

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

**Decision notice**

**Date:** 12 October 2015

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

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

**Decision (including any steps ordered)**

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1. The complainant has requested wide-ranging information about two meetings between the Prince of Wales and two Secretaries of State. DEFRA identified that the information described in the request spanned two access regimes, the FOIA and the EIR. It refused to comply with the request on the basis that to do so would exceed the appropriate limit under section 12(1) of the FOIA; and, to the extent that it also sought access to environmental information, responding to the request would also be manifestly unreasonable under regulation 12(4)(b) of the EIR.
2. The Information Commissioner's decision is that complying with the request would exceed the appropriate cost limit under section 12(1) of the FOIA for some of the information. In relation to the information which constitutes environmental information, it is also a manifestly unreasonable request by virtue of cost under regulation 12(4)(b) of the EIR and the public interest favours maintaining the exception. DEFRA is therefore entitled to refuse to comply with the request. However, the Commissioner found that DEFRA breached regulation 11(3) of the EIR by failing to provide an internal review. The Commissioner requires no steps to be taken.

**Request and response**

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3. On 1 October 2014, the complainant wrote to DEFRA and made the following request for information, which he specified should be dealt with under the EIR:

*"My request concerns two separate meetings involving two Secretaries of State and the Prince of Wales which are listed on the court circular.*

*The most recent meeting with Elizabeth Truss took place on 9 September 2014. The earlier meeting with Owen Paterson took place on 2 May 2014.*

- 1. In the case of each meeting can you please provide copies of all correspondence and communications (including emails) between the relevant Secretary of State and His Royal Highness the Prince of Wales which in any way relates to the meeting and the topics under discussion at this meeting. Please note that the reference to His Royal Highness the Prince of Wales should also include his Private Secretary and or his private office. Please note that the reference to each Secretary of State should include their Private Secretary and or their private office. This correspondence and communication could have been generated prior to the meetings taking place or it could have been generated afterwards.*
- 2. In the case of each meeting can you please identify any other representatives and or employees from the department who accompanied the Secretary of State. Can you please identify all other individuals at the meeting irrespective of whether they are connected to the department.*
- 3. In the case of each meeting can the department please provide copies of all documentation, correspondence and communications (including emails) held by the organisation which in any way relates to the meeting and the topics under discussion at this meeting.*
- 4. In the case of each meeting can the department please provide a list of all environmental topics covered at the meeting.*
- 5. In the case of each meeting can the department please provide copies of any briefing notes and or similar which were issued to the Secretary of State and or any other department staff member or representative prior to the meeting taking place.*
- 6. Can the department please provide copies of any correspondence and communications (including emails) between both Secretaries of State and any other departmental employee which in any way relate to the meetings and the topics under discussion at this meeting. These communications could have*

*pre-dated the meetings or it could have been generated afterwards."*

4. DEFRA responded on 17 December 2014. It stated that it did not hold information in respect of the earlier meeting of 2 May 2014. It confirmed that it held information in respect of the later meeting, on 9 September 2014, but that it was exempt from disclosure under section 37(1)(aa), 40(2) and 41(1) of the FOIA.
5. On 17 December 2015 the complainant asked DEFRA to conduct an internal review, arguing that the request should have been considered under the EIR.
6. Despite the Commissioner also asking DEFRA to complete the internal review, it failed to do so.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 25 March 2015 to complain about the way his request for information had been handled. He drew the Commissioner's attention to DEFRA's failure to consider the request under the EIR and to conduct an internal review.
8. During the course of the Commissioner's investigation, DEFRA withdrew, in its entirety, the position set out in its refusal notice of 17 December 2014. Its amended position is that the information described in the request spans different access regimes; some of it would fall to be considered under the FOIA and some under the EIR.
9. In respect of the information covered by the FOIA, it has argued that compliance with the request would exceed the appropriate limit under section 12(1). In respect of the information covered by the EIR, it has refused to deal with the request on the basis that it is manifestly unreasonable within the meaning of regulation 12(4)(b).
10. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
11. The Commissioner therefore considers the scope of the decision notice to be DEFRA's application of section 12(1) and regulation 12(4)(b) to refuse to comply with the request. He has also considered its failure to conduct an internal review.

## Reasons for decision

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### Requests that span different access regimes

12. DEFRA initially considered the request only under the FOIA. The complainant maintained that the information he had asked for fell within the definition of "environmental information" and therefore that the request should instead be considered under the EIR.
13. The EIR give rights of public access to environmental information held by public authorities. "Environmental information" is defined at regulation 2(1) of the EIR and covers information held in different formats on matters relating to the environment.
14. In its submissions to the Commissioner, DEFRA conceded that some of the information described in the request would fall to be considered under the EIR rather than under the FOIA. However, it was unable to specify what part of the definition at regulation 2(1) the information would fall under due to factors discussed at paragraph 34, below.
15. DEFRA's overall position is that compliance with the request would be excessively costly.
16. Regulation 12(4)(b) of the EIR says that a public authority may refuse to disclose information if the request for information is manifestly unreasonable. The purpose of the exception is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling a request.
17. Regulation 12(4)(b) can be applied when a request is vexatious or when the cost of complying with it is too great. In this case DEFRA considers that the request is manifestly unreasonable by virtue of cost.
18. DEFRA also considers that it is not obliged to comply with the request under section 12(1) of the FOIA. Section 12(1) states that a public authority is not obliged to comply with a request for information if the public authority estimates that the cost of complying with the request would exceed the appropriate limit.
19. DEFRA has considered the request under both regimes because some of the information described in it would fall under the FOIA and some would fall under the EIR. In order to identify any and all specific communications, documents and items of correspondence containing information about the two meetings, DEFRA would need to examine each of them. Without conducting an analysis of all the information described in the request it would not be possible to ascertain whether

information falls under the FOIA or the EIR. Consequently, DEFRA has treated the request under both the FOIA and EIR.

20. The Commissioner has issued guidance<sup>1</sup> on such cases. This guidance says that in order to calculate the costs involved in complying with a request that spans different access regimes, public authorities should take two steps.
21. First, they should consider the request under the FOIA. They should then consider any additional obligations under the EIR. This is not quite the approach DEFRA has taken. However, it has considered both the FOIA and EIR in its submissions to the Commissioner, and the Commissioner has taken this into account.

### **Step 1 – considering the request under the FOIA**

22. DEFRA says it is not obliged to comply with the request because to do so would exceed the appropriate limit under section 12(1) of the FOIA.
23. Section 12(1) of the FOIA allows a public authority to refuse to deal with a request where it estimates that the cost of complying with the request would exceed the appropriate limit. The appropriate limit in this case is £600, as laid out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”).
24. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time (for DEFRA, the appropriate limit of £600 provides an effective time limit of 24 hours work):
  - 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.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1192/calculating\\_costs\\_foia\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1192/calculating_costs_foia_eir_guidance.pdf)

25. Where a public authority considers section 12(1) to be engaged, section 16 of the FOIA requires it to provide advice and assistance to the requester, so far as it would be reasonable to do so.
26. To determine whether DEFRA applied section 12(1) and section 16 of the FOIA correctly, the Commissioner has only considered the submission DEFRA provided to him as part of his investigation, as it had not adopted this position when corresponding with the complainant.
27. DEFRA says that its records management practices and the broad scope of the request are the determining factors in its conclusion that compliance with the request would exceed the appropriate limit. It explained that it follows the recommendations in the Cabinet Office Guidance Model 2<sup>2</sup> with regard to the management of papers in Private Offices. Under Model 2, the Private Office is not responsible for capturing and placing the records it handles into the departmental records system; the maintenance and management of such records is instead delegated to the numerous policy teams throughout the department.
28. DEFRA said that prior to issuing the refusal notice dated 17 December 2014, it conducted searches within the Secretary of State's Private Office (the term "Private Office" is used to describe the offices where the Secretary of State's private secretary and other staff are located). The searches only located two documents, in relation to the meeting on 9 September 2014. However, for the reasons set out above, it cannot be established that this information constitutes all of the information which DEFRA holds in relation to both meetings, which falls within the scope of the request. Such was the range of information requested (effectively, any and all information DEFRA held which related to the two meetings), identifying all the documents that might hold information within the scope of the request would involve a search of the whole department. Relevant information could potentially be held by one or more of at least 500 teams across DEFRA. Assuming one person per team spent 10 minutes (which DEFRA considered to be a conservative estimate) searching for and extracting any relevant information held across a variety of possible formats, this would equate to 83 hours work, or a cost of £2075. This exceeds the appropriate limit of 24 hours work, costing £600.

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<sup>2</sup> <http://www.nationalarchives.gov.uk/documents/information-management/popapersguidance2009.pdf> paragraph 21

29. The Commissioner has considered DEFRA's reasoning and estimations. In view of the lack of specificity contained in the request and DEFRA's documented records management procedures, he accepts that the cost limit would be exceeded by some way and that DEFRA is entitled to rely on section 12(1) to refuse to comply with the request.
30. As set out above, where section 12 applies, section 16 of the FOIA requires a public authority to provide advice and assistance to requesters, so far as it would be reasonable to do so. In this case, as noted in paragraphs 8 – 9 above, DEFRA only applied section 12(1) at the point it made submissions to the Commissioner about the complaint, after the complainant had referred the matter to the Commissioner for a decision. Furthermore, aside from the question of costs, because of the nature of the information requested, it was also likely to be exempt from disclosure, as a class, under section 37(1)(aa) (information relating to communications with the heir to, or the person who is for the time being second in line of succession to, the Throne - an absolute exemption). The Commissioner is therefore satisfied that, in the circumstances of the case, it was not reasonable for DEFRA to provide advice and assistance to the complainant on how he might refine his request in such a way that it might succeed.

### **Step 2 – considering any additional obligation under the EIR**

31. As set out above, when a request appears to span different access regimes, it should first be considered under the FOIA, and then any additional obligations under the EIR should be considered.
32. DEFRA has cited regulation 12(4)(b) of the EIR (manifestly unreasonable request by virtue of cost) in respect of the request. Even though the Commissioner considers the request has been correctly refused under the FOIA, DEFRA should still consider its obligations under the EIR. This is because under the EIR the complainant has a separate right of access to any environmental information covered in the request. Therefore, in this case the Commissioner has gone on to consider any additional obligations DEFRA may have under the EIR.
33. Under the EIR, it will only be permissible to take into account the costs related to the provision of environmental information as defined at regulation 2(1). However, the Commissioner's guidance says that public authorities may take into account the costs of collating *all* the information falling within the scope of a request as long as doing so is a necessary first step, because they cannot otherwise isolate the environmental information.
34. DEFRA has acknowledged that it is highly likely that some, but not all, of the relevant information held will be environmental information. As the



request is wide-ranging, it has refused the request under section 12(1) of the FOIA and 12(4)(b) of the EIR. In order to go on to consider its obligations under the EIR, DEFRA would have to devise a search strategy in which it only searches for the environmental information.

35. The Commissioner considers that DEFRA would be unable to devise such a strategy. This is because DEFRA does not have any way of knowing in advance which information will contain environmental information and which will not. DEFRA would consequently have to collate all the requested information before it can go on to isolate the environmental information. In this circumstance, the Commissioner accepts that collating all the requested information is a necessary first step because it cannot otherwise isolate the environmental information. He accepts that the costs of collating all the information can be taken into account when deciding if this part of the request is manifestly unreasonable under regulation 12(4)(b).

*Is the request a manifestly unreasonable request by virtue of cost?*

36. While section 12 of FOIA allows a public authority to refuse to comply with a request where it estimates that to do so would exceed the appropriate limit, the EIR contain no equivalent provision. However, the Commissioner considers that under the EIR, if a public authority is able to demonstrate that the time and cost of complying with a request is obviously unreasonable, regulation 12(4)(b) will be engaged.
37. The Commissioner is mindful of the fact that environmental information has been deemed to warrant its own access regime and therefore the detailed provisions of the FOIA cannot be transposed into the EIR. Nevertheless, the Commissioner considers it reasonable that, where appropriate, the FOIA should inform his understanding of the EIR.
38. Regulation 12(4)(b) makes it clear that it is not the intention of the EIR to place an obligation on public authorities to respond to any information request, regardless of the burden of processing that request. The Commissioner's view is that in section 12 of the FOIA, Parliament has given some indication of what it would consider to be an acceptable burden for an information request to impose upon a public authority. As set out at paragraph 23, section 12 of the FOIA (via the fees regulations) provides that DEFRA is not obliged to comply with a request where to do so would incur a cost to it of more than £600 or 24 hours work.
39. As detailed in paragraphs 27 – 29 above, the Commissioner considers that DEFRA's explanation of the time necessary to comply with the request is credible and reasonable. He has decided that DEFRA is entitled to refuse to comply with the request under section 12 of the



FOIA, because to comply with it would exceed the appropriate limit of £600

40. Using section 12 of the FOIA to inform his understanding of regulation 12(4)(b) has led the Commissioner to conclude that regulation 12(4)(b) is also engaged. The Commissioner has taken account of DEFRA's estimate of the time necessary to comply with the request and of the particular circumstances of this case. This includes the cost of carrying out the necessary first step of collating all the information, as described at paragraph 35. The Commissioner has therefore concluded that the request is also manifestly unreasonable within the meaning of regulation 12(4)(b), and that DEFRA is not obliged to comply with it.

*Public interest test*

41. Regulation 12(4)(b) is subject to the public interest test set out at regulation 12(1)(b). This says that a public authority may only refuse to disclose environmental information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

*Public interest arguments in favour of disclosing the information*

42. DEFRA accepts that disclosing the information it holds would satisfy the complainant's interests. It also acknowledges that there is a general public interest in transparency concerning meetings between the Prince of Wales and Government Ministers.

*Public interest arguments in favour of maintaining the exception*

43. DEFRA estimates that it would take 83 hours to search for and extract, information falling within the scope of the request. The diversion of resources to do this would inevitably distract DEFRA from its core work, and would have a serious impact on its delivery of core services.

*Balance of the public interest*

44. The Commissioner has considered the public interest arguments as they relate to DEFRA's application of regulation 12(4)(b) to the request. He has concluded that, because of the effort and costs involved in complying with the request, and the resulting impact on DEFRA's work, the public interest favours maintaining the exception at 12(4)(b).

**Regulation 9 – advice and assistance**

45. Regulation 9(1) provides that a public authority shall provide advice and assistance to applicants and prospective applicants. Regulation 9(2) provides that where a request is too broad, a public authority shall assist

an applicant to refine the request. In this case, although there would appear to be potential for the complainant to refine the scope of his request, the Commissioner considers that it was not reasonable to expect DEFRA to have complied with regulation 9(2), for the same reasons that he found it was not reasonable to comply with section 16 of the FOIA, detailed at paragraph 30.

### **Regulation 11 – representation and reconsideration**

46. Regulation 11 of the EIR provides that the applicant may make representations to a public authority if he or she believes that the authority has failed to comply with the EIR. Regulation 11(3) states that:

*"(3) The public authority shall on receipt of the representations and free of charge –*

*(a) consider them and any supporting evidence produced by the applicant; and*

*(b) decide if it has complied with the requirement."*

47. In this case, the complainant requested an internal review on 17 December 2014. Not having received a response, he asked the Commissioner to intervene, and on 25 February 2015 the Commissioner asked DEFRA to complete the review. DEFRA acknowledged receipt of the Commissioner's letter but it failed to complete an internal review.
48. Since DEFRA did not communicate the outcome of the internal review to the complainant, the Commissioner finds that it failed to comply with regulation 11(3) of the EIR.
49. DEFRA subsequently explained to the Commissioner that the failure was an oversight, and that it thought that it had responded to the internal review. It said that it was not until it received the Commissioner's further correspondence, dated 1 April 2015, that the error came to light.
50. Regulation 11 of the EIR sets out a clear statutory requirement for a public authority to conduct an internal review where requested. The Commissioner expects all public authorities dealing with requests for environmental information to adhere to the requirement and the statutory timescales set out in the EIR. The Commissioner monitors complaints received and uses the intelligence gathered to inform his enforcement activities.

## Right of appeal

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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 .....**

**Jon Manners**  
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