

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 March 2022

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant requested from the Ministry of Defence ("MOD") information regarding work orders for installed fencing and gates at Long Valley training area B4. MOD provided information that falls within scope of the first part of the request, and confirmed that it does not hold information to some other parts of the request.
2. The Commissioner's decision is that the MOD should have considered the request under the EIR, rather than FOIA. However, the Commissioner is satisfied that on the balance of probabilities, the MOD does not hold any recorded information falling within the scope of the remaining parts of the request. Therefore, he does not require the MOD to take any steps as a result of this decision.

Request and response

3. On 7 December 2020, the complainant wrote to MOD and requested information in the following terms:

"I would be grateful if you would provide a copy of the following work orders:

- 1. Construction of a fence at training area B4/Long Valley. This fence was constructed on or around 27th of March 2020 and runs along the western edge of Rushmoor Road.*
- 2. Installation of access gates in the fence referred to in 1. above. The gates were installed in September 2020.*

In addition to the work orders please provide a summary of costs incurred. If possible a breakdown of labour and materials for each work order would be of interest but I will accept individual summary totals.

I believe such costs are not recurring and therefore may be disclosed under FOI."

4. On 21 December 2020 MOD responded and confirmed that some information in scope of the request is held. MOD stated that information requested in questions 1 and 2 can be found at Annexes A and B which it provided to the complainant. MOD also redacted some information and applied section 40 (personal data) of the FOIA to those parts.
5. On 31 December 2020 the complainant asked the MOD for an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 15 March 2021 to complain about the way his request for information had been handled.
7. Further to the Commissioner's intervention, MOD provided the complainant with its internal review response on 26 March 2021.

8. MOD stated that the request was handled in accordance with the FOIA and that it had provided the recorded information it holds that falls within scope of the first part of the request in full. With regard to 'work orders' MOD confirmed that it does not hold a separate work order relating to the installation of the gates. With regard to some of the information withheld under section 40(2) (personal data) of FOIA, the MOD said that this was not reviewed as the complainant had not specifically complained about this aspect.
9. The following analysis focuses on whether, on the balance of probabilities, the MOD was correct to state that it does not hold information relating to work orders for fencing and gates at Long Valley training area.

Reasons for decision

Regulation 2(1) of the EIR - is the information environmental?

10. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other 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..."

11. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
12. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information.
13. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
14. The requested information in this case relates to a construction of a fence at Long Valley training area, and also to installation of access gates within the fence in question.
15. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on measures such as policies, plans and activities which are likely to affect environmental elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b).
16. In such cases, the Commissioner may require a public authority to issue a fresh response to the complainant under the correct regime. In this case the MOD accepted that the request could have been handled under EIR, and said that given that some of the information was found to be not held, that the choice of regime made no significant difference to the outcome of the complaint. The MOD therefore processed it under FOIA as per the complainant's wishes. However, the Commissioner has first considered whether the requested information is held by the MOD.

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

17. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.

¹ <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

18. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held.
19. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held.

The complainant's view

20. The complainant strongly believes that MOD have not made a truthful disclosure and explained to the Commissioner reasons for his view.
21. The complainant stated that *"auditing a paper trail of decisions to spend public money should ensure all documents may be cross-reference and validated. All documents supplied pass audit and a clear trail established, except for The Estate Service Requirement (ESR)."* The complainant said that the ESR describes the inclusion of pedestrian gates as part of the installation of a deterrent fence, and that all subsequent contractor documents refer to a deterrent fence but without reference to the inclusion of pedestrian gates. Although MOD asserted that the contractor was at fault and installed gates at their own cost to correct the mistake, the complainant highlighted to the Commissioner that the contractor documents demonstrated the contract for works, as delivered by the contractor, had been for installation of a deterrent fence and pedestrian gates. The complainant emphasised that the fence and gates were not requested, nor were they quoted for or originally installed.
22. The complainant argued that the ESR had been deliberately created or modified to give the impression that pedestrian gates had been planned, and he stated that it had taken six months for the pedestrian gates to be installed.

23. With regard to the further information supplied to the complainant by MOD, he considered that this disclosure was incomplete and significant information was missing. The complainant requested another internal review because it did not fully satisfy point 2 of his original request. He said that all material supplied by MOD referred to "Two" gates, and that since September 2020 a total of "Five" gates are in existence in the Rushmoor Road deterrent fence. The complainant stated that the information supplied was consistent in requesting two vehicle gates to be supplied and installed. These gates were installed in March 2020 as part of the work to install the deterrent fence. He also stated that three additional pedestrian gates were installed in September 2020, and highlighted to MOD that information relating to this change was missing.
24. The complainant reiterated that three pedestrian gates exist that were installed following a local campaign to restore access. He also said that there was a delay between the two phases of fence installation and gate additions. The complainant confirmed to the Commissioner that the primary issue is the fence and gates which had been installed in two phases; in March 2020 the fence and in September 2020 the gates. The complainant clarified that his complaint revolves around two issues; the documents (quotations, works orders and acceptance) which he believes that they make no reference to the installation of foot gates.
25. He said that the ESR document carries a reference number to tie it into the rest of the supporting document, but that the sole reference to three foot gates sits in isolation within an Annex. He added *"being unable to audit or verify how it relates to the other documents."*
26. The complainant's second issue is a part of the internal review which he said does not suggest the contractor was expected to supply and fit three foot gates. He said the quotation is for 800 metres of chain link fence and two vehicle gates, and explained *"The purpose of this fence was to deter access to an area of land to which the public enjoy recreational access, and to which the Minister of State for Defence Procurement has instructed [Defence Infrastructure Organisation] DIO to ensure remains accessible for recreation when not in use."* The complainant therefore considers the information within the Annex to be untrue, and that it was created after September 2020. He also considers *"the assertion the contractor was responsible for failing to supply and fit (and subsequently rectify) responsible for fitting the three foot gates to be untruthful."* The Complainant argued that *"If what DIO say is true then Landmarc will hold documents created as a direct result of and acting on DIO's direct instruction."*

27. The complainant confirmed to the Commissioner what he considers to be missing from the MOD's response; a copy of documentation containing reference to and details of installation of three foot gates and costs associated with supply and fit of three foot gates. The complainant explained that from the information which MOD had released, the works orders refer to just two gates 5 metres wide supplied and fitted. The fence has a total of five gates installed comprising 2 x 5m vehicle gates and 3 x foot gates. He said that the documents released lacks any reference to the 3 x foot gates.
28. The complainant summarised that he is seeking the actual breakdown of costs for the fence and gates. He stated that the costs are split between MOD and its contractor – Landmarc, and therefore, he believes that the summary costs supplied are incomplete and are not the actual total. Or, that the costs are accurate but the requested breakdown of costs has not been supplied to him by MOD. The complainant is also of the view that *"This matter could be swiftly resolved by DIO producing and providing a single document that supports the claim of "mistake" and the liability for the error was for Landmarc to correct."*

The MOD's view

29. The MOD explained that the Defence Infrastructure Organisation (DIO) confirmed that the request for 'work orders' was interpreted as information which provides top level details about the scope of the tasks to be conducted. In this case, it was considered that the DIO Estate Service Requirement (ESR) form and the National Training Estate Prime (NTEP) contractor's (i.e. Landmarc) Statement of Need (SoN) document, falls in scope of the request.
30. The MOD confirmed that a search for whether information was held had been conducted by the DIO, in particular within one email account where it is known that the information would be held and in the 'ESR' area. MOD explained that as Landmarc (contractor) hold information on behalf of MOD, they were also asked to conduct a search for the requested information (work orders). MOD stated that two documents (ESR form and draft SoN) that were located within DIO were provided to the complainant, and that some further information was released in response to a subsequent request. However, MOD said that no further information had been located.

31. The MOD stated that information in scope of the request is held electronically within DIO's SharePoint, DIO's Information Management System (IMS) and within individual email accounts. Information, MOD said, is also held by Landmarc on their internal corporate systems, and MOD advised that the information relevant to this request is held in the DIO IMS and Landmarc Information System which can only be directly accessed by Landmarc and DIO respectively. MOD further explained that the DIO Overseas and Training HQ Team coordinated the searches and tasked the Overseas and Training team in the South East region (that have the authority to approve and fund the works that are of interest to the complainant) to search their holdings. In addition, MOD said that the O&S Training SE team consulted Landmarc and the individual responsible for regional delivery was also consulted.
32. The MOD described the search terms used to locate the information and that this included the Task ID and IMS reference numbers and the SoN reference number, also search terms which related to 'SE – Bourley Deterrent fence'. MOD said that in addition, the search terms; 'ESR', 'Landmarc', 'Rushmoor Rd', 'gate' and 'fence' were used, but that some of these terms captured a wide range of information which fell out of scope of the request.
33. MOD explained that *"The information relating to this request was mainly found in one individual's email account, in a folder titled 'ESR' where the relevant information is stored by the individual responsible for submitting ESRs and within the DIO's IMS. Some information was also found by the individual responsible for regional delivery."*
34. In response to a request by the complainant for a further review of his information request, the MOD advised that it would not normally complete a further internal review into a case that is the subject of an ongoing ICO investigation. However, MOD provided the complainant with a response to each of his questions which he raised with the ICO.
35. The MOD advised the complainant that in this case, DIO raised the original ESR which contained an initial description of the additional work services proposed. MOD said documents stated that there was a requirement for the installation of foot gates, and MOD highlighted an extract from a section of the ESR document; *"Construct a new section of fencing of an identical design and construction as the B4 safety fence together with three x supporting foot gates"*. MOD therefore considered that the complainant had been provided with recorded information (the original ESR), which states that DIO expected the contractor to install three foot gates in the fence from the outset.

36. With regard to costs of installing a fence and foot gates, MOD said that DIO confirmed that the total cost for the works was £36,384.03. The recorded information, the MOD said, confirmed the 'Total Firm Price (excluding VAT)' and that this was released with its letter of 16 December 2021 to the complainant. The breakdown of the work services, the MOD stated, was contained within the specific document. The costs held (whether estimates or firm prices) for the installation of the fence (including gates) had also been provided to the complainant.
37. The MOD confirmed that the installation of the fence was completed in two phases. In March 2020 the fence was installed and included the installation of two vehicle gates. In September 2020 the gates were installed and that these were three pedestrian gates, which the MOD considers to be the focus of the complaint. The MOD explained that as the fence was installed in two phases, it may have appeared to be two separate and distinct works. The MOD said the complainant's assertion that there would have been paperwork raised for each phase is not unreasonable. However, it also said that the complainant incorrectly assumed that a separate ESR, SoN and task order (complete with quotation) must exist for the installation of the foot gates.
38. The MOD reiterated that the work conducted to complete the installation (fence and gates) was completed in fulfilment of a single ESR raised by DIO. It provided the complainant with an explanation as to why further information is not held.
39. The MOD informed the complainant that DIO explained that the installation of gates (two vehicle and three pedestrian) formed part of their ESR. Landmarc's full draft SoN does not specifically state the number of gates but refers to them as 'associated gates'. It said that as the specific number and location for the required gates were not recorded in the SoN paperwork, an error was made during the installation of the fence in March 2020. The pedestrian gates had been omitted and this error was not identified at the time.
40. The MOD also informed the complainant that following the error being identified, a series of conversations between representatives from Landmarc and DIO were held to resolve the matter. In September 2020 the outstanding works to install the missed pedestrian gates were completed at Landmarc's expense. The MOD further explained that as the work was originally authorised under specific reference numbers, the corrective action was completed without any additional SoN or work orders being created.

41. The MOD apologised to the complainant for any confusion caused during the handling of his request, and it confirmed that it had provided him with all the recorded information held which falls in scope of his original request. MOD also explained that the change in the way that the gate requirement was recorded, meant that the contractor missed the requirement to install the foot gates. As the requirement was missed, the quotation for the works did not include any separate costs relating to the installation of the foot gates. MOD concluded that it had been assured DIO has not deliberately destroyed, hidden or altered any of the requested information to prevent it being released. MOD said that if any further recorded information had been located, it would have provided the information to the complainant subject to any exceptions that would have applied.

The Commissioner's decision

42. The Commissioner has examined the submissions of both parties. He considered the complainant's concerns/arguments, and also the searches conducted by the MOD and its explanations as to why further information is not held.
43. The Commissioner recognises that the requested information is clearly of interest to the complainant, and the complainant considers that further information should be held. However, the Commissioner is satisfied by the MOD's explanations as to why there is no further information held. He acknowledges that the contractor missed the requirement to install the foot gates, therefore, the quotation for the works did not include any separate costs relating to the installation of the foot gates. The Commissioner is also satisfied that the MOD carried out adequate and appropriately-targeted searches in response to the request, which would have been likely to retrieve information if it was held. He notes that all the relevant departments were consulted and reasonable searches undertaken. The Commissioner considers that such searches would have located related information. There is no evidence that the MOD had attempted to conceal information from the complainant.
44. The Commissioner is satisfied that on the balance of probabilities, the MOD does not hold any further information falling within the scope of the request to that which it subsequently identified and disclosed to the complainant. Therefore, the Commissioner does not require the MOD to take any steps as a result of this decision.

Right of appeal

45. 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@justice.gov.uk.

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

46. 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.
47. 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

**Phillip Angell
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