



**FREEDOM OF INFORMATION ACT 2000 (SECTION 50)
ENVIRONMENTAL INFORMATION REGULATIONS 2004**

DECISION NOTICE

Dated 21 July 2006

Public Authority: Health Protection Agency

**Address: Central Office
7th Floor
Holborn Gate
330 High Holborn
London WC1 V7PP**

Summary Decision

The Commissioner's decision in this matter is that the Health Protection Agency has not dealt with the complainant's request in accordance with Part 2 of the Environmental Information Regulations in that it has failed to comply with its obligations under Regulation 5(1).

- 1. Freedom of Information Act 2000 ('the Act'), Environmental Information Regulations 2004 ('the Regulations') – Application for a Decision and the Duty of the Commissioner.**
- 1.1 The Information Commissioner ('the Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part 1 of the Act.**
- 1.2 The Commissioner considers the information requested by the complainant to be environmental information as defined in Regulation 2 of the Environmental Information Regulations 2004. He has therefore considered whether the request has been dealt with in accordance with the requirements of Part 2 of the Environmental Information Regulations 2004.**
- 1.3 Where a complainant has made an application for a decision, unless:**
 - a complainant has failed to exhaust a local complaints

- procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

The Commissioner is under a duty to make a decision.

1.4 The Commissioner shall notify the complainant either that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

- 2.1 The complainant contracted Legionnaires' Disease during a holiday at a hotel in Buggiba, Malta in June 2004. He was informed by the Health Protection Agency (HPA) that this was the second reported case of Legionnaires' Disease associated with that hotel within one year. Investigations were carried out at the hotel by the Maltese public health authorities to check for Legionella infection. The complainant required details of the investigations in order to support his insurance claim for compensation. The Maltese Chief Government Medical Officer had refused to provide the complainant with the results of their investigations on the grounds that they were outside the public domain.
- 2.2 The HPA is the co-ordinating centre of EWGLINET (European Surveillance Scheme for Travel Associated Legionnaires' Disease) and as such is in possession of the information required by the complainant. Thirty five countries currently collaborate within EWGLINET. The organisation is supported as a European Union Disease Specific Network under Decision 2119/98/EC of the European Parliament and of the Council for setting up a network for the epidemiological surveillance and control of communicable diseases in the community.
- 2.3 On 1 February 2005 the complainant requested the following information from the HPA in accordance with section 1 of the Act:
- 'copies of the results of the investigations carried out at the Carolina Hotel, to include details of the recent case in July 2004 and also details of the previous investigation which was carried out including the date and results of this investigation.'*
- 2.4 On 2 March 2005 the HPA informed the complainant that the information was withheld under section 41 of the Act (information provided in confidence).
- 2.5 The complainant asked the HPA to review its decision to withhold the information. On 26 May 2005 the HPA upheld its original decision, citing the same exemption as it had done previously.

3. Relevant Statutory Obligations under the Regulations

Regulation 5(1) provides that –

“...a public authority that holds environmental information shall make it available on request.”

4. Review of the case

- 4.1 The complainant asked the Commissioner to investigate the HPA's decision to withhold the requested information. Accordingly, the HPA's application of the section 41 exemption as its basis for withholding the information was examined.
- 4.2 The Commissioner needed to ascertain whether information about an outbreak of Legionella is environmental information. He therefore asked the Consultant Clinical Scientist (Water Environment Microbiology) at the HPA whether Legionella could be categorised as an 'emission' for the purposes of Regulation 2(1)(b) the EIR. The Commissioner was advised that it could but that it had apparently not been tested in court. However, based on this advice, the Commissioner took the view that Legionella is a biological emission. The presence of Legionella is a factor affecting or likely to affect the environment for the purposes of Regulation 2(1)(b) of the Regulations. Information about an outbreak of Legionella is consequently environmental information.
- 4.3 The Commissioner has therefore dealt with the matter under the Regulations rather than the Act.

5. The Commissioner's Decision

5.1 Section 41 (information provided in confidence)

The HPA relied upon section 41 of the Act as a basis on which to withhold the information. This states that:

41. - (1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

- 5.2 Section 41 is absolute and therefore not subject to the public interest test.
- 5.3 The HPA argued that information collected by the Maltese authorities about the Maltese hotel is not held by HPA but by EWGLINET or, if HPA does hold the information then it does so on behalf of EWGLINET or the Maltese authorities.

- 5.4 The HPA tried to deal with the complainant's request by putting it before EWGLINET's Steering Committee. The Committee's view was that the HPA (as coordinating centre) should not override individual decisions by participating countries on whether or not to release information generated in connection with the pan-European scheme. Constrained by the Committee's view, the HPA went on to inform the complainant that because the requested information had been provided to the EWGLINET scheme in confidence and under a contractual arrangement, in its view it could not be released.
- 5.5 The Commissioner has examined that contractual arrangement. He is not persuaded that disclosure by the HPA would constitute an actionable breach of confidence as is required by the section 41 exemption.
- 5.6 The Commissioner's opinion is informed by his understanding that all European administrations have an obligation under EC Directive 2003/4/EC (on public access to environmental information) to make environmental information available on request. This means that the UK and Maltese authorities must both adopt an approach to disclosure that is compatible with the Directive.
- 5.7 The requirement to make available environmental information is stated in Article 3 of the EC Directive. This states that:

Member states shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.

- 5.8 Turning to HPA's own obligations under UK legislation, the Commissioner is mindful of the Explanatory Note that is attached to the Regulations concerning regulation 12. This provides that where the information requested relates to information on emissions, disclosure of that information cannot be refused under the exceptions listed in 12(5)(d) to (g). These exceptions are:

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it: and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

- 5.9 The Commissioner is satisfied therefore that the exception at 12(5)(e) of the Regulations cannot be used as a basis for refusing disclosure of the requested information.
- 5.10 All the exceptions in the Regulations are subject to the public interest test. This means that even if an exception is engaged, environmental information must still be disclosed if, in all the circumstances of the case, the public interest in disclosure outweighs the public interest in maintaining the exception.
- 5.11 The s41 exemption relied on by the HPA is not subject to the public interest test. However, the Commissioner is mindful of the public interest arguments put forward by the HPA in support of its decision to withhold the information. The HPA argued that,
1. If the name of a hotel at which patients had contracted Legionnaires' disease was published, hotels would refuse to cooperate with future investigations and the EWGLINET scheme might collapse.
 2. Current control measures, including remedial action at hotels where the Legionella infection was present, would cease. This would lead to increased risks for travellers.
- 5.12 The Commissioner is not persuaded by these arguments. He is aware that in 2000 the Netherlands used its FOI Act to publish the names of 51 hotels in Europe that had had Legionella infections. Although two countries stopped reporting cases, eight months later they rejoined the EWGLINET scheme. When in 2001 a Dutch newspaper published further details of hotels which had Legionella infection there was no such international response.
- 5.13 The Commissioner is also aware that health protection authorities of some member states within the EWGLINET scheme have disclosed similar information on several occasions without apparent detriment to the EWGLINET database. He is therefore not persuaded by the argument that the EWGLINET reporting scheme would be damaged if the complainant was provided with the requested information.
- 5.14 The Commissioner is satisfied that public interest arguments are not required to support disclosure of the requested information in this case (see para 5.8). However, in this case the Commissioner has decided that it would be appropriate to counter the public interest arguments against disclosure that the HPA has put forward.
1. Members of the public must be able to protect themselves from risks to their health and wellbeing. In order to do so, they must have access to information, where available, about the presence of infections such as Legionella.
 2. Disclosure of information revealing that a particular hotel has a history of harbouring life threatening diseases would allow individuals thinking of staying

there to make an informed choice about whether to do so.

3. Hotels would become more effective in countering Legionella on their premises if it was known that information revealing the presence of the disease would be made public. This would have a positive effect on public health and the health and safety of individuals.

5.16 For the reasons stated above, the Commissioner's decision in this matter is that the Health Protection Agency has not dealt with the complainant's request in accordance with Part 2 of the Environmental Information Regulations in that it has failed to comply with its obligations under Regulation 5(1).

6. Action Required

6.1 The Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that the Health Protection Agency shall, within 35 days of the date of this Decision Notice, provide the complainant with the requested information.

7. Failure to comply

Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

8. Right of appeal

8.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the Tribunal). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: informationtribunal@dca.gsi.gov.uk
Leicester	
LE1 6ZX	

8.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 21st day of July 2006

Signed:

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane Wilmslow SK9 5AF**