

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

Date: 1 August 2023

Public Authority: Department for Environment, Food & Rural Affairs

Address: Seacole Building
4th Floor
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information relating to SSSIs (Sites of Special Scientific Interest) from the Department for Environment, Food & Rural Affairs (Defra). Defra withheld the requested information under regulation 12(4)(e) of the EIR - internal communications - regarding part one of the request. At review, it stated that it did not hold information relating to part two of the request (regulation 12(4)(a)).
2. The Commissioner's decision is that, on the balance of probability, Defra does not hold any further information (not subject to an exception) falling within scope of the request. He also finds that Defra is entitled to withhold information under regulation 12(4)(e) of the EIR and that the public interest favours maintaining the exception. As Defra provided the complainant with environmental information to which they were entitled beyond the statutory time period, the Commissioner has found Defra in

breach of regulation 5(2) of the EIR. In providing its internal review late, Defra also breached regulation 11(4) of the EIR.

3. The Commissioner does not require further steps.

Request and response

4. On 10 January 2023 the complainant wrote to Defra and requested information in the following terms:

"This is an EIRs request.

1. Please provide details of any discussions within Defra between June and December 2022 over the possibility of including a target under the Environment Act for increasing the percentage of SSSIs in a favourable condition to 75% or some other level. I would like details of any discussions by email, text message and WhatsApp or meeting memoranda or briefing notes.

2. Please provide any advice received from Natural England, the Environment Agency or Defra on setting a target for the proportion of SSSIs in a favourable condition. Please ensure that any redactions you seek to make, based on the exceptions in the Regulations, are sufficiently granular.

Where you do cite exceptions, please explain how they directly relate to the withheld information, and, where applicable, how the public interest of withholding/releasing the information has informed your decision."

5. Defra notified the complainant that it required an extension on 6 February 2023 as it needed to consider possible exceptions. The material it needed to search through in order to establish what information fell within scope was complex and voluminous.
6. Defra responded on 7 March 2023 and confirmed that it held the requested information but withheld it under regulation 12(4)(e) of the EIR - internal communications.
7. On the same day the complainant made an internal review request.
8. Defra provided an internal review on 17 May 2023 in which it maintained its original position but also stated that it did not hold information relating to part two of the request (Regulation 12(4)(a)).

Scope of the case

9. The complainant contacted the Commissioner on 22 May 2023 to complain about the way their request for information had been handled. They stated that the withheld information should be released as it was in the public interest.
10. After the Commissioner sent his investigation letter, Defra located further information falling within scope of the request and disclosed it to the complainant on 21 July 2023. Additionally, it cited regulations 12(3) and 13(1) of the EIR to withhold the names of junior officials. It is unclear whether Defra cited this particular exception in its communication to the complainant.
11. The Commissioner considers that the scope of this case is Defra's citing of regulations 12(4)(a) and 12(4)(e) of the EIR and any procedural matters that have arisen.

Reasons for decision

Is the requested information environmental?

12. 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);
13. The requested information relates to information about targets for increasing the percentage of SSSIs. The Commissioner believes that the requested information is information falling within regulation 2(1)(c) - measures affecting or likely to affect the elements and factors referred to in (a).

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

14. 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 an applicant's request is received.
15. Defra confirmed in its internal review that it did not hold any information relating to part two of the request.
16. Responding to the Commissioner's questions, Defra explained that it had "systematically" searched electronic files and emails with the timeframe June to December 2022 -

"for references to a protected sites target under the Environment Act 2022, along with general discussions on the possible Environment Act targets and areas that were raised in the Environment Act consultation responses. Meeting notes, briefing notes and submissions, were also checked".

The Environmental Targets team and the National Biodiversity Targets team searched for documents "which were not specifically about protected sites but might have included an unscheduled discussion of a protected sites target". Searches were conducted both locally on personal computer systems and network systems.

17. Defra explained that "Emails rather than text or WhatsApp messages from work phones would have been used when carrying out this work within Defra".
18. Defra "focussed on the key emails and documents that discussed a statutory Environment Act Protected Sites target but excluded

discussions that followed about interim targets". Defra listed the search terms used.

19. Defra confirmed that no information had been deleted or destroyed. Its records management policy recommends that information is stored for seven years from the date it is saved or modified.
20. The Commissioner accepts, on the balance of probability, that the requested information at part two of the request is not held.
21. Although this a qualified exception, the ICO's position is that it is not necessary to go on to consider the public interest test as to do so would be illogical.

Regulation 12(4)(e) – internal communications

22. Regulation 12(4)(e) states that information is exempt from disclosure if it involves "the disclosure of internal communications". The Commissioner has published guidance¹ on regulation 12(4)(e) of the EIR which includes a description of the types of information that may be classified as 'internal communications'. To be considered an internal communication, the communication must stay within the public authority.
23. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. This applies to any communication that has been sent internally. A "communication" is something intended to transfer information from a person to one or more other people.
24. Defra confirmed to the Commissioner that the communications had not been shared.
25. Once the searches had been carried out, Defra only located two readouts [this is a summary document of the content of a meeting, telephone call etc that involves government officials], dated 20 October 2022 and 1 November 2022 and a briefing note for a meeting from October 2022, all of which were withheld.
26. The Commissioner accepts that the withheld information is internal communications. The exception is engaged.

¹ [Regulation 12\(4\)\(e\) – internal communications | ICO](#)

Public interest test

27. Although the exception is engaged, the Commissioner needs to go on to consider where the public interest lies in this matter.

Public interest factors in favour of disclosing the requested information

28. The complainant argued that there is a strong public interest in the requested information about SSSIs but did not add anything further.
29. Defra set out the public interest arguments in favour of disclosure in its internal review where it recognised the public interest in "meetings that Defra Ministers have". The review also mentioned accountability, transparency and the presumption in favour of disclosure in regulation 12(2) of the EIR.

Public interest factors in favour of maintaining the exception

30. Defra concluded that "there was a stronger public interest in withholding the information..." It argued that disclosing the information -

"would undermine effective government by discouraging frankness and candour in internal communications, damaging the quality of advice and ultimately lead to poorer decision making".

It accepted that it was in the public interest to address the "net decrease in the area of SSSIs in favourable condition" but that Defra needed a "safe space to consider options and then deliver them when briefing a Minister or preparing a readout". Additionally, releasing information,

"would risk inhibiting full, frank and open discussions as part of the process of ongoing work, particularly if those involved felt that speculative information relating to these discussions would be released before final decisions were made on those issues".

31. Part of the information was a briefing ahead of a meeting with Natural England. Defra contends that these briefings should remain private because they contain "strategy and priorities" and it believes that "the public interest lies in the policy outcome of these meetings, not the briefing materials going into them".

Balance of the public interest

32. Defra provided the Commissioner with some additional argument as to why it does not consider it to be in the public interest to disclose some of the withheld information. However, this cannot be included here as

Defra considers it to be 'in confidence'. The Commissioner has not, however, taken account of part of this particular argument in reaching his decision.

33. The Commissioner's guidance² underlines regulation 12(2) of the EIR - that a public authority must apply a presumption in favour of disclosure. A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
34. At the time the request was made the issue was still 'live'. Although the subject of SSSIs is clearly one that is of significant public interest, the Commissioner's decision is that the public interest favours maintaining the exception based on the timing of the request which was only two to three months after the information had been created.
35. However, the need for a safe space only lasts for a limited time. Consequently, the balance of the public interest regarding this particular information will decrease once a decision has been made.
36. As the Commissioner has decided that the withheld information has been appropriately cited he has not gone on to consider the withholding of third party personal data within that information.

Procedural matters

Regulation 5 of EIR – duty to make environmental information available on request

37. Regulation 5(1) of the EIR states that "a public authority that holds environmental information shall make it available on request." This is subject to any exceptions that may apply.
38. Defra provided the complainant with environmental information to which they were entitled outside the statutory time limits of the EIR. Therefore the Commissioner has found a breach of regulation 5(2) of EIR.

Regulation 11(4) – internal review

39. Regulation 11(4) of the EIR provides that a public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and

² [What do the EIR say? | ICO](#)

no later than 40 working days after the date of receipt of the representations.

40. Defra should have provided its internal review on 9 May 2023 but did not provide it until 17 May 2023. The Commissioner therefore finds that it breached regulation 11(4) of the EIR.

Right of appeal

41. 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

42. 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.
43. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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