

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

Decision notice

Date: 5 February 2024

Public Authority: Department for Environmental Food & Rural Affairs (Defra)

Address: 17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to the levels of noise that come from the euro-fighter at the BAE Warton site. Defra confirmed that it does not hold the requested information and therefore regulation 12(4)(a) of the EIR applies.
2. The Commissioner's decision is that on the balance of probabilities Defra does not hold the requested information. It is therefore entitled to rely on regulation 12(4)(a) of the EIR.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 1 August 2023, the complainant wrote to Defra and requested information in the following terms:

“Will you please forward to me under the F.O.I. act the highest decibel levels of noise that come from the euro-fighter at the BAE Warton site? I already know the average levels from the site of noise coming from the site. which BAE portray to be 80 decibels over an 8-hour day in order to comply with the H&S at work act We are asking you for the highest levels of noise coming from the site when the euro-fighter takes off with full afterburners.”

5. On 15 August 2023 they also requested:

“This request is under the FOI act will you please forward to me the high levels of noise in decibels that come from the Eurofighter when it takes off with full after burners. We residents believe that this noise comes under environment responsibility”

6. Defra responded on 24 August 2023. It refused the requests under regulation 12(4)(a) of the EIR, as it does not hold the requested information.
7. The complainant requested an internal review on 24 August 2023.
8. Defra carried out an internal review and notified the complainant of its findings on 5 September 2023. It upheld its application of regulation 12(4)(a) of the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 5 September 2023 to complain about the way their request for information had been handled. They believe that Defra should hold the requested information, as the noise is a public health issue. They feel Defra should acquire the requested information.
10. The Commissioner considers that the scope of his investigation is to establish whether on the balance of probabilities Defra holds the requested information and therefore whether it is entitled to rely on regulation 12(4)(a) of the EIR.

Reasons for decision

11. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that if it does not hold the requested information at the time of the request.

12. Firstly the Commissioner wishes to point out that there is no requirement for a public authority to acquire or create new information in order to comply with an information request. The EIR only provides a right of access to recorded information that is held by a public authority subject to any exceptions that may apply, under regulation 12 of the EIR. If no recorded information is held, the public authority need only advise the complainant of that fact.
13. Defra confirmed that the two requests were referred to its Noise and Nuisance Policy Team. No specific searches were carried out in pursuit of any recorded information as that team confirmed with certainty that it does not hold any relevant files or emails of the nature specified in the requests. This is because there is no requirement for Defra to hold the type of information requested, and there is no requirement or obligation for Defra or the team concerned to collect or hold this type of information. Additionally, it said, that it would not request information of this kind from anyone else either.
14. Defra advised that it can say with certainty that it does not hold this information and therefore regulation 12(4)(a) of the EIR applies.

Public interest test

15. Regulation 12(4)(a) is in theory subject to the public interest test. However, the Commissioner agrees with Defra that conducting a public interest test for information that is not held serves no useful purpose. It is not possible to consider arguments for and against disclosure and how these should be balanced in a given case, when the information is not held. A public authority cannot disclose information it does not hold.
16. For the above reasons, the Commissioner is satisfied that on the balance of probabilities Defra does not hold the requested information and therefore regulation 12(4)(a) of the EIR applies. As stated above, there is no requirement for Defra to obtain or create information in order to comply with an information request. It is also not relevant if the complainant feels the public authority should hold the requested information. It is about what a public authority does hold. A public authority cannot provide access to recorded information it does not hold.

Right of appeal

17. 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

18. 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.
19. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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