

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 February 2014

Public Authority: Department for Environment Food and Rural Affairs (DEFRA)

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information from DEFRA about correspondence DEFRA has had about the implementation of the Door Drop Preference Service ("DDPS") covering the period from 7 May 2012 to 6 November 2012. DEFRA provided some correspondence that it held and sought to rely upon regulation 12(4)(d)(material in the course of completion) and regulation 12(4)(e)(internal communications) in relation to the remaining information. During the investigation the complainant advised that he accepted that regulation 12(4)(e) applied to some of the withheld information in so far as it related to internal communications.
2. The Commissioner's decision is that DEFRA is entitled to rely upon regulation 12(4)(d) in respect of the correspondence held as it relates to a voluntary agreement still being formulated. He is also satisfied that the public interest in releasing the information is outweighed by the public interest in withholding the information. He is therefore satisfied that DEFRA has met its obligations under the EIR and requires no steps to be taken to comply with the legislation.

Request and response

3. On 6 November 2012 the complainant contacted the Department for Environment, Food and Rural Affairs ("DEFRA") and requested information in the following terms:

"I am writing to request the release of all correspondence DEFRA has had about the implementation of the so-called "Door Drop Preference Service", covering the period from 7 May 2012 to today (6 November 2012).

As you will be aware, the "Drop Door Preference Service" is the opt-out service that was due to be launched in April this year as part of the "voluntary producer responsibility agreement" between the "direct mail" industry and DEFRA. I am interested in any correspondence DEFRA has had about the opt-out scheme, including correspondence with:

1. the parties that are part of the responsibility deal and/or the steering group overseeing the implementation of the agreement (the Direct Marketing Association, Royal Mail, WRAP and the Scottish and Welsh Governments);

2. "Other parts of the industry that are delivering unaddressed printed material to householders" (I am aware this sounds rather vague. To clarify, I am quoting from page 2 of the responsibility deal document dated November 2011. The document does not reveal who these "other parts" are but I understand DEFRA has agreed that it should talk with certain "other parts" before the DMA will launch the opt-out scheme. In other words, I am asking for any correspondence DEFRA has had with whoever these "other parts" may be,);

3. the Secretary of State for Environment, Food and Rural Affairs;

4. the media; and

5. members of the public."

4. On 7 November 2012 DEFRA acknowledged receipt of the request for information and advised that it would be dealing with matters under the Environmental Information Regulations 2004 ("EIR").
5. On 4 December 2012 the complainant received a letter dated 3 December 2012 from DEFRA advising that it would need to extend the time limit for responding to his request because of the complexity of the request and the volume of information that he had requested.

6. On 3 January 2013 DEFRA provided its response to the request. Some information was provided to the complainant and DEFRA sought to rely on exceptions under the EIR in relation to further information that it stated it held. It said it was relying on regulation 12(4)(d) of the EIR in respect of material which it considered to be still in the course of completion and regulation 12(4)(e) in respect of internal communications.
7. It also confirmed that the public interest was best served by maintaining the exception and withholding the further information it had identified and not provided. It stated that to release the information would severely hamper its ability to conclude the work required as it would hinder negotiations and discussions with the industry bodies concerned.
8. On 17 February 2013 the complainant advised DEFRA that he was not satisfied with this response and asked for the decision to withhold information to be reviewed.
9. On 29 April 2013 the complainant sent a further email chasing up a response to his request for an internal review of the decision to withhold information.
10. On 22 May 2013 (letter dated 20 May 2013) the complainant lodged a complaint with the Information Commissioner's Office stating that he was not satisfied with the lack of response he had received to his request for an internal review.
11. On 3 October 2013 DEFRA provided a response to the complainant's request for an internal review. It maintained that it continued to rely upon regulation 12(4)(d) and 12(4)(e) of the EIR as a basis for not providing the requested information and that the public interest would be best served by maintaining the exception. It also apologised to the complainant and to the Information Commissioner (the "Commissioner") for the lack of response to the request for internal review.

Scope of the case

12. On 15 October 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He stated that he was not satisfied with the response received.
13. During the course of the investigation the complainant clarified the scope of his request and indicated that he accepted that regulation 12(4)(e) applied to some of the withheld information in so far as it related to internal communications only.

14. Therefore the scope of this case has been to consider whether DEFRA was correct in relying upon regulations 12(4)(d) of the EIR only in refusing to provide further information which fell within the scope of the request dated 6 November 2012.

Reasons for decision

Is any of the requested information, if held, "environmental"?

15. "Environmental Information" is defined at regulation 2 of the EIR. In order for it to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) to (f) of the EIR – constituting "information on" any of the subjects covered by those six sub-sections.
16. The complainant has requested correspondence concerning information about a proposed voluntary agreement to introduce a single opt out system for consumers in relation to unaddressed direct marketing mail. The Commissioner is satisfied that the requested information is on a measure designed to protect the elements and factors cited in regulations 2(1)(a) and 2(1)(b) of the EIR and therefore it is environmental information falling within Regulation 2(1)(c).
17. He has therefore concluded that the requested information, falls within the definition of environmental information set out at regulation 2(1)(c) of the EIR.

Regulation 12(4)(d)

18. Regulation 12(4) of the EIR states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
19. In considering the engagement of this exception it is not necessary to show that disclosure would have an adverse effect although this may be relevant to the public interest test which applies in this case.
20. Consideration of this exception is a two-stage process. First the information must fall within one of the classes specified in the exception. Secondly, this exception is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure.

21. DEFRA explained to the complainant and to the Commissioner that the withheld information is part of material which relates to and is connected with the development of new responsibility deals with the magazine and newspaper sectors to improve the environmental impact of paper
22. As part of this ongoing discussion with the industry there is a proposed voluntary agreement dealing with the introduction of an industry wide consumer opt-out to stop unaddressed direct marketing material and mail. DEFRA provided the Commissioner with details as to the negotiations between the various bodies consulted on the proposed opt-out and the views of those parties as to their relative positions on the proposals.
23. The Commissioner is aware from the information provided that negotiations are still ongoing and the proposals for the opt-out are still under review with discussions still taking place between the parties as to their relative positions on the proposed voluntary agreement.
24. The complainant has submitted that as the information he is seeking relates to finished pieces of correspondence the information he seeks cannot be in the course of completion.
25. As to whether this exception is engaged, the Commissioner's published guidance¹ states that:

*"The fact that the exception refers to both **material** in the course of completion and unfinished **documents** implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion."*
26. After viewing the withheld information and taking into account the submissions made, the Commissioner considers that the correspondence withheld relates to material which is still in the course of completion. Whilst the correspondence held consists of completed documents it relates to material concerned with the formulation and development of a voluntary sector wide agreement to improve the environmental effect of paper by way of a consumer opt-out provision.
27. DEFRA has also provided a time estimate of the end of this financial year as to when it considers that the negotiations between the parties in the

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx

industry will be completed, at which point the agreement in relation to the direct opt –out should be in place and no longer considered in the process of formulation.

Public Interest Test

28. When regulation 12(4)(d) is engaged, the public authority must still carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.
29. The factors determining the weight of the arguments for and against disclosure can include: the likelihood and severity of any adverse effect; the age of the information; how far disclosing the information would serve the public interest; and what information is already in the public domain.
30. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. In the context of EIR, there is a public interest in a sustainable environment. More generally, there is also a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes.

Public interest factors in favour of disclosure

31. The complainant has argued and DEFRA has acknowledged that there is real public interest in the development of measures designed to reduce the amount of unsolicited advertising material that the public receives.
32. Also given the announcement of the opt-out scheme was made towards the end of 2011 there will be general interest as to why the scheme has not been launched and the reasons for this given the emphasis placed upon the commitment to reducing waste and the inconvenience to members of the public who receive unsolicited marketing material. There is always public interest as to whether a government has the ability to tackle environmental problems and whether a system of self-regulation by the industries is sufficient to achieve identifiable progress in the reduction of waste.

Public interest factors in favour of maintaining the exception

33. DEFRA has advised the Commissioner that given the nature of the discussions it believes that any release of information which is

connected with the proposed opt-out would adversely affect the negotiations as the correspondence withheld discusses the relative position of the parties concerned in respect of a voluntary agreement which is still being formulated.

34. DEFRA has argued that to reveal the position of the respective parties involved in the negotiations would potentially destabilise the progress made to date. This could potentially result in one or more parties withdrawing from the discussions which are taking place to formulate a working voluntary agreement on the reduction of unsolicited advertising material. DEFRA has maintained that a breakdown in these discussions could jeopardise its ambitions in respect of the overall reduction in paper waste in this sector.

Balance of the public interest arguments

35. The Commissioner considers that there is a public interest in disclosing information relating to attempts to establish voluntary agreements to restrict the impact of unsolicited advertising material and matters concerning the corresponding reduction of paper waste.
36. However the Commissioner considers that in this case DEFRA's negotiations and discussions with the sector are still ongoing and as a consequence a final policy position has not yet been reached.
37. It has explained that, whilst progress has been made, to release information into the public domain relating to a period of time when negotiations were at their "embryonic stage" (November 2011) could undermine the progress made to date and could jeopardise the voluntary agreement being finalised and being adopted by all parties involved.
38. The Commissioner considers that there is a strong public interest in allowing DEFRA the safe space to conclude its negotiations. He recognises that brokering voluntary arrangements between parties which may materially affect their business opportunities has to be handled in a sensitive and considered manner to achieve the finalisation of the process and the establishment of a defined policy moving forward which will have material benefits for the environment.
39. The Commissioner also considers that it is in the public interest not to hinder DEFRA's ongoing relationship with the external bodies it is working with to finalise the voluntary agreement which would see the introduction of the Door Drop Preference Service. It should be noted again that the aim of the scheme is to reduce the amount of unsolicited marketing material delivered to consumers, with a consequent reduction

in paper waste – which would have a positive impact upon the environment.

40. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.
41. The Commissioner therefore considers that DEFRA has acted appropriately in withholding the requested information and is entitled to rely upon regulation 12(4)(d) of the FOIA.

Other Matters

42. Part IV of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Guide to Freedom of Information', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing a review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over seven months for an internal review to be completed, despite the publication of his guidance on this matter.

Right of appeal

44. 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

45. 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.
46. 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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