

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 25 October 2007

**Public Authority:** Department for Environment Food and Rural Affairs  
**Address:** Nobel House  
17 Smith Square  
London SW1P 3JR

### Summary

---

The complainant, on 15 March 2005, requested information from the Department for Environment Food and Rural Affairs ("the Department") in relation to the farm upon which she and her family live and which she and her family run as a business. The Department withheld the information on the basis that it is exempt under section 12 of the Freedom of Information Act 2000 ("the Act") in that the cost of complying with the request would exceed the appropriate limit. The Commissioner is satisfied that the withheld information is environmental information and so falls to be considered under the Environmental Information Regulations 2004 (the "EIR").

The Commissioner is satisfied that all of the information is excepted from disclosure under regulation 5(3) of the EIR because the information constitutes personal data of which the complainant is the data subject.

The Commissioner finds that the Department has not dealt with the complainant's request in accordance with Part 1 of the Act in that it has incorrectly applied the exemption under section 12 of the Act and has failed to consider the information under the EIR and that the Department has failed to comply with regulation 5 of the EIR and in particular has failed to apply regulation 5(3) of the EIR.

### The Commissioner's Role

---

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR. This Notice sets out his decision in respect of the complainant's request dated 15 March 2005.

## The Request

---

2. On 15 March 2005 the complainant wrote to the Department to request information as follows:

*"I would like all documents and correspondence held by your self – the directorate of Defra – about [my farm], the animals on it, or the reports by [veterinary surgeon] about the farm or the animals on it... I know that [veterinary surgeon] travelled to meet with you several times. I would like the minutes of those meetings. I would like the draft reports about my farm. – I believe there are two. I gave you permission to come onto my farm and I believe I have every right to see them.*

*I believe a probability survey or the equivalent was done about the pyres and [my farm]. – I would like that and anything else you have about [my farm] or the animals." (the requested information'.*

3. On 7 April 2005 the Department wrote to the complainant with its decision in relation to the requested information. The Department advised the complainant that the request was considered to be broad and that it could cover an enormous amount of information. The Department advised:

*"Gathering it together would therefore be likely to involve a significant cost and diversion of resources from the Department's other work. It certainly seems likely to exceed the £600 cost limit which the Government has set for dealing with Freedom of Information requests.*

*...The best way we can help you is therefore to ask you to try to narrow down your request to focus more clearly on the precise information you are seeking."*

4. The Department advises that its records show that the complainant's husband contacted the Department to state that he did not wish to pay for access to the requested information. On 15 April 2005 the Department wrote to the complainant referring to that call:

*"We note that you do not wish to pay to access the information you have requested in your letter of 15 March 2005 and that you do not provide any guidance to narrow the scope of your enquiry. Our interpretation is therefore that you do not wish us to pursue your request for information under the Freedom of Information Act.*

*If this is not your intention can you respond by narrowing the scope of your enquiry as previously detailed in our letter of 7 April.*

*You could for example:*

*State specific dates you would be interested in;*

*Include the date and times that your farm was visited by Defra;*

*State if it is just Defra HQ papers you wish to see, or the papers from Thirsk Veterinary Investigation Centre."*

The Department then offered the complainant the opportunity to seek an internal review of its decision and stated that if still unhappy the complainant might bring the matter to the attention of the Information Commissioner.

5. On 14 February 2006 Commissioner received correspondence from the complainant about the way a number of requests for information had been handled by the Department. The complainant advised the Commissioner that she was "*appealing on 2 refusals.*" The complainant provided the Commissioner with copy correspondence relating to the request of 15 March 2005 and to subsequent requests for information made of the Department. The Commissioner contacted the Department regarding the request of 15 March 2005 as no internal review had taken place.
6. On 22 March 2006 the Department wrote to the complainant and her husband and advised "*it is normal practice for a case to be considered under Defra's internal review procedures before a complaint can be assessed by the Information Commissioner.*" The Department explained that it had agreed to carry out an internal review and that its decision upheld the original decision of the Department to exempt the information on the basis of costs. However at this stage, the Department also advised that some of that information specifically requested in the request of 15 March 2005, that is, the "*probability survey*", was not held.
7. The complainant advised the Commissioner that, having received notice of the outcome of the internal review carried out by the Department, she wished to proceed with her complaint in respect of the Department's handling of her request of 15 March 2005.

## The Investigation

---

### Background to the request

8. The Department was formed in June 2001 when it took over the responsibilities of the Ministry of Agriculture Fisheries and Food ('MAFF'). MAFF took the lead in managing the foot and mouth epidemic of 2001 when slaughtered animals were disposed of in open mass pyres. The complainant is a dairy farmer in partnership with her husband. During the foot and mouth disease crisis of 2001 a number of pyres were burned near to the complainant's farm. The complainant's stock escaped foot and mouth disease. However, the complainant and her family became gravely concerned regarding the impact of the pyres and emissions from the pyres upon animal and human health. The Department has undertaken investigation of these concerns and a considerable amount of information is held by the Department relating to these matters.

## Scope of the case

9. In its refusal notice to the complainant the Department withheld the requested information on the grounds that the cost of complying with the request would exceed the appropriate limit. The Department did not consider that the requested information was environmental information and so did not give consideration to the request under the EIR. Nor, in its response to the complainant's request of 15 March 2005, did the Department give consideration as to whether the request might properly be considered as a request for personal information of the complainant under the Data Protection Act 1998 (the 'DPA').
10. The Commissioner notes that the Complainant made further requests for information on 16 March 2005, 16 April 2005 and 18 May 2005. The Commissioner will not address the handling of these requests in this decision but will consider certain of the correspondence which the Department advises is related to these requests where to do so will illuminate the issues presently before him.
11. The Commissioner in this decision will consider the response of the Department to that request for information made by the complainant on 15 March 2005.

## Chronology

12. On 10 May 2005 the Commissioner wrote to the Department asking that the Commissioner be provided with copies of the requested information and making detailed enquiries regarding the approach of the Department to the request of 15 March 2005.
13. The Commissioner advised the Department that whilst the complainant had referred to "two refusals" in her complaint to the ICO and made several requests for information of the Department, it was the Commissioner's view that the earlier request of 15 March 2005 encompassed all of the information requested and so only that request would be considered by the Commissioner. This approach was supported by the complainant and the Department.
14. The Commissioner sought confirmation as to what consideration had been given by the Department as to the applicability of the EIR. The Commissioner asked the Department to provide details of its consideration of the presumption of openness under the EIR.
15. The Commissioner asked the Department to provide details of each of the exemptions or exceptions upon which it sought to rely and the particular relevance of each to each item of information. The Commissioner also asked the Department to explain why, in all the circumstances of this case, the public interest in maintaining each claimed qualified exemption or exception, outweighed the public interest in the disclosure of the requested information.
16. The Commissioner also asked the Department to provide details of the "significant cost", referred to in its letter to the complainant dated 22 March 2005, which the Department felt would be incurred in responding to the request of 15 March 2005.

17. On 5 and 6 June 2007 the Department afforded the Commissioner the opportunity to carry out an examination of the requested information at the offices of the Department and subsequently made the requested information available for inspection at the Commissioner's offices. The Commissioner carried out a detailed examination of all of the requested information.
18. On 19 June 2007 the Department provided the Commissioner with a detailed response to his enquiries of 10 May 2007. The Department advised the Commissioner that the request of 15 March 2005 was considered entirely under the Freedom of Information Act 2000 and not under the Environmental Information Regulations 2004.
19. The Department also advised that with regard to the other cases (see paragraph 10 above) the information requested had to be set against the background of the 2001 Foot and Mouth epidemic. The Department advised that the complainant and her husband were prompted by concerns that the health of their cows had been affected by the pyres that had been burning nearby. The Department was of the view that some of this information could fall to be considered under regulations 2 (1)(a) and (b) of the EIR as it relates to both the state of the elements of the environment such as air and atmosphere, land and soil and also discharges and other releases into the environment.
20. The Department went on to state that it did not consider that this altered the cost arguments or the public interest considerations with regard to the 15 March 2005 request.
21. In relation to the calculation of the cost of responding to the request of 15 March 2005, the Department advised that it considered that a conservative estimate of the time taken to deal with the subsequent requests by the complainant was 31 ½ hours at a cost of £787.50. The Department considered that the costs of responding to the request of 15 March 2005 would have been considerably higher. The Department provided the Commissioner with details of the other requests and its response to them.
22. On 13 September 2007 the Commissioner asked the Department for its views on whether it considered the requested information to be the personal data of the complainant. The Commissioner provided the Department with a link to the Commissioner's guidance on personal data.<sup>1</sup>
23. On 27 September 2007 the Department advised that it considered that the request was properly considered under the Act and that not all of the requested information constitutes personal data within the meaning of the DPA. The Department also stated that, in so far as any of the requested information does relate to personal data, similar costs considerations applied under DPA as under FOIA because the Department considered that the requested information was held manually in unstructured files. The Commissioner has examined the

---

<sup>1</sup> [http://www.ico.gov.uk/about\\_us/news\\_and\\_views/current\\_topics/what\\_is\\_personal\\_data.aspx](http://www.ico.gov.uk/about_us/news_and_views/current_topics/what_is_personal_data.aspx)

requested information and notes that the requested information is held in files referenced by file numbers and the surname of the complainant.

## Analysis

### Environmental Information

24. The Commissioner is satisfied that all of the requested information is environmental information and falls to be considered under the EIR for the following reasons.

25. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged by regulations under section 74 of the Act to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in regulation 2.

26. Regulation 2 of the EIR states:

*“environmental information” has the same meaning as in Article 2(1) of the Directive, namely 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;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and*

*built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);*

27. The Commissioner has considered the requested information and is satisfied that the requested information is environmental information as defined by regulation 2 of the EIR.
28. The Commissioner notes the Department's view that some of the withheld information may be considered under the EIR. The Department considers that some of the requested information could fall to be considered under Regulations 2(1)(a) and (b) as it relates to both the state of the elements of the environment such as air and atmosphere, land and soil and also to discharges and other releases into the environment.
29. The Commissioner is satisfied that a substantial amount of the requested information falls under regulations 2(1)(a) and (b) of the EIR.
30. The Commissioner is satisfied that some of the requested information is environmental information under 2(1)(c) of the EIR in that it is information on measures and activities affecting or likely to affect the elements and factors referred to in regulations 2(1)(a) and (b) of the EIR.
31. Further of the requested information is environmental information under 2(1)(f) of the EIR in that it is information on the state of human health and safety including the contamination of the food chain, in as much as it is affected by the state of the elements or, through those elements by matters referred to in 2(1)(b) and (c) of the EIR.
32. Accordingly, the Commissioner is satisfied that all of the requested information is environmental information and falls to be considered under the EIR.

### **Exemption claimed by the Department**

#### **The exemption under section 12 of the Act**

33. In its refusal of the complainant's request of 15 March 2005 the Department claimed that the information was exempted from disclosure as the cost of responding would involve a significant cost and diversion of resources from the Department's other work. The Department sought to apply section 12 of the Act as it estimated that the cost of complying with the request would exceed the appropriate cost limit.
34. As the requested information is environmental information and falls to be considered under the EIR and not the Act, section 12 of the Act cannot be applied and should not have been applied by the Department in relation to this request.

## Exception considered by the Commissioner:

### The exception under regulation 5(3) of the EIR

35. The Commissioner has considered whether the requested information is excepted from disclosure under regulation 5(3) of the EIR.
36. Regulation 5(3) of the EIR states that, to the extent that requested information includes personal data of which the applicant is the data subject, the requirement to make information available upon request shall not apply to those personal data. (For the full text of regulation 5(3) see appendix 2).
37. "Personal data" is defined in regulation 2(4) of the EIR as having the same meaning as in the Data Protection Act 1998 ("the DPA").
38. Section 1(1) of the DPA defines personal data as follows:
- " "personal data" means data which relate to a living individual who can be identified –*
- (a) from those data, or*
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*
39. The Commissioner is satisfied that the absolute exception under regulation 5(3) of the EIR is engaged for the following reasons.
40. The Commissioner has considered whether the complainant is acting as an agent of her husband or as an agent of their business partnership in making her request of the Department.
41. The complainant has worked on the family dairy farm for 30 years and is formally an equal partner in the business having a hands-on role in its day to day and strategic operation.<sup>2</sup> The Commissioner recognises that the complainant has concerns at the impact of the pyres upon her business and recognises the very close working relationship between the complainant and her husband. The Commissioner also acknowledges that the interests of the complainant, her husband and the family business coincide to a significant degree. However, the Commissioner recognises the very particular professional and personal interests of the complainant in this matter and is satisfied that in making this request for information the complainant has acted in her own right and makes the request on her own behalf.

---

<sup>2</sup> The complainant is an equal equity partner with her husband and an equal profit sharer with her husband and son.

42. The Commissioner has considered whether the requested information constitutes personal data of which the complainant is the data subject.
43. The Commissioner is satisfied that all of the information is personal data in that it “relates to” a living individual who can be identified from that data or from those data and other information which is in, or is likely to come into the possession of, the data controller. The Commissioner finds that all of the withheld information “relates to” the complainant.
44. ‘Personal data’ is defined by section 1(1) of the DPA (see paragraph 38 above). The Commissioner has considered the guidance of the court on the interpretation of this provision given in the case of *Durant v Financial Services Authority*<sup>3</sup>.
45. The Commissioner is satisfied the requested information does “relate to” the complainant in that it goes beyond the mere description of her business and working environment but rather does effect her privacy in a business, professional and personal capacity. The information is biographical in a significant sense as it speaks of the complainant’s business, her abilities in the management of the business, her concerns regarding that business, her family and personal life and her home.
46. The Commissioner is satisfied that the complainant is the focus of the requested information. The data relates to the business she has run for thirty years, the farm upon which she lives, the manner of its management, the concerns she has raised and the impact of the pyres upon her business, health, life and livelihood.
47. Further, the Commissioner is satisfied that the complainant can “be identified” from the data or from those data and other data within the possession of the Department.
48. The Commissioner has considered the requested information and notes that the information is held in files referenced by file numbers and the surname of the complainant. Some of the information held manually is electronic in origin. The Commissioner is satisfied that the requested information is the structured personal data of the complainant. The Commissioner recognises that certain of the information contained within the requested information may be personal data of persons other than the complainant. The Commissioner is satisfied that this in no way prevents the requested information also being the personal data of the complainant.
49. Accordingly, the Commission finds that the requested information is personal data of which the complainant is the data subject and that the exception under regulation 5(3) is engaged in respect of the requested information.

---

<sup>3</sup> [2003] EWCA Civ 1746

## The Decision

---

50. The Commissioner's decision is that the public authority has not dealt with the request in accordance with the Act for the following reasons:

- The Department was in error in its failure to consider the complainant's request under the Environmental Information Regulations 2004. Consequently, the Department was in error in its application of the exemption under section 12 of the Freedom of Information Act 2000.
- The Department was in error in its failure to apply the exception under regulation 5(3) of the Environmental Information Regulations 2004.

## Steps Required

---

51. No steps are required to be taken by the Department in relation to the Commissioner's consideration of this request under the Environmental Information Regulations 2004.

## Other matters

---

52. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

- Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. Therefore, in relation to the request, the Commissioner will go on to make an assessment under section 42 of the DPA as to whether the information in question in this case should be disclosed to the complainant under this access right. However, this assessment will be dealt with separately and will not form part of this decision, because an assessment under section 42 of the DPA is a separate legal process from the consideration of a complaint under section 50 of the Act.

## Right of Appeal

---

53. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 25<sup>th</sup> day of October 2007**

**Signed .....**

**Marie Anderson  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Appendix 1:

### Relevant Statutory Obligations under the Act

1. **Section 1(1)** provides that –

*“Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.”*

2. **Section 12(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

**Section 12(2)** provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

**Section 12(3)** provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

3. **Section 39(1)** provides that –

“Information is exempt information if the public authority holding it-

(a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.”

## Appendix 2:

### Relevant Statutory Obligations under the EIR

#### 1. Regulation 2 - Interpretation

**Regulation 2(1)** In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (g) 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;
- (h) 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);
- (i) 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;
- (j) reports on the implementation of environmental legislation;
- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and

built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

## 2. **Regulation 5 - Duty to make available environmental information on request**

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 5(3)** To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.