

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

Decision notice

Date: 2 November 2018

Public Authority: Natural England
Address: Foss House
Kings Pool
1-2 Peasholme Green
York
YO1 7PX

Decision (including any steps ordered)

1. The complainant has requested information held by Natural England on site works in a specific area, including all correspondence, letters and notes relating to conservation sites and protected species. Natural England initially refused the request on the basis of regulation 12(5)(d) and 12(4)(e) and later introduced regulation 12(5)(f) of the EIR as a further basis for refusing the request.
2. During the course of the Commissioner's investigation the majority of the requested information was disclosed to the complainant but some information continued to be withheld on the basis of regulation 12(5)(f).
3. The Commissioner's decision is that Natural England has correctly applied the exception from disclosure at regulation 12(5)(f) to withhold this information. She requires no steps to be taken; however as the majority of information was provided outside of 20 working days she finds that Natural England did breach regulation 5(2) of the EIR.

Request and response

4. On 23 October 2017, the complainant wrote to Natural England and requested information in the following terms:

"I am writing on behalf of South West Products Limited to request all the following information Natural England holds in respect of the operations at the Eclipse Works (Ashcott Road, Meare near Glastonbury, Somerset, BA6 9SU) to cover all correspondence both internal and external including letters, emails and any associated reports, telephone or meeting notes either between themselves or with any third parties in relation to the following matter

Conservation Sites

- *Somerset Levels and Moors RAMSAR & SPA*
- *Ham Wall NNR*
- *Shapwick Heath SSSI and NNR*
- *Westhay Heath SSSI*
- *Street Heath SSSI*

Protected Species

- *Bittern*
- *Great Crested Newts"*

5. Natural England responded on 20 November 2017 and refused the request on the basis of regulation 12(5)(d) and 12(4)(e) of the EIR.
6. The complainant requested an internal review on 21 November 2017. In this the complainant pointed out that information on emissions could not be exempt from disclosure under regulation 12(5)(d) so asked Natural England if any information on dust or emissions was held and could be provided. The complainant also expressed concern at the blanket application of the exceptions.
7. Natural England conducted an internal review and responded on 26 January 2018. It explained that its role had been limited to providing advice on environmental legislation requirements and acting as an adviser to the Environment Agency and no information on emissions was held.
8. Natural England upheld its decision to withhold information under regulations 12(5)(d) and 12(4)(e) and also introduced a new exception – regulation 12(5)(f) – to exempt information provided voluntarily.

Scope of the case

9. The complainant contacted the Commissioner on 21 March 2018 to complain about the way her request for information had been handled.

10. During the course of the Commissioner's investigation; Natural England disclosed the majority of the information it held but continued to withhold some information, in the form of redactions from the information disclosed. These redactions were made on the basis of regulation 12(3) and 12(5)(f).
11. The Commissioner contacted the complainant following these disclosures to confirm the scope of any further investigation and the Commissioner therefore considers the scope of her investigation to be to determine if the remaining information has been correctly withheld under the 12(5)(f) exception in the EIR and to establish if Natural England has complied with the procedural aspects of the EIR in responding to the request.

Reasons for decision

Regulation 12(5)(f)

12. The exception has been applied to withhold information that consists of communications sent to Natural England by private individuals expressing their personal views and opinions. This includes the identities of those expressing the views.
13. Regulation 12(5)(f) provides that information will be exempt from disclosure if its disclosure would adversely affect:

"(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or ..."

14. The exception will protect confidentiality owed to a third party by a public authority where its disclosure would adversely affect the interests of the person who provided the information.
15. The information was provided to Natural England voluntarily by individuals who wished to express their views on the planning process. Natural England argues that the information was provided to it in

confidence and there was no expectation that information provided could be disclosed.

16. The individuals provided these views voluntarily and therefore the first part of the test, (i), has been met.
17. In considering part (ii) of the test, Natural England argues that the information was provided to it in confidence and therefore it was supplied in such circumstances that Natural England is not entitled to disclose it.
18. In common law, following the case of *Coco v Clark [1969] RPC 41*, when determining if disclosure would constitute a breach of confidence, the Commissioner considers that an authority will usually need to consider;
 - whether the information has the quality of confidence,
 - whether it was imparted in circumstances importing an obligation of confidence, and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
19. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
20. The Commissioner notes that the majority of the consultations Natural England opens for public comment are hosted on other websites, usually Defra, and set out the scope of the comments required but contain neither an explicit statement that comments will be confidential nor an explicit statement to the contrary.
21. That being said, the Commissioner accepts this ambiguity does imply a duty of confidence. The Commissioner considers there would be an expectation that commenting on a planning process would carry a degree of anonymity and comments would not be disclosed but only used to assist in the public authorities understanding of the issues around the issue being consulted on.
22. The Commissioner has therefore decided that the information has the necessary obligation of confidence and she has also decided that the information has the necessary quality of confidence. The withheld information is not trivial and is not otherwise in the public domain. It will contain identifying details of the individuals, but the comments

themselves may also contain information which could potentially lead to some of the individuals being identified.

23. Given that the information provides the views of those responding regarding a planning process and licence application, a disclosure of the information would be detrimental to the privacy of the individuals concerned as it would identify their own individual views with the published comments.
24. The Commissioner has also considered whether there would be a public interest defence to the disclosure of the information.
25. A disclosure of the comments would be in the public interest as it would shed some light on the views of individuals on the subject. Whilst Natural England also recognises the public interest in disclosure where it would show transparency in the action of public authorities it does not consider this public interest outweighs that in protecting private individuals from having their personal view placed in the public domain and breaching their confidentiality.
26. Natural England also argues that it is not in the public interest to harm the relationship between providers of information and Natural England. It considers that disclosing any personal view provided could affect the free flow of information to Natural England which it relies on to carry out its regulatory and statutory functions under legislation.
27. The Commissioner accepts that disclosing personal views provided to Natural England when there was an implied duty of confidence would potentially cause a chilling effect on future public participation. Licencing applications such as the one referred to in the request can be sensitive and there are a range of issues that can arise that individuals may want to comment on. Some individuals may be dissuaded from providing a view, particularly any which are controversial or contrary to majority opinion, if they are aware that their identity and comment could be disclosed.
28. Having considered this further the Commissioner is satisfied that the public interest would not provide a defence to an unauthorised disclosure of the information. The Commissioner has therefore decided that Natural England was correct to state that this information was provided to it in confidence, and therefore part (ii) of the test outlined above has been met.
29. For the purposes of part (iii) of the test, none of the individuals have been asked to consent to the disclosure of the information, however the Commissioner considers that Natural England is not under an obligation to contact each and every person who submitted their view to seek this

given the expectation of confidentiality which is inherent in this kind of communication.

30. The Commissioner also recognises that a disclosure of the comments without anonymising them would also be likely to engage Regulation 13(1) (personal data), however given the application of Regulation 12(5)(f) she has not needed to explore this further within this decision notice.

Regulation 5

31. The EIR places requirements on public authorities at regulation 5(2) which states that:

“Information shall be made available ... as soon as possible and no later than 20 working days after the date or receipt of the request.”

32. As the majority of the information requested was eventually disclosed to the complainant during the course of the Commissioner’s investigation the Commissioner has to conclude that Natural England has failed to respond and provide information within 20 working days. It has therefore breached regulation 5(2) of the EIR.
33. The complainant had concerns about why the position of Natural England had changed given the site matters that Natural England have been providing advice to the Environment Agency on are still outstanding. Unfortunately this is not a matter the Commissioner can comment on as the information has now been disclosed and she cannot speculate on the reasons for this change in position but she again stresses that this disclose is outside the required timescale and does constitute a breach of regulation 5(2) of the EIR.

Right of appeal

34. 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

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

35. 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.
36. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF