

Freedom of Information Act 2000

Environmental Information Regulations 2004

Decision Notice

Date: 20 May 2010

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

Summary

The complainant submitted a request to the Department for Environment, Food & Rural Affairs ("DEFRA") for a six-figure map reference of a spillage of oilseed rape. This was refused by DEFRA by the use of Regulation 13(1) of the Environmental Information Regulations 2004 (EIR). DEFRA stated that it had considered the public interest in the matter but that revelation of the map co-ordinates would breach the first principle of the Data Protection Act 1998 (DPA). The Commissioner's decision is that DEFRA has applied the regulations correctly and requires no action to be taken.

The Commissioner's Role

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.
2. 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 "Act" are imported into the EIR.

Background

3. In 2008 in south Somerset there was an accidental spillage of a genetically modified organism, namely a herbicide-tolerant oilseed rape with a genetically modified trait known as GT73. The case between the parties has hinged on the possible admixture of crops and wild plants by cross-pollination, an important point given the herbicide-resistant nature of the GM trait with the potential loss of weed control.

The Request

4. On 8 January 2009 the complainant wrote to DEFRA asking for a six-figure map reference for the location of a GM contamination of oilseed rape in a field or fields in Somerset. DEFRA acknowledged the request on 4 February 2009 stating that it would be treating the request under EIR.
5. DEFRA wrote to the complainant on 10 February 2009, refusing to release the information under section 13(1) of the EIR and considering a public interest test within their reasoning.
6. On 26 March 2009 the complainant wrote to DEFRA asking for an internal review.
7. On 20 April 2009 DEFRA wrote to the complainant stating that it would respond with an internal review within forty days from 1 April 2009.
8. On 3 June 2009 the complainant wrote to DEFRA enquiring as to progress on the internal review. DEFRA wrote back the next day stating it would reply shortly.
9. On 16 July 2009 the complainant contacted the Commissioner to complain about DEFRA's failure to serve him with an internal review.
10. On 1 August 2009 the Commissioner wrote to DEFRA asking for a copy of the internal review within twenty working days.
11. On 7 August 2009 DEFRA replied that it was still working on the internal review and that it would be sent shortly.

12. On 17 August 2009 the complainant received the internal review from DEFRA, which supported the authority's original decision to withhold the information from the complainant.

The Investigation

Scope of the Case

13. On 9 October 2009 the complainant wrote to the Commissioner to lodge an appeal against the decision to withhold the requested information.

Chronology

14. On 13 October 2009 the Commissioner asked for the map grid reference locating the exact spot of GM contamination.
15. On 5 November 2009 DEFRA supplied this grid reference to the Commissioner. DEFRA also pointed out that the complainant had raised the issue of the lateness of the internal review, and the authority wrote to the complainant on the same date, regretting its inability to send the review to the complainant within the time limit stated in the EIR.
16. On 11 November 2009 the Commissioner wrote to DEFRA and the complainant seeking a compromise based on past Decision Notices.
17. On 8 December 2009 the complainant wrote to the Commissioner stating that he would not accept a compromise and wished the Commissioner to proceed direct to a Decision Notice which would uphold DEFRA's position in order that he could take the matter to the Information Tribunal.
18. On 10 March 2010 the Commissioner wrote to DEFRA enquiring as to whether the landowner of the area where the spillage had occurred knew of the incident and whether he had been asked for his consent to release the information. DEFRA replied that he did know of the incident and did not want the fact released into the public domain.

Analysis

Regulation 13(1) 'Personal Data'

19. DEFRA sought to keep the location of the oilseed rape incident exempt by the application of section 13(1) of the EIR,

claiming that its release would allow identification of the landowner. The complainant cited previous European Council directives and technical data which he believed made the case for disclosure. DEFRA also considered the notion of public interest raised by the complainant in its internal review, but rejected this on both technical grounds and the possible future impediment of individuals sharing information of this nature with DEFRA.

20. The information sought is being held as exempt by virtue of regulation 13(1)(a)(i).
21. Section 13(1) of the EIR provides an exception for information that constitutes the personal data of third parties if its disclosure breaches data protection principles as set out in schedule 1 of the DPA.
22. In order to rely on this exception, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal data as:

'...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'.
23. DEFRA had given the location of the spill as the parliamentary constituency of Somerton & Frome covering nearly 900 square miles. The Commissioner was minded to narrow this further by the use of the outbound section of the postcode, which would have brought the geographical spread released to the complainant to about eighteen square kilometres. In doing this he was following precedents created in previous Decision Notices. FS50169424 and FS50236990 are examples of precedent on this direction, in yielding the outbound sector of the postcode (the first half) and redacting the inbound sector (the second half).
24. This position was upheld in the Information Tribunal decision *EA2007/0009 Roy Benford v the Information Commissioner and DEFRA* which found that: *"...part of the address can be given without that being sufficient to identify any living individuals. So, for example, in an address made up of outbound postcode (i.e. the first half of the postcode) and inbound postcode (i.e. the second half of the postcode) may constitute 'personal data' but the county and outbound postcode would clearly not".*

25. The Commissioner considers that the request for a grid reference is analagous to that of a postcode, in some cases being even more specific; when combined with other, readily available local knowledge, this would constitute personal data and the identity of the landowner could easily be obtained.
26. FS50169424 is also an example of a complainant contacting the Commissioner to complain about the precedent that full postcodes are personal data. After taking advice from the Post Office, which stated that the final letters of a postcode ("the Unit Code") produces an average of fifteen addresses, this produces a position whereby an individual address can, with little effort, be deduced.
27. Whilst under consideration by DEFRA, the complainant contacted the Commissioner to state that this compromise would be insufficient. Therefore, the Commissioner can only consider the merits of the exception regarding the specific location of the land in question. As this should be considered personal data, the principles of the DPA are left to be examined. The release of the information sought breaches the first principle of the DPA, that personal information must be fairly and lawfully processed; the Commissioner has considered whether it would be fair for DEFRA to release the personal data of the landowner in question.
28. DEFRA has informed the Commissioner that during trials of what was believed to be conventional rapeseed it was discovered that the seed was contaminated with a genetically modified strain. After the discovery of this, DEFRA discussed the position with the landowner. He stated that he did not want his property to be known in public as the site of a GM incident.
29. The Commissioner has considered whether it would be fair to the complainant if the requested information were to be disclosed. The public authority has concluded in both its initial answer and its internal review that the privacy rights of the data subject take precedence. The Commissioner has been informed that the farmer unknowingly sowed the contaminated oilseed rape owing to a mistake by a third party. He considers it would be reasonable for the farmer to expect his identity would be protected by the public authority, and that disclosure of the information could potentially adversely affect the price of his farm and his reputation.
30. While the issue of consent is not determinative, the Commissioner accepts that by not providing consent it further adds to the expectations of the data subject that the

information would not be released, thereby adding weight to the unfairness of release at this point.

Procedural requirements

Regulation 11 'representations and reconsideration'

31. Regulation 11(4) of EIR requires a public authority to notify a complainant of its internal review decision within 40 working days from the date of receipt of the request for review. The public authority failed to notify the complainant within the required time frame and therefore breached regulation 11(4).

The Decision

32. The Commissioner notes that the complainant asked for an internal review of the original decision not to release the information sought on 26 March 2009. The review was not forthcoming until 17 August 2009 and DEFRA acknowledged in this review that it had breached regulation 11(4). The Commissioner therefore finds DEFRA in breach of 11(4) of EIR.

Steps Required

33. The Commissioner requires no steps to be taken.

Right of Appeal

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

First-tier Tribunal (Information Rights)
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated the 20th day of May 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

Representations and reconsideration

11. - (1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

(3) The public authority shall on receipt of the representations and free of charge - (a) consider them and any supporting evidence produced by the applicant; and (b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of -
(a) the failure to comply;
(b) the action the authority has decided to take to comply with the requirement; and
(c) the period within which that action is to be taken.

Personal data

13. - (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is -

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene -

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data

Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Data Protection Act 1998

Section 1(1) of the Data Protection Act defines personal data as “data which relate to a living individual who can be identified-

(a) from that 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”.

Schedule 1, Part 1 of the Act delineates the principles of the Act.

The first principle is: “personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met.

Schedule 2 states the “conditions relevant for purposes of the first principle: processing of any personal data: 1 The data subject has given his consent to the processing. 2 The processing is necessary—(a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract. 3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract. 4 The processing is necessary in order to protect the vital interests of the data subject. 5 The processing is necessary— (a) for the administration of justice, (b) for the exercise of any functions conferred on any person by or under any enactment, (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or (d) for the exercise of any other functions of a public nature exercised in the public interest by any person. 6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate

interests of the data subject. (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied."