outweigh the public interest in maintaining the exception.

21. When seeking an internal review, the complainant challenged DEFRA's assertion that it would need to redact large amounts of information. She noted that the electronic portal through which the consultation had been managed allowed users to determine whether or not they wished their responses to remain confidential. She also noted that the only questions that might have required respondents to provide personal data were at the beginning and were thus easily removed from each response. Finally, she argued that respondents should have had a reasonable expectation that their responses might be disclosed under the EIR.
22. In its internal review, DEFRA accepted that it did have a confidentiality filter in its online portal – however it pointed out that, even for those who had not asked for their submission to remain confidential, DEFRA still had an obligation to ensure that no personal data had inadvertently been included in the free text response boxes.
23. More importantly, DEFRA also noted that the majority of the responses it had received (3,347) had not been submitted via the online portal, but had in fact been submitted via email. These responses did not follow a standard pattern and could not be easily filtered in the way that responses via the portal could be filtered. These emails would therefore all need to be reviewed manually to ensure that any commercially sensitive or personal information had been removed. This would still require a significant amount of time to process, causing an unreasonable diversion of resources.
24. Finally, DEFRA noted that, if it were to filter out some responses altogether, there would be no guarantee that the remaining responses would also be representative of the responses that had been filtered out. Disclosing these responses might risk giving a misleading picture of all the responses DEFRA had received.

The Commissioner's view

25. In the Commissioner's view, DEFRA has demonstrated why the request would impose a manifestly unreasonable burden.
26. Had the request been dealt with under the FOIA, sorting through the correspondence received by email alone would have required DEFRA to review each email in under 26 seconds in order to comply with the request without exceeding the FOIA cost limit. That 26 seconds would include both the time spent identifying exempt information and the time spent physically separating that information from the information to be disclosed. The Commissioner does not consider that this is feasible.

27. DEFRA's estimate of the amount of time it would need is 5 minutes per response. The Commissioner notes that, even if DEFRA was able to review each email and remove sensitive information within a single minute, it would still require over 55 hours of work to review all 3,347 emailed responses.
28. Furthermore, the Commissioner notes that the request sought *all* responses to the consultation – not those submitted in any particular way. Therefore all 6,000 responses fall within scope and must be reviewed.
29. In addition, the Commissioner notes that DEFRA is not permitted, under EIR, to withhold responses merely because the respondent has asked for the response to remain confidential. It may only withhold information if an EIR exception would apply to that information and if the balance of the public interest favours maintaining that exception. For responses that have been provided by, or on behalf of, organisations (which would not be personal data), DEFRA would need to establish some form of detriment before it could apply an exception – regardless of what had been stated on the response. Therefore DEFRA could not comply with its obligations under EIR by simply excluding portal responses where the respondent had asked for their submission to remain confidential – it would need to consider each one individually.
30. In the case of portal responses where the respondent had not asked for their response to remain confidential, the Commissioner does not accept that DEFRA would need to carry out exhaustive checks for personal data. Those submitting such responses should have a reasonable expectation that they will be published in full – and should therefore take steps to ensure that sensitive information has been removed. Reasonable checks to ensure that contact details have been removed should be sufficient for DEFRA to fulfil its obligations.
31. Nevertheless, the Commissioner considers that DEFRA has amply demonstrated that the volume of information that falls within the scope of the request is significant and that the amount of work required to deal with each response cannot be done quickly. The Commissioner is therefore satisfied that complying with this request would impose a manifestly unreasonable burden on DEFRA and thus Regulation 12(4)(b) of the EIR is engaged.

Public Interest Test

32. The Commissioner recognises that genetically modified organisms are controversial. There is a considerable public interest in understanding how such organisms are regulated especially where – as in this case – there is a realistic possibility of a change in legislation.

33. That said, there is an even stronger interest in protecting public authorities from requests that impose a manifestly unreasonable burden – especially where that burden will divert the public authority's resources to an unreasonable extent.
34. Even if DEFRA were to be required to comply with the request, the information that would be disclosed would present only a partial picture of the responses provided – one which would be so incomplete as to be potentially misleading. The public interest in disclosing an incomplete and unrepresentative sample of responses is considerably weaker than in disclosing an accurate representation of responses.
35. DEFRA has noted that it intends to publish a summary of the consultation responses – as well as the Government's response to the consultation. The Commissioner therefore considers that the balance of the public interest lies in allowing DEFRA to continue with that work.
36. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining this exception.
37. Finally, the Commissioner has considered the presumption in favour of disclosure. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. The Upper Tribunal in *Vesco v Information Commissioner & Government Legal Department* [2019] UKUT 247 (AAC):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
38. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Other matters

39. Section 47 of the FOIA imposes a general duty on the Commissioner to promote best practice in dealing with FOIA requests. Regulations 16(5) and 16(6) of the EIR impose an equivalent duty in respect of requests for environmental information.
40. The Commissioner regularly highlights, in her decision notices, examples of poor request-handling practice. It is equally important to highlight examples of good practice.
41. DEFRA's refusal notice contained a detailed explanation as to why the exception was engaged. When then the complainant made some reasonable counter-arguments, DEFRA's internal review dealt with those arguments clearly and concisely.
42. Whilst the quality of these responses did not, in this instance, prevent a complaint to the Commissioner, it has meant that she has been able dispose of the complaint without requiring any significant further input from DEFRA.

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

44. 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.
45. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF