

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

Decision notice

Date: 8 April 2014

Public Authority: Marine Management Organisation

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

Decision (including any steps ordered)

1. The complainant made a request to the Marine Management Organisation ("MMO") for information related to licence variations for fishing vessels in early 2013. The MMO disclosed some information but withheld the remainder under the exception in regulation 12(5)(b) (the course of justice) of the EIR.
2. The Commissioner's decision is that the MMO has correctly applied regulation 12(5)(b) to the withheld information. However, he has determined that it breach regulations 5(2) and 13(3) by not providing some information, and a refusal in respect of other information, within 20 working days of receipt of the request. He does not require the MMO to take any further steps to ensure compliance with the legislation.

Request and response

3. On 14 January 2013 the complainant wrote to the MMO and requested a number of pieces of information, numbered (a)-(f). The request included the following:

I shall be grateful, therefore, if you will supply me with the following information:

(a) why the MMO and Marine Scotland have issued licence variations on different dates with different effects for the same type of vessels fishing for the same species in the same waters under the same management rules. Was this an error on the part of the MMO? If so, how did the error occur bearing in mind all the discussion prior to Christmas, the problems that arose last year when Marine Scotland and the MMO failed to act in concert and the subsequent assurances provide by your senior team and the importance of this fishery?

4. The MMO responded on 1 March 2013. In relation to part (a), it provided some explanation for the delay in the issuing of the licence variation but did not provide copies of any relevant documents.
5. On 1 March 2013, the complainant wrote to the MMO to ask it to carry out an internal review. She argued that she had not received a proper response to her request.
6. On 11 April 2013, the MMO wrote to the complainant with the result of its review. It upheld its original decision. It provided some additional contextual information related to part (a) of the request.
7. During the course of his initial investigation, the MMO informed the Commissioner that it had identified additional information falling within the scope of part (a) of the complainant's request. In addition, following discussions with the Commissioner about its initial handling of the request, it was agreed that the MMO should provide a new revised response to the complainant in respect of the whole of her request, parts (a)-(f).
8. On 24 January 2014 the MMO issued a revised response to the complainant. It disclosed parts of some documents but withheld the remainder of the information falling within the scope of part (a) of the request under regulation 12(5)(b) on the basis that it was subject to legal professional privilege ("LPP").

Scope of the case

9. The complainant contacted the Commissioner on 22 April 2013 to complain about the way her request for information had been handled by the MMO, specifically, that she had not been provided with the information that she had requested.
10. Following the issuing of the revised response by the MMO on 24 January 2014, the complainant made a further complaint about the MMO's handling of her request on 30 January 2014.

11. In this notice, the Commissioner considered whether the MMO complied with the EIR in its handling of part (a) of the complainant's request.

Reasons for decision

Regulation 12(5)(b) – Adverse affect on the course of justice

12. Regulation 12(5)(b) allows a public authority to refuse to disclose information to the extent that its disclosure would adversely affect the course of justice. The Commissioner accepts that information covered by legal professional privilege ("LPP") falls within the scope of the exception. LPP protects the confidentiality of communications between a lawyer and a client.
13. The MMO provided the Commissioner with the withheld information falling within part (a) of the request that it believed was exempt under regulation 12(5)(b). It informed him that this information was subject to legal advice privilege. Advice privilege will apply where no litigation is in progress or being contemplated. For it to be applicable, the communications must be:
 - a) made between a client and professional legal adviser acting in their professional capacity;
 - b) communicated in the legal advisor's professional capacity; and
 - c) made for the sole or dominant purpose of obtaining legal advice.
14. The MMO informed the Commissioner that, in its view, these criteria were met. It also confirmed that the requested information had not been made available to the public or to any third party without restriction which could have resulted in privilege being lost.
15. Having examined the information in relation to which the MMO has applied regulation 12(5)(b), the Commissioner is satisfied that LPP applies to it and that therefore the exception is engaged.
16. Regulation 12(5)(b) is subject to a public interest test which requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

17. The MMO acknowledged that there was a public interest in favour of disclosure as this would further accountability and facilitate transparency with regard to the rules that it adopted in relation to fisheries management.
18. In addition, the Commissioner believes that disclosure might assist individuals and organisations who were affected by the MMO's decisions to gain a better understanding of the basis for those decisions, and where appropriate, to challenge those decisions.
19. The Commissioner also considers that the public interest arguments in favour of disclosure include allowing the public to verify that decisions had been made on the basis of good quality legal advice.

Public interest arguments in favour of maintaining the exception

20. In relation to the public interest argument in favour of maintaining the exception, the MMO informed the Commissioner that there is a strong public interest in withholding the information as the concept of LPP is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
21. In addition, the MMO argued that it is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice highlights the strengths and weaknesses of a particular position. If it was routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. For example, those who may seek to challenge the basis upon which any legal action has been taken against them, with regards to non-compliance with any rules imposed by the MMO, could use the EIR as a means of access to advice provided by the MMO's legal advisors, which could potentially impact upon the process of administering justice.
22. The MMO went on to explain that English law considers "privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned". As a result of this, there must therefore be a strong public interest in ensuring that LPP applies equally to all parties, so that they are on a level footing. As such, the MMO was of the view that there is a strong public interest in maintaining the exception prescribed by regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of LPP,

is not countered by at least equally strong arguments in favour of disclosure

Balance of the public interest

23. The Commissioner's view, based on a number of decisions of the courts, the First-tier Tribunal and Upper Tribunal, is that there will always be an initial weighting in favour of maintaining the exception in regulation 12(5)(b) in relation to information covered by LPP. This is due to the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. However, where there are equal or weightier countervailing factors, then the public interest in maintaining the exception will not outweigh the public interest in disclosure.
24. In relation to the factors in favour of maintaining the exception, as well as the initial inbuilt weight to be given to LPP, the Commissioner has given additional weight to the fact that the legal advice falling within the scope of the request only come into existence a short time before the request was made and would have still been "live", in that it was still being relied upon by the MMO as it related to an issue which could give rise to legal challenges by those unhappy with the course of action adopted by the MMO.
25. The Commissioner notes that in the case of the *Foreign and Commonwealth Office v IC (EA/2007/0092)*, the First-tier Tribunal considered what sort of public interest is likely to undermine the maintenance of LPP. It stated that:

"There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained." (para. 29)
26. Having reviewed the withheld information, the Commissioner is not aware of anything which would suggest that any of these factors were applicable at the time that the request was made.
27. In light of the above, the Commissioner has determined that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. He has therefore decided that the MMO correctly applied regulation 12(5)(b) to the information falling within the scope of part (a) of the request which was covered by LPP.

Regulations 5 and 14 – Disclosure of information and refusal to disclose information

28. Regulation 5(2) requires that a public authority disclose information to a requester no later than 20 working days after the date of the receipt of the request. The MMO provided some information falling within the scope of the request to the complainant in its revised response. However, by not doing so within 20 working days of the request it breached regulation 5(2).
29. Regulation 14(2) requires that a refusal to disclose information is to be made by a public authority no later than 20 working days after the date of receipt of the request. By not issuing a refusal relying on the exception in regulation 12(5)(b) within 20 working days of the request, the MMO breached regulation 14(2).

Other matters

30. The Commissioner notes that, in its original response to the complainant, the MMO confirmed that it was dealing with the entire request under the EIR. It provided her with an explanation as to circumstances surrounding the issues raised in part (a) of her request. However, it was not until the MMO provided a revised response to the complainant in January 2014 that it confirmed that it held information falling within the scope of this part of her request. In this response, it disclosed copies of some documents and withheld others under regulation 12(5)(b).
31. The Commissioner appreciates that, in some circumstances, a public authority may be unsure as to whether a requester is seeking to obtain an explanation related to a particular issue or whether they are seeking to obtain copies of information that is held.
32. In this case, if the MMO was initially uncertain as to whether the complainant was seeking information that it held falling within the scope of her request or simply seeking an explanation about the circumstances surrounding the events that she identified, it should, at the outset, have clarified this with her.
33. The Commissioner notes that when complaining about the initial response that she had received and requesting an internal review, the complainant specifically stated that she "*...would have expected to see 'documents' that demonstrate the explanations you have given here, one presumes with all this work going on there was email traffic back and forth, perhaps notes of meetings?*"

34. Once it had received this correspondence, it should have been apparent to the MMO that the complainant was requesting copies of any relevant documents that it held falling within the scope of her request rather than an explanation for what had occurred. Had the MMO responded appropriately at this point in time, this would have avoided significant delay before the complainant was provided with some information and informed that the remaining information falling within the scope of her request was exempt from disclosure under regulation 12(5)(b). It would also have reduced the need for the involvement of the Commissioner.

Right of appeal

35. 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: GRC@hmcts.gsi.gov.uk

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

36. 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.
37. 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

Racheal Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF