

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 January 2013

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps)

1. The complainant has requested information concerning pollution monitoring data in Diego Garcia. The Information Commissioner's decision is that the public authority breached regulation 5(2) of the EIR by failing to respond to the complainant's request within the statutory time limit. As it subsequently provided a response the Information Commissioner does not require the public authority to take any action as a result of this notice.

Request and response

2. On 9 March 2012, the complainant wrote to the public authority and requested information in the following terms:

"In the context of a general study of international legal practice in the field of environmental information ... the focus of my current research is public access to environmental data in EU overseas territories, including BIOT, on which I seek information from your Office.

It is my understanding, from the US Navy's Integrated Natural Resources Management Plan Diego Garcia (INRMP 2005, p 2-1), that under the 1966 UK-US bilateral agreement on BIOT "the full governmental and judicial authority, including that relating to natural resources conservation and environmental protection, rests with the British Representative (BRITREP), a Senior Royal

Navy Commander. The UK, through the BRITREP, generally monitors environmental matters."

From a recent scientific publication (Sheppard et al, Aquatic Conservation: Marine & Freshwater Ecosystems, online 17 January 2012), I was pleased to learn that your BIOT Administration at the Foreign and Commonwealth Office in London holds extensive pollution monitoring data from Diego Garcia, based on regular analyses of over 100 metals and organic substances. I should be most grateful for a full list of the data concerned, in particular information on the following:

- 1. Records of air pollutant emissions from the two waste incinerators operated by the US base on Diego Garcia (especially toxic components – heavy metals, dioxins); and of soil and groundwater sampling at the landfill sites operated on the island by civilian contractors for the base (a consortium of US and UK firms). According to the US Department of Defence, the Diego Garcia base generates approximately 200 tonnes of solid waste per year, most of which is either incinerated or land-filled on the island. I presume that applicable UK regulations require periodic monitoring/sampling at these facilities.*
- 2. The types and amounts of chemical compounds (especially pesticides and herbicides) used in the course of pest control, weed or invasive plant control measures by the US military or the civilian contractors on Diego Garcia. For example, Appendix D of the Navy's INRMP contains a list of the pesticides used on Diego Garcia in 1995 and 2003, several of which would not seem to be permissible under applicable UK regulations. I wonder whether your Office keeps more recent data, and whether the UK authorities monitor residues of US-applied chemicals on the island.*
- 3. Recent soil and groundwater samplings taken on the site of the JP-5 jet fuel spills reported in 1984, 1991, 1997 and 1998 at the Diego Garcia airfield (totalling more than 1.3 million gallons), which according to the Chagos Conservation Trust (Peak of Limuria: The Story of Diego Garcia and the Chagos Archipelago 2004, p 103) had still not been cleared up at the time of the second Gulf War in 2003, when a record 88.8 million gallons of JP-5 fuel were issued from the Diego Garcia airfield.*
- 4. Recent measurements of radionuclide pollution levels in the Diego Garcia lagoon and territorial waters: The only published data go back to September 2006 (Marine Environmental Radioactivity Surveys at Nuclear Submarine Berths 2006,*

MOD/Dstl 2008, para 8.8: Diego Garcia); i.e., before the 2008 trans-shipment of 37 planeloads (550 tonnes) of Iraqi uranium yellow-cake by the US Department of Defence in the Diego Garcia lagoon, and before the 2010 forward deployment to Diego Garcia of the US Fifth Fleet's SSN nuclear submarines and their submarine tender USS Emory S. Land (transferred from its former Mediterranean base following radionuclide pollution of an adjacent marine protected area in Italian territorial waters, which had led to the closing down of that naval base in 2008)".

3. The public authority responded and acknowledged receipt of the request on the same day.
4. On 11 April 2012, 16 April 2012 and 7 May 2012 the complainant chased a response.
5. The Information Commissioner received a complaint about the lack of response on 14 May 2012. However, before he wrote to the public authority about this, on 16 May 2012 the public authority provided a response. It released some information and advised that nothing further was held.
6. The complainant was advised by the Information Commissioner:

"When considering complaints about delayed or failed responses to information requests our priority is to ensure requesters receive a response as quickly as possible (where one has not been provided) and to monitor any persistent trends which might indicate that a public authority was routinely failing to respond within the statutory 20 working days permitted under section 10 of the Freedom of Information Act.

We monitor complaints where a serious contravention of section 10 is recorded and where persistent contraventions occur we will consider placing a public authority on our monitoring programme (http://www.ico.gov.uk/what_we_cover/promoting_openness/monitoring_compliance.aspx).

It is important to note that the Commissioner does not need to serve a decision notice in an individual case in order to use that case as evidence for future enforcement action. However, should you wish the Information Commissioner to issue a decision notice for your specific complaint we are able to do so. However, at this stage, any decision notice will focus solely on the section 10 aspects of your complaint.

In relation to the response itself, should you be dissatisfied with this, or information has been withheld, you will need to exhaust the public authority's internal review procedure before the Information Commissioner's Office can do anything further".

Scope of the case

7. As explained above, the complainant was advised by the Information Commissioner that he could consider any delay in responding by way of decision notice. The complainant advised, on 14 August 2012, that he wished to have a decision notice.

Reasons for decision

Environmental Information Regulation 2(1) of the EIR

8. The first question for the Information Commissioner to consider is whether the information requested by the complainant is environmental information as defined by the EIR.
9. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form 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) and (b) as well as measures or activities designed to protect those elements..."*
10. The Information Commissioner considers that the phrase '*any information ...on*' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Information Commissioner's opinion a broad

interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.

11. The information requested in this case relates to pollution monitoring data recorded about the environment on and around the island of Diego Garcia. The Information Commissioner considers that this information falls within regulation 2(1)(c).

Regulation 5 of the EIR

12. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 5(2) provides that this information should be made available within 20 working days following receipt of the request. Under regulation 7, a public authority is permitted to extend this period to 40 working days if it considers that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.
13. Regulation 5(1) is also subject to regulation 14 of the EIR. Regulation 14(2) provides that if a public authority intends to refuse a request it must issue a refusal notice as soon as possible and not later than 20 working days after the date of receipt of the request.
14. The Information Commissioner finds that the public authority breached Regulation 5(2) of the EIR by failing to respond to the complainant's request as soon as possible and in any event within 20 working days of receipt.

Right of appeal

15. 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,
Arnhem House,
31, Waterloo Way,
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

16. 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.
17. 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
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