

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

Decision Notice

Date: 24 August 2021

Public Authority: Foreign, Commonwealth and Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted an information request to the British Indian Ocean Territory (BIOT) Administrator, who stated that the BIOT Administration was not a public authority under the EIR. The complainant maintained that the BIOT Administrator was acting on behalf of the Foreign, Commonwealth and Development Office (the FCDO). Therefore the complainant argued that a request made to the BIOT Administrator was in effect made to the FCDO for the purposes of the EIR.
2. The Commissioner's decision is that the BIOT Administrator is not part of the FCDO (which is itself a public authority), nor does he act on the FCDO's behalf. Consequently a request made to the BIOT Administrator is not made to the FCDO for the purposes of the EIR. The Commissioner does not require any steps to be taken.

Background

3. The request that is the subject of this complaint relates to the British Indian Ocean Territory (BIOT),¹ one of the United Kingdom's 14 Overseas Territories. The BIOT is constitutionally distinct and separate from the UK. It is administered from London by a Commissioner

¹ <https://biot.gov.io/about/>

(appointed by The Queen), assisted by a Deputy Commissioner and an Administrator.²

4. At the time of the complainant's request the FCDO was called the Foreign and Commonwealth Office (the FCO). The FCO became the FCDO in September 2020, following its merger with the Department for International Development.

Request and response

5. The complainant submitted the following request for information to the BIOT Administrator on 6 July 2020:

"In the current Blue Belt Work Plan for the BIOT (2020/21 Extension Plan dated 14 May 2020) it is stated that a BIOT Conservation Management Plan was completed in March 2019.

Please could I request a copy of that Plan under FOI/Environmental Information Regulations."

6. The complainant requested an acknowledgement of his request on 11 July 2020. He copied this email to the section of the FCDO which is responsible for dealing with information requests.
7. The BIOT Administrator acknowledged the request on 13 July 2020, advising the complainant that "BIOTA [the BIOT Administration] are not the FCO". In response the complainant referred the BIOT Administrator to two decision notices issued on 6 November 2012 which found that there had been at that time some overlap between information held by the BIOT Administration and the then FCO (FS50436500 and FS50413563).³
8. On 4 August 2020 the BIOT Administrator reiterated his position to the complainant that "the BIOT Administration does not have an FOI/EIR regime". No internal review or right of appeal was offered.

² <https://www.gov.uk/world/organisations/british-indian-ocean-territory>

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2012/774300/fs_50436500.pdf

Scope of the case

9. The complainant contacted the Commissioner on 5 August 2020 to complain about the handling of his request. The complainant maintained that the BIOT Administration was “inseparable” from the FCDO. Therefore the complainant argued that an information request made to the BIOT Administrator was in effect made to the FCDO.
10. The Commissioner is of the opinion that the requested information, if held, meets the definition of environmental information within the meaning of regulation 2(1)(c) of the EIR. This is because a conservation plan is a measure that would be likely to affect the elements of the environment. It is also likely to be a measure designed to protect those elements. Neither the complainant nor the public authority has disputed this, therefore the Commissioner has considered the complaint under the EIR rather than FOIA.
11. During the course of the Commissioner’s investigation the FCDO confirmed that it held the requested information in its own right, ie the information was held by the FCDO’s BIOT Team as distinct and separate from the BIOT Administrator. In an effort to resolve the matter informally the FCDO subsequently issued a response to the complainant under the EIR. However the complainant requested that the Commissioner issue a decision notice in respect of his complaint.
12. Accordingly the scope of the Commissioner’s investigation was to determine whether or not a request made to the BIOT Administrator can be said to have been made to the FCDO. This decision notice has been issued on the FCDO as the public authority under the EIR, since it is not disputed that the FCDO is a public authority. The complainant has not sought to argue that the BIOT Administration is a public authority in its own right.

Reasons for decision

Is the BIOT Administration part of the FCDO for the purposes of the EIR?

The complainant’s position

13. The complainant has put forward three reasons for maintaining that his request ought to have been treated as received by the FCDO, rather than the BIOT Administration.
14. Firstly, the complainant has pointed out that the BIOT Administrator uses an FCDO email address.

15. Secondly the complainant has argued that the BIOT Administration cannot conduct its business as a standalone entity because the BIOT Commissioner and Deputy Commissioner are both employed full time in the FCDO's Overseas Territories Directorate.
16. Thirdly the complainant has argued that the BIOT Administration is not entirely separate from the FCDO because it is based within the FCDO in London.

The FCDO's position

17. The FCDO referred the Commissioner to the previous decision notices, in which she had accepted that the governments of BIOT and the UK are constitutionally separate.
18. The FCDO confirmed that, following the decision notices, it had taken measures to separate the work of the FCDO and BIOTA. For example, the FCDO acknowledged that the functions of BIOT Administrator, and the FCDO Head of BIOT Team, had previously been undertaken by one individual. The FCDO confirmed that the functions have since been fully separated and are now carried out by different individuals.
19. The FCDO also confirmed to the Commissioner that all BIOT Administration employees are seconded from government departments to the BIOT Administration. The BIOT Administrator is not an FCDO official but works full-time for the BIOT Administration, with no FCDO responsibilities. In contrast, the role of Head of the FCDO's BIOT Team is undertaken by an FCDO employee who does not have any administrative responsibilities for BIOT.

The Commissioner's findings

20. The Commissioner notes that both the complainant and the FCDO have sought to rely on the previous decision notices in respect of their opposing positions.
21. The Commissioner is mindful that the key issue in both previous decision notices was whether or not the requested information was held by the FCDO. In those cases the Commissioner found, contrary to the complainant's position, that the UK government and the BIOT Administration were constitutionally separate. However the Commissioner also found that in practice staff with dual roles had not drawn sufficiently clear distinction between the work they did and the information they held with regard to the roles undertaken.
22. The Commissioner notes that the decision notices were issued in 2012, eight years before the request that is the subject of this decision notice. She further notes that the functions of the BIOT Administrator and Head

of the FCDO's BIOT Team are now carried out by different individuals. The Commissioner considers this to be persuasive evidence that the FCDO has taken steps to distinguish between information held by the BIOT Administrator, and the FCDO BIOT Team. As set out at paragraph 11 above the FCDO has confirmed that the requested information in this case is held by its own BIOT Team, and is also held by the BIOT Administrator. The Commissioner is of the opinion that this indicates that the information is held by two separate entities.

23. The Commissioner accepts that the FCDO may provide administrative services such as hosting an email account, but this does not provide conclusive proof that any information received or sent by that email account is held for the FCDO's purposes. The Commissioner observes that public authorities often provide administrative support for other bodies, as the First-tier Tribunal found in the case of *Digby-Cameron v Information Commissioner*.⁴ That case involved information held by a local authority who provided administrative support for the Coroner's Service. The Tribunal found that ownership and control of that information lay with the Coroner rather than the local authority.
24. With regard to the complainant's second argument, the Commissioner acknowledges that the BIOT Commissioner holds a number of other roles. The BIOT Commissioner has the power to make laws for the "peace, order and good governance of the territory" by virtue of the British Indian Ocean Territory (Constitution) Order 2004.⁵ The individual who is currently the BIOT Commissioner is also Director of Overseas Territories at the FCDO and also Commissioner of the British Antarctic Territory. The Commissioner therefore accepts that the individual who acts as the BIOT Commissioner may, in his FCDO role, hold some information on behalf of the FCDO. However the Commissioner notes that the complainant chose to send his request to the BIOT Administrator rather than the BIOT Commissioner.
25. In any event, in the Commissioner's opinion the status of the BIOT Commissioner does not itself affect the status of the BIOT Administrator. The role of the Administrator is to support the BIOT Commissioner in that specific role, as opposed to supporting the work of the FCDO. The Commissioner accepts the FCDO's position that the BIOT Administrator is a full-time secondee to BIOTA and has no FCDO responsibilities.
26. For the reasons set out above the Commissioner concludes that the BIOT Administrator is not part of the FCDO. The FCDO falls under the scope of the EIR by virtue of regulation 2(2)(a), which provides that

⁴ Appeal no EA/2008/0010

⁵ <https://www.gov.uk/world/organisations/british-indian-ocean-territory> and <https://biot.gov.io/governance/>

government departments are public authorities for the purposes of the EIR. However, the Commissioner is satisfied that the BIOT Administrator is not part of the FCDO as a government department. It follows that the BIOT Administrator is not required to respond to requests for information under the EIR on behalf of the FCDO or in the FCDO's capacity.

27. The Commissioner also notes that the complainant copied the FCDO into his request for an acknowledgement of his substantive request. The Commissioner is of the opinion that the act of copying a public authority into a request for acknowledgement of an email sent to another person does not in itself mean that a valid request for information has been made to the public authority.
28. Consequently the Commissioner finds that the FCDO was not obliged to treat the copied email as a request for information. However, regulation 9 of the EIR states that a public authority is required to provide advice and assistance to prospective requesters. The Commissioner is mindful that the complainant in this case has, over a period of years, made several requests to the FCDO regarding the BIOT.
29. In the context of the complainant's previous contact with the FCDO, the Commissioner considers that the FCDO ought to have been more proactive at the point that it was copied into the request. The Commissioner is of the opinion that in order to comply with regulation 9 of the EIR, the FCDO ought to have advised the applicant to redirect his request to the FCDO itself.

Other Matters

30. The Commissioner recognises that the use of FCDO email addresses may cause some confusion for requesters who wish to request information relating to BIOT. Therefore the Commissioner has recommended to the FCDO that it consider issuing BIOTA officials with appropriate guidance as to what they should do if they receive requests for information that are intended for the FCDO.

Right of appeal

31. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Sarah O’Cathain
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