

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

Decision notice

Date: 4 February 2013

Public Authority: Marine Management Organisation

Address: Lancaster House
Hampshire Court
Newcastle upon Tyne
NE4 7YH

Decision (including any steps ordered)

1. The complainant requested from the Marine Management Organisation ("MMO") a list of vessels sent to the EU Commission in 2003. The MMO applied regulation 12(4)(a) of the EIR on the basis that it did not hold the requested information.
2. The Commissioner's decision is that the MMO has correctly applied regulation 12(4)(a) as it does not hold the requested information. However, he identified some breaches of the EIR in the MMO's handling of the request.

Request and response

3. On 1 July 2012, the complainant wrote to the MMO and requested information in the following terms:

"I would be grateful if you could send as a matter of urgency the list of vessels forwarded to the Commission in 2003 that were fishing and whose effort contributed to the baseline figure of effort for the reference period of 1998-2002 for WW scallop effort, and the most recent list please, or direct me to where I may find such lists on the MMO site. I would hope, as these lists are already supposed to be on the FIDES system as well, you can

simply send to me by return, if this is not the case please treat this as a request under EIR."

4. On 30 July 2012, having not received a response within 20 working days, the complainant requested that the MMO carry out an internal review.
5. On 28 August 2012 the MMO provided a response to the complainant in which it informed her that the list that she had requested was available on its website and provided a link to this information. It also informed her that there had been a delay in completing the internal review and that it aimed to provide the outcome by 4 September 2012.
6. On 28 August 2012 the complainant informed the MMO that its response did not provide the information that she had requested and expressed her disappointment over the delay in completing the internal review.
7. On 5 September 2012 the Commissioner informed the MMO that he did not believe that it had responded correctly to the request in terms of the information provided. He emphasised that it needed to clearly inform the complainant whether it held the information that she had asked for in the two parts of her request and either provide it to her or explain why it was exempt from disclosure.
8. On 6 September 2012 the complainant requested that the internal review be extended to deal with why she had not been provided with the information that she had requested.
9. On 14 September 2012 the MMO wrote to the complainant to inform her that it needed more time to conclude the internal review but that it intended to respond no later than 19 September 2012.
10. On 19 September 2012 the MMO wrote to the complainant with the outcome of the internal review. It acknowledged that it had breached regulation 5(2) of the EIR by not providing a response within 20 working days of the request and that its initial response did not provide her with the two pieces of information that she had requested. It informed her that a fresh response would be provided no later than 26 September 2012.
11. On 26 September 2012 the MMO sent the complainant a new response in respect of the two parts of her request.
12. On 27 September 2012 the complainant informed the MMO that she still did not believe that she had received the information that she had requested. She asked that it carry out an internal review in relation to its most recent response.

13. On 25 October 2012 the MMO provided a response to the request for an internal review. In relation to the first part of the request, the MMO appeared to suggest that the list that was sent to the EU Commission in 2003 was different to the one that was provided to the complainant. In relation to the second part of the request, for the most recent list of fishing vessels, the MMO confirmed that, following further clarification, it had provided the information that had been requested.
14. Following subsequent discussions with the Information Commissioner, the MMO wrote to the complainant on 2 November 2012 to confirm that it did not hold the information that she asked for in the first part of her request and that therefore regulation 12(4)(a) applied. It explained that the list that it had previously provided to her was produced in an effort to best fulfil her request. It apologised for the lack of clarity in its previous correspondence.
15. In light of previous responses that she had received, the complainant queried whether the MMO's latest response in relation to the first part of her request was correct. The Commissioner therefore wrote to the MMO and asked a series of questions to establish whether it held the information. The MMO provided a response to those questions.

Scope of the case

16. On 2 August 2012 the complainant contacted the Commissioner to complain about the way her request for information had been handled. During the course of the Commissioner's investigation the complainant accepted that the MMO had eventually provided the information that she had requested in the second part of her request. However, in relation to the first part of the request, she asked the Commissioner to make a determination as to whether the MMO held the requested information. She also asked the Commissioner to make a determination as to any breaches of the legislation that had occurred during the course of the handling of her request.
17. The Commissioner considered whether the MMO held the information requested by the complainant in the first part of her request and whether it had breached any of the procedural provisions of the EIR.

Reasons for decision

Exception

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

18. Regulation 12(4)(a) of the EIR states that:

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;"

19. In situations where there is a dispute between a public authority and a complainant about whether requested information is held by the public authority, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
20. The first part of the complainant's request was for *"...a list of vessels forwarded to the Commission in 2003 that were fishing and whose effort contributed to the baseline figure of effort for the reference period of 1998-2002 for [Western Waters] scallop effort."*
21. The MMO informed the Commissioner that the production and supply of a list of vessels to the EU Commission, as described in the complainant's request, was not a requirement of the Western Waters regime. The list that was required by the EU Commission was one which included vessels with access, under UK rules, to the area covered by the Western Waters regime itself. The list was not required by gear type and was not constrained to be a list of vessels that contributed to the baseline figure of effort.
22. The MMO explained that the list of vessels required is defined under Article 7 of Regulation 1954/2003, which states:
- "1. The Member States shall establish a list of fishing vessels flying their flag and registered in the Community which are authorised to carry out their fishing activities in the fisheries defined in Articles 3 and 6.*
- 2. Member States may subsequently replace vessels entered on their list provided that the total fishing effort of vessels in any area and fishery defined in Articles 3 and 6 does not increase."*

23. The MMO went on to explain that Articles 3 and 6, referred to above, define the overall regime and the specific regime related to the biologically Sensitive Area of the coast of Ireland. Council Regulation (EC) No. 195/20036 did not set any specific format for the submissions of vessel data, as this was only established by Annex 1 of the Commission (EC) Regulation No. 2103/2044 of 9th December 2004.
24. The MMO stated that the breadth of definition within the Western Waters regime, combined with the way that fishing vessels in the UK have a wide range of access rights, meant that the list of fishing vessels with access to the regime was effectively all UK vessels. It supplied the list of vessels on this basis (i.e. the format required by the EU Commission for submission only required that details of access rights to individual areas within the Western Waters regimes were provided and details of the activity groupings the vessel was linked to). As such the list of vessels required by the UK was synonymous with the list of vessels that the MMO made available on its internet site.
25. The MMO informed the Commissioner that, in summary, what the EU Commission required was a list of vessels with access to the fisheries concerned under the Western Waters Regime and, due to the way that access rights have been implemented, reflecting the very mobile nature of activity, virtually all UK vessels have the potential for access to one or more of the elements of the Western Waters fishery. As the list supplied to the EU Commission in 2003 did not match what was requested, the MMO confirmed that the list that the complainant requested did not exist and such a list is not and had never been held by the MMO.
26. Based on the explanation provided by the MMO, the Commissioner is satisfied that, on the balance of probability, it does not hold a list of vessels that was sent to the EU Commission in 2003 in the form requested by the complainant. Therefore it correctly applied regulation 12(4)(a) to the request.
27. However, the Commissioner went on to consider whether the MMO complied with regulation 9 in terms of providing reasonable advice and assistance to the complainant.

Procedural issues

Regulation 9 – Advice and assistance

28. Regulation 9(1) provides that:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

29. The Commissioner has found that the MMO did not hold a list in the terms specifically requested by the complainant. However, during the course of his investigation, the MMO confirmed that it did hold a list of vessels which was sent to the EU Commission in 2003. In these circumstances, the Commissioner would have expected the MMO to have provided advice and assistance to the complainant. It should have informed her that it held a list which, whilst not exactly meeting the terms of her request, was similar in nature to the list that she had requested and asked her if she wished to request the list that was held. By not providing advice and assistance the MMO breached regulation 9 of the EIR.
30. As the list of vessels that is held by the MMO was subsequently provided to the complainant during the course of the Commissioner's investigation, he has not ordered any further steps to be taken.

Regulation 5 – Time period for response to request

31. Regulation 5(2) requires a public authority to provide a response to a request under the EIR within 20 working days. The MMO did not respond to the complainant's request within the required time period and therefore breached regulation 5(2)

Regulation 14 – Refusal to disclose information

32. Under regulation 14(2), where a public authority is relying on an exception contained in regulation 12, it should issue a refusal notice as soon as possible and no later than 20 working days after the date of receipt of the request. The MMO did not inform the complainant that it was relying on the exception contained in regulation 12(4)(a) within the required time period and therefore breached regulation 14(2).

Other matters

(i) The handling of the complainant's request

33. The Commissioner has already identified, above, breaches of the EIR as a result of the MMO's failure to comply with the deadlines for providing a response and a refusal notice to the complainant. However, he is concerned that, despite the complainant advising the MMO on 30 July 2012 that it had not responded to her request within the required

timeframe, it still took until 28 August 2012 for a response to be provided.

34. It appears from internal MMO email exchanges that were sent, the Commissioner presumes inadvertently, to the complainant that it was not clear who at the MMO was supposed to be responding to her request. The Commissioner expects that the MMO will ensure that it has systems in place that enable it to respond to requests within the required statutory time limits and that make it clear where within the organisation the responsibility for providing a response lies.
35. In addition, he is concerned that, from the time that the complainant pointed out that the statutory deadline had already been exceeded, it still took the MMO a further month to provide a response. This response, in essence, informed her that the information that she was seeking was available on its website. The Commissioner can see no reason why this response could not have been provided to the complainant very soon after she alerted the MMO, at the end of July 2012, of its failure to respond. He would expect that where a public authority is informed of a failure such as this, it would make every effort to rectify that failure as quickly as possible.
36. The Commissioner is also notes that, despite taking a further month to respond to the request, the response that was eventually provided did not clearly address both parts of the complainant's request. The MMO needs to ensure that where receives requests that have more than one part, it provides a clear response to each part of the request.

(ii) Whether information was held

37. The Commissioner is concerned that it took the MMO a considerable period of time before it provided a response which made it clear to the complainant and the Commissioner that the information she had requested in the first part of her request was not held. During this time it appears that the MMO tried to create a list which it hoped might satisfy the complainant, without success.
38. Clearly there is no obligation under the EIR on a public authority to create new information to satisfy a requester. However, the Commissioner would not wish to deter a public authority from doing this if it wishes to do so. However, if it chooses to do this, it should initially make it clear to a requester that it does not hold the information that has been requested.
39. Had the MMO made it clear from the outset that it did not hold the list that the complainant had requested, it would have saved the complainant, the Commissioner and itself a considerable amount of time

and effort. The Commissioner expects that in future the MMO will state clearly when it responds to requesters whether it holds the information that has been requested.

Right of appeal

40. 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

41. 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.
42. 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

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