

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

Date: 30 July 2012

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

Address: Area 1B, Ergon House
Horseferry Road
London
SW1P 2AL

Decision (including any steps ordered)

1. The complainant has requested "all correspondence, statements, records, reports, memos, emails etc. that Defra used to defend the Whitburn case". Defra refused to disclose the requested information under regulation 12(5)(a), 12(5)(b) and 12(5)(d).
2. The Commissioner's decision is that Defra has correctly applied regulation 12(5)(a).
3. The Commissioner requires no steps to be taken.

Request and response

4. On 14 December 2011, the complainant wrote to Defra and requested information in the following terms:

"all correspondence, statements, records, reports, memos, emails etc. that Defra used to defend the Whitburn case."
5. Defra responded on 16 January 2012. It refused to provide the complainant with the requested information as it said the exceptions set out in regulation 12(5)(a), 12(5)(b) and 12(5)(d) EIR were applicable.
6. Following an internal review Defra wrote to the complainant on 8 March 2012. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the requested information should have been withheld under regulation 12(5)(a), 12(5)(b) or 12(5)(d) EIR.

Reasons for decision

9. Section 12(5)(a) EIR states that, "a public authority may refuse to disclose information to the extent that its disclosure would adversely affect, (a) international relations, defence, national security or public safety".
10. Defra has explained that this exception was applied to material relating to the conduct of Defra's defence of live infringement proceedings currently before the Court of Justice of the European Union (CJEU) relating to the requirements of the Urban Waste Water Treatment Directive in Whitburn. It said that prior to completing the internal review it sought the views of the European Commission on potential disclosure. The European Commission advised Defra that this was an ongoing case and disclosure of the requested information would undermine Court proceedings. Defra therefore concluded that the European Commission objected to disclosure. Defra also said that disclosure of the UK defence would also expose the arguments advanced by the European Commission in their pleadings. Defra argued that it owes the European Commission and the CJEU a duty of confidentiality, and disclosure against the European Commission's wishes would adversely affect the UK's international relations with those bodies.
11. Defra said that at the time of the original request, the oral hearing before the CJEU had taken place, however the Advocate General Opinion had not been issued. It confirmed that this was published on 26 January 2012. Defra said that although the hearing was in public and the Opinion revealed some aspects of the case, the pleadings have not been made available by the Court. Defra said that it is currently awaiting judgment in the case. It did however say that if it were to receive the request again once judgment had been issued it would reconsider its position.
12. The Commissioner considers that as the European Commission has expressly stated that disclosure would undermine court proceedings relating to ongoing infringement proceedings, disclosure in this case would adversely affect international relations. He therefore considers that regulation 12(5)(a) is applicable.

13. The Commissioner has therefore gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested information

14. Defra acknowledged that there are longstanding arguments about the environmental impacts of untreated waste water in Whitburn, and that there is a public interest in disclosure of any information relating to Whitburn bathing waters for local residents and business owners as well as visitors to the area.
15. Defra also said that disclosure would meet the general public interest in transparency and accountability. However it counter argued that disclosure at this stage would not enable further public contribution to decision-making in this matter, as there is no further opportunity for members of the public to submit evidence to the CJEU.
16. The complainant has argued that the information provided in the defence documents is inaccurate. Defra has said that it is confident that the information provided to the CJEU is accurate. Furthermore, it said any future decision following from the judgment of the CJEU may be subject to judicial review if unreasonable, such as if taken without regard to relevant, accurate information.

Public interest arguments in favour of maintaining the exception

17. Defra said that as infraction proceedings against the UK for breaches of the Urban Waste Water Directive have not yet concluded, disclosure of information forming part of the UK pleadings would prejudice the UK's relations with the European Commission and the Court of Justice, which would not be in the public interest.
18. Defra explained that in a previous DN which related to a very similar request, case reference FER0219897, the ICO decided that there was a very strong public interest in allowing the European Commission to "expedite an outcome in line with its original aim". The ICO's decision was underpinned by "the knowledge that the EC has initiated a legal process to ensure that the UK government properly safeguards the locations in question". The ICO was not "convinced that the release of the information would ensure a more advantageous or speedy resolution to the issue" and recognised the importance of an "effective infraction process". Defra argued that until the decision of the CJEU is handed down, this infraction process is still live and the ICO's previous assessment remains relevant.

Balance of the public interest arguments

19. The Commissioner considers that there is a public interest in disclosure of information about the environmental impacts of untreated waste water as this is relevant to residents and business owners in the Whitburn area and to individuals who visit the area.
20. He also considers that there is a public interest in transparency and accountability and that disclosure of information of this type enables the public to participate further in discussion and debate. Whilst the Commissioner is aware that there will be no further opportunity for members of the public to submit evidence to the CJEU, he does consider that it is an issue in relation to which there is significant interest to members of the public in this area and beyond and therefore this is a significant public interest factor to take into account.
21. The Commissioner is aware that the complainant considers that the withheld information is inaccurate. Defra has confirmed that it does not consider that the withheld information is inaccurate and that if it were any future decisions made once the CJEU has handed down its judgement could be subject to judicial review. The Commissioner has not been presented with any further evidence to suggest that the withheld documents contain inaccurate information and has not therefore given any significant weight to this argument.
22. As the European Commission has indicated that disclosure of the requested information would undermine court proceedings, the Commissioner has concluded that disclosure contrary to this objection would adversely affect international relations. The Commissioner considers that there is a very strong public interest in the UK having a good working relationship with the European Commission and the CJEU.
23. The Commissioner also considers that there is a very strong public interest in the European Commission and CJEU being able to conduct effective infraction proceedings against the UK for breaches of the Urban Waste Water Directive and that this may not be possible if the requested information were disclosed whilst these proceedings are ongoing.
24. In this case the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception. The Commissioner therefore considers that regulation 12(5)(a) was correctly applied in this case.
25. As the Commissioner has concluded that regulation 12(5)(a) was correctly engaged in this case, he has not gone on to consider the application of regulation 12(5)(b) and 12(5)(d) any further.

Right of appeal

26. 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

27. 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.
28. 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

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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SK9 5AF**