

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 9 April 2008**

**Public Authority:** Department for Environment, Food and Rural Affairs  
**Address:** 3-8 Whitehall Place  
London  
SW1A 2HH

### Summary

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The complainant requested from DEFRA the release of briefing notes and background evidence advice in relation to the issue of redress in the case of the cross-contamination of non-GM crops by GM crops. He also requested relevant legal advice and to be told the names of those with whom the legal advice had been shared. DEFRA initially refused to release this information under the Environmental Information Regulations but, at review stage, decided that the matter was more appropriately dealt with under the Freedom of Information Act. DEFRA withheld the information sought under sections 22, 35 and 42 of the Act. Subsequently DEFRA agreed to release much of the information to the complainant as it had now reached the public domain but continued to withhold information under sections 35 and 42. The Commissioner decided that the information had been correctly withheld under section 35, and did not therefore consider section 42. DEFRA was criticised for failing to issue a Refusal Notice under the correct legislation.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision. 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.

## The Request

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2. On 13 September 2005 the complainant wrote to the Department for the Environment, Food and Rural Affairs (DEFRA) to ask for the following information: *“all communications made and received by Cabinet Ministers, all briefing notes and background evidence advice, and legal advice made available to Cabinet Ministers and meeting notes where Cabinet Ministers were present regarding liability of losses caused by cross-contamination from genetically modified crops.”* On 29 September 2005 DEFRA replied. DEFRA said that it could only deal with the request in respect of its own Cabinet Ministers although, as the lead policy department for genetically modified (GM) crops, it thought it likely anyway that it would hold all of the available information. DEFRA said that the request as it stood would involve a significant cost and diversion of resources. The complainant was invited to submit a more focussed request, in particular by stipulating some kind of time frame.

3. On the same day the complainant submitted a revised request. Dating from 8 June 2001, the complainant requested:

*“all background evidence advice made available to Cabinet Ministers regarding liability of losses caused by cross-contamination from genetically modified crops; and-  
all legal advice made available to Cabinet Ministers regarding liability of losses caused by cross-contamination from genetically modified crops; and-  
a list of who received the legal advice made available to Cabinet Ministers regarding liability of losses caused by cross-contamination from genetically modified crops.”*

On 10 October 2005 DEFRA replied. DEFRA said that it was withholding the information requested under exception 12(4)(e) of the EIR, which deals with internal communications. It said that it had taken account of the public interest in releasing the information but had concluded that the greater public interest lay in government having space in which to think freely about policy issues. DEFRA said also that it would be in due course be issuing a consultation paper on the question of the co-existence of GM and non-GM crops.

4. On 17 October 2005 the complainant sought a review. In disagreeing with the public interest arguments put forward by DEFRA to justify not releasing the information, he identified a number of public interest arguments in favour of disclosure. In addition, as a new request, he asked to be provided with a full audit of all the steps taken by DEFRA when handling his request and to be provided with a full list of all the information refused by DEFRA, and for the reasons for the refusal.

5. On 23 November 2005 DEFRA informed the complainant that, given the complexity of the case, it would need the full 40 working days allowed by the legislation in order to carry out the review. DEFRA subsequently replied in full on 9 December 2005. In that reply DEFRA said that its original citing of the EIR had been an error: DEFRA now took the view that the information sought was not in

fact environmental information and that it should therefore be dealt with under the Act, although it went on to say (without specifying the particular information it had in mind) that a very small amount of information “*may be*” environmental and that it would be covered by exception 12(4)(e) as cited earlier.

6. Under the Act, DEFRA said that the information should have been withheld under sections 22(information intended for future publication): 35((formulation of government policy) and 42(legal professional privilege). DEFRA recognised that all of these exemptions were qualified and that consideration of the public interest test was therefore required: however, it was DEFRA’s view that, in the case of each exemption cited, the public interest operated in favour of withholding the information. DEFRA drew attention again to the forthcoming consultation paper and also to the background information on this particular subject that was already available on its website. In a subsequent email dated 15 December 2005 DEFRA refused to provide the complainant with the information sought in the new request of 17 October 2005 (see paragraph 4 above) on the grounds that the information was either not held or, where it was, that it was being withheld under section 36 of the Act (Prejudice to effective conduct of public affairs).

## The Investigation

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### Scope of the case

7. On 17 February 2006 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. The complainant said that his reasons for believing that the information ought to be released to him were set out in the previous correspondence, which he enclosed. The Commissioner wrote to the complainant on 19 April 2007 to tell him that the investigation into his complaint had started. In that letter he told the complainant that he would be confining his investigation to the information request of 29 September 2005 as there was no evidence that the complainant’s second request (dated 17 October 2005) had been submitted to DEFRA for internal review. This matter is therefore considered no further in this Decision Notice.

### Chronology

8. The Commissioner wrote to DEFRA on 19 April 2007 to announce the start of his investigation. DEFRA subsequently provided the Commissioner with copies of the relevant documents and, following a further submission from DEFRA on 24 August 2007, a member of the Commissioner’s staff attended a meeting with DEFRA on 4 October 2007 to discuss some of the issues raised by the investigation in greater detail.

### Findings of fact

9. In July 2006 DEFRA issued its consultation document on the issue of co-existence between GM crops, conventional crops and organic crops. Paragraphs 136 – 171 (inclusive) of this document dealt with the question of redress. In

November 2007 DEFRA published a summary of responses to the consultation document (of which there had been over eleven thousand): paragraphs 35 – 44 (inclusive) summarise the responses to questions raised about the subject of redress.

## Analysis

### Legislation

10. In its initial response to this request DEFRA cited the EIR. Subsequently, at review stage, DEFRA changed its mind and decided that the request would be more appropriately dealt with under the Act, while continuing to suggest that the EIR might still apply to some of the information sought. In its review reply of 9 December 2005 DEFRA said little more than that it had now decided that the information requested was not environmental information: it did not say why it had reached that conclusion. In subsequent discussion with the Commissioner, DEFRA said that its default position would always be that anything to do with the environment should be covered by the EIR. However, the information sought in this case essentially related to a question of how to establish liability for losses and DEFRA believed, on closer consideration, that the issues raised here were essentially ones of equity and legality rather than matters directly to do with the environment itself.
11. In order to be considered environmental information, and thus fall within the EIR, information must relate to one or more of the definitions set out in sections 2(1) (a) – (f) inclusive of the EIR (see the Legal Annex): indeed it must be definable as 'information on' any of the subjects covered by those six sub-sections. For example, regulation 2 (1) (a) refers to information on *"the state of the elements of the environment.....including genetically modified organisms, and the interaction among these elements."* Given that the subject matter of this request deals with issues relating to GM crops and their co-existence with other types of crop, this would seem at first glance to put the request fairly comfortably within the confines of the EIR. However, in the Commissioner's view, matters are not necessarily so straightforward.
12. In coming to a view in any given case, on what can be a very difficult area of definition, the Commissioner believes that the correct approach should encompass a close examination of the information actually held by the public authority and its relationship, if any, to sections 2(1) (a) to (f): in effect, is the information held definable as information **on** one of the matters set out in that part of the EIR? In this context, the Commissioner is also of the view that a relatively broad approach should be taken.
13. However, in this case, the subject matter of the information sought is essentially about how farmers of non-GM crops might be compensated if their crops become contaminated above the threshold (currently set at 0.9%) at which, for example, a farmer of organic crops would no longer be able to market his produce as organic and might suffer a financial loss as a result. Various options are considered, in particular the possible legal implications. While, therefore, the context of these papers is clearly an environmental one, the actual matter under discussion (the

consideration of a range of possible approaches to the issue of compensation) is not: an entirely similar discussion could easily have taken place in relation to other matters that were clearly outside the definition of 'environmental' altogether. In a sense, the documents with which this request are concerned do not constitute information on the state of the environment: they are documents dealing with alternative forms of redress in relation to a situation that has arisen that happens to be an environmental one. On that basis, therefore, the Commissioner is inclined to accept the view that the subject matter of this request falls outside the EIR, and, therefore, that it can be fully dealt with under the Act. This view was adopted by DEFRA on internal review.

### **Procedural matters**

14. If a public authority intends to refuse a request for information, Section 17(1) of the Act requires that authority to issue, within the timescale set out in section 10 (1) of the Act, a Refusal Notice stating not only that the information requested is exempt but under what exemption or exemptions of the Act the information is being withheld. In this case DEFRA issued its Refusal Notice under the EIR. Having, subsequently, come to the view that in this case it should have applied the Act rather than the EIR, DEFRA has clearly failed to issue a Refusal Notice in accordance with the requirements of the above two sections of the Act.

### **Exemption**

#### **Information now in the public domain**

15. In its letter to the Commissioner dated 24 August 2007 DEFRA recognised that some of the information which it had initially withheld under section 22 of the Act (see paragraph 6 above) was now effectively in the public domain and that it was therefore now happy to release that information to the complainant. Further discussion between the Commissioner and DEFRA has established the extent of that information and DEFRA is now content to release it. Given that, the Commissioner has not thought it necessary to come to a view as to whether or not that information should have been released to the complainant at the time of the request.

#### **Section 35**

16. In that same letter DEFRA confirmed that it now believed section 35(1)(a) of the Act to apply to all of the withheld information, with section 42 applying additionally to that part of it which was subject to legal professional privilege. On that basis, the Commissioner has considered the applicability of section 35 first, as DEFRA is applying that exemption to the information at issue in its entirety. The full text of section 35 (1) can be found in the Legal Annex.
17. In its response to the complainant of 9 December 2005 (by which time DEFRA had determined that it was the Act rather than the EIR that should apply) DEFRA said that the information sought fell within this exemption as it related to policy that was still in the process of formulation. This included matters essentially legal in nature. Subsequent discussion with DEFRA confirmed that, given the slow rate

of development of the policy on GM crops as a whole, and the substantial difficulties raised by this aspect of the policy in particular, the Government view was still very far from established on the matter of redress and it remained a live issue. On that basis, DEFRA continued to take the view that section 35 applied. Having looked at the information at issue, the Commissioner is satisfied that section 35 is engaged. However, section 35 is a qualified exemption, which therefore requires consideration of the public interest test.

### **Public Interest Test**

18. The complainant said that disclosing the information sought would increase transparency and enable the public to have a better understanding of all of the options under discussion. He also thought that release of the information would allow those who wished to take part in the public debate on this subject to do so in a more informed manner.
19. In its initial response, while it was still considering the matter under the EIR, DEFRA recognised and accepted the argument that release of the information sought would lead to greater transparency. However, in opposition to that, DEFRA felt that at that stage of the process what was required was full and frank discussion of the policy and space in which to think freely about it, and said that release now of what the Government was thinking could impede that process and would therefore not be in the public interest. DEFRA also drew attention to the forthcoming consultation paper (subsequently issued in July 2006), which it said would outline where, by that stage, Government thinking had reached, and which would enable everyone with an interest in the subject to comment.
20. By the time of the internal review DEFRA had amended its opinion of the appropriate legislation, and it dealt with the matter at that stage under the Act. In its review letter DEFRA acknowledged the arguments put forward by the complainant in favour of release. However, DEFRA repeated the points it had previously made under the EIR (although these were in respect of an exception that was not fully comparable). It drew attention again to the forthcoming consultation paper, which DEFRA clearly saw as the appropriate mechanism for sharing its current thinking on a subject which it described as contentious, and as the means by which the complainant and others could, in response, set out their concerns.
21. In subsequent exchanges with DEFRA the Commissioner raised the issue of whether or not, given that the consultation paper had now been issued and a summary of responses published on the website, the arguments for withholding the discussions on issues relating to the policy on redress (some of which had fed into the consultation paper) still held water. DEFRA argued that they did. DEFRA said that the complainant's request had focussed specifically on issues relating to redress. Given the fact that the level of planting of GM crops was still extremely low, decisions about questions concerning redress in relation to cases of cross-contamination were a long way yet from being a significant practical problem. Ministers had not made up their minds about this complex and difficult subject and revealing the advice that had so far been provided to them on the



options available would not, in the view of DEFRA, be in the public interest at this stage.

22. The Commissioner has noted that the Consultation Paper issued in July 2006 sets out the background to the problem and, in particular, identifies three possible options for dealing with the issue of redress in relation to cross-contamination of crops. It also asks a number of specific questions to which those responding to the Consultation Paper are invited to suggest answers. Those responses were subsequently summarised in the document issued in November 2007. The Government has therefore shared some of its thinking and invited responses to its suggestions. The Consultation Paper is, however, relatively neutral in tone although there are, as said, several indications of Government thinking in general and of particular solutions that the Government might be inclined to favour in respect of a number of specific issues. The policy advice in the documents the Commissioner has examined is, however, less circumspect: indeed, at times it is expressed in frank terms. The Commissioner recognises that this advice is now some years old but accepts too that it is advice about a matter on which the Government is yet to make up its mind and on which it may not do so for some time to come. In that context the Commissioner had particularly in mind paragraph 75 (iv) of the judgement of the Information Tribunal in the case of *Department for Education & Skills v Information Commissioner & The Evening Standard (EA/2006/0006)* where the Tribunal says: “*We fully accept..... that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest...*” Bearing that in mind, and given that the policy is still very far from decided, the Commissioner is of the view that in this case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## Section 42

23. DEFRA has argued that all of the withheld information can be covered by section 35. Some of that information, as noted above, essentially constitutes legal advice. Given that the Commissioner is satisfied that all of the unreleased information can be successfully withheld under section 35 he sees no reason to attempt to determine whether or not section 42 might also apply to that information. This view applies as well to the names of those to whom the legal advice had been circulated, to which DEFRA had also applied section 42. The decision of the Information Tribunal in the case cited in paragraph 22 makes it clear that the issue of the release of the names of officials is a matter that can be considered under section 35. Paragraph 75(xi) of that judgement suggests indeed that specific reasons should be advanced for not disclosing the names of officials in cases where a document is otherwise disclosable. However, that is not the situation here. In this case the Commissioner is of the view that it would be a meaningless exercise, and clearly not in the public interest, to recommend disclosure of the names of individuals who were in receipt of advice when the advice itself is not to be disclosed.

- 24 The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it failed to issue a Refusal Notice as required by sections 10 and 17 of the Act.

### Steps Required

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25. The Commissioner requires DEFRA to release to the complainant as soon as possible that information which it has been agreed can now be released to the complainant.

### Right of Appeal

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26. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.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 9<sup>th</sup> day of April 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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



## Legal Annex

### Freedom of Information Act

Section 10 (1) - Subject to subsections (2) and (3), a public authority must comply within section 1(1) promptly and in any event not later than the twentieth working day following the day of receipt.

Section 17 (1) - A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 35 (1) - Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,

### Environmental Information Regulations

2. (1) In these Regulations-

“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 those 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 life and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);