

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 25 March 2013

**Public Authority:** Foreign and Commonwealth Office  
**Address:** Old Admiralty Building  
Whitehall  
London  
SW1A 2PA

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of all correspondence between the Foreign and Commonwealth Office (FCO) and the British Indian Ocean Territory Conservation/ Environmental / Scientific Advisor, covering the period 1 January 2008 to the present. The FCO ultimately said that part of one document and two further documents were exempt from disclosure. The respective relative exceptions being regulation 12(5)(a) (international relations, defence, national security or public safety) and 13(1) (personal data) of the Environmental Information Regulations 2004. The complainant agreed with the Commissioner not to pursue the disclosure of the two documents withheld under regulation 13(1). The Commissioner upholds the FCO reliance on regulation 12(5)(a) for the part of the document withheld under regulation 12(5)(a).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of "The March 2011 report by Professor Charles Sheppard, Environmental Adviser to the BIOT Commissioner, of his annual visit to BIOT" save for the part identified to the Commissioner by the FCO as being exempt from disclosure by virtue of regulation 12(5)(a) of the EIR .

The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Background**

3. In 1965, the United Kingdom made the British Indian Ocean Territories Order 1965 SI no. 1920 ('BIOT order'). The BIOT order detached the Chagos Archipelago (and some other islands) from its colony of Mauritius and constituted them a separate colony known as the British Indian Ocean Territory ('BIOT'). BIOT is situated in the Indian Ocean, halfway between Africa and Indonesia.

## **Request and response**

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4. On 13 October 2011, the complainant made the following request for information under the EIR:
  - Copies of all correspondence (including but not limited to: e-mails, letters, advice, or minutes) between the Foreign and Commonwealth Office and the British Indian Ocean Territory Conservation/ Environmental / Scientific Advisor, covering the period 1 January 2008 to the present
5. The FCO responded on 8 December 2011 and provided some information which it considered fell within the scope of the request but refused to provide the remainder. The FCO cited the following regulations of the EIR as the reason for the refusal to provide the remainder :
  - 12(4)(e) – formulation of government policy
  - 12(3) - personal data
6. On 16 December 2011 the complainant asked the FCO to conduct an internal review of its decision.
7. The FCO conducted the internal review and on 1 February 2012 informed the complainant that it no longer maintained its original position. It released further information to the complainant and provided a schedule of all the requested information it had located and what it had or had not divulged to the complainant. According to the schedule only one document, described as a "Report to the Commissioner" was now being withheld from the complainant.
8. The review letter said it withheld the "Report to the Commissioner" from the complainant solely via regulation 12(4)(e) of the EIR due to it being an "internal communication". It falling under this exception "as some of the copy recipients on the withheld information are Foreign and Commonwealth Office (FCO) officers".

### **Scope of the case**

9. On 8 February 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner's investigation of the complainant's complaint brought about lengthy and protracted correspondence with the FCO. During this correspondence the FCO at one point argued that any information it held was only held on behalf of the Government of the BIOT and not by the FCO. It later accepted that it did hold the information in its own right and reverted to withholding it under EIR exceptions..
11. On 12 October 2012 the complainant explained and complained to the Commissioner that an FCO disclosed email had attachments that had not been disclosed to him. The disclosed email was dated 6 October 2012 and the attachments were described as "biot 4 october 2011.doc" and "BIOT costs.tif". The complainant asked that the Commissioner to consider whether the FCO should be required to disclose these documents to him. The FCO said that this information should not be disclosed because it was personal data.
12. On 11 December 2012 the FCO informed the Commissioner that it would release (to the complainant) the majority of the report but would withhold the remainder ("the withheld information") and now relied on regulation 12(5)(a) to do so. It provided the Commissioner with an un-redacted copy of the report but highlighted the withheld information therein.
13. On 22 March 2013 the complainant agreed with the Commissioner that he would not pursue the disclosure of the two documents withheld under regulation 13(1).

### **Reasons for decision**

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14. Regulation 5(1) of the EIR provides that "a public authority that holds environmental information shall make it available on request". A public authority may only refuse to disclose information where an exception applies.
15. If an exception applies, the information is still to be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". This is assessed having regard to the overriding presumption in favour of disclosure. The result is that the threshold to justify non-disclosure is a high one.

16. Regulation 12(5)(a) provides that information is exempt from disclosure if its disclosure would adversely affect international relations, defence, national security or public safety.
17. The FCO argues that disclosing the withheld information would adversely affect international relations, namely with the United States of America ("the United States"). The subject matter of the withheld information is, it claims, subject to on-going negotiations with the United States and to disclose it now would adversely affect the conduct of those negotiations.
18. The Commissioner notes that the threshold to engage the exceptions under regulation 12(5) of the EIR is a high one. It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.
19. The Commissioner has to be circumspect as to the subject matter of the withheld information, to do otherwise would of course divulge it. Taking account of the withheld information and the negotiations (between the United Kingdom and the United States) regarding its subject matter the Commissioner readily sees that disclosing the withheld information would harm the relations between the two countries. Accordingly the Commissioner finds the exception engaged.

### **Public Interest Test**

20. Regulation 12(5)(a) is subject to the public interest test. Regulation 12(2) of the EIR sets a presumption in favour of disclosure and the Commissioner has borne this requirement in mind in carrying out his assessment of the public interest test.
21. The FCO explained that it had assessed the public interest for disclosure, namely that it would assist accountability and transparency. It then had gone on to consider the arguments for retention which were those inherent in the exception.
22. The Commissioner considers that there is always a general public interest in the disclosure of environmental information. As noted above, EIR implements EU Directive 2003/4/EC on public access to environmental information. Recital 1 of the preamble to the Directive states this public interest clearly that:

“Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the

23. The Commissioner also, however, accepts the importance placed on respecting another state’s expectations of confidentiality, in order to maintain international relations and diplomacy. The impact of disclosures under either the EIR or FOIA would extend beyond any immediate effect on the relationship between the UK and the confiding country. Disclosing such information would give the impression that the UK government could no longer be trusted with confidential information and this could affect its relations with the international community more generally. There is therefore an inherent public interest in preserving international confidences.
24. The Commissioner believes that there are strong arguments on both sides in this case .However it has been established that releasing the information would damage relations between otherwise close countries and the Commissioner finds that the public interest in avoiding this outweighs the public interest in releasing the information in the circumstances of this case.

### **Timing of the FCO’s response**

25. The complainant’s original request was made on 13 October 2011. The FCO should therefore have responded by either; providing the information, issuing a refusal notice, or advising the complainant that it required an extension of time because of the volume and complexity of the information requested, by 10 November 2011. Although the FCO did advise the complainant that it required an extension of time to reply it did not so this until 21 November 2011, outside of the statutory time limit provided by the EIR.

### **Other matters**

Although the complainant has agreed not to pursue the disclosure of the two documents withheld under regulation 13(1), the Commissioner notes that these did fall within the scope of the request. The FCO should therefore have either disclosed them or refused to do so in its original response to the request.

## Right of appeal

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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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://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 .....**

**Lisa Adshead**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Wilmslow**  
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