

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 13 July 2018

Public Authority: The Rural Payments Agency
(An Executive agency of the Department for
Environment, Food and Rural Affairs)

Address: PO Box 69
Reading
RG1 3YD

Decision (including any steps ordered)

1. The complainant has requested information relating to a funding application made to the Rural Payments Agency (RPA) including the application form, subsequent correspondence and decision letter. The RPA withheld this information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that the RPA has failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(5)(e)
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. Regulation 2(2)(b) of the EIR states that the majority of public authorities covered by the Freedom of Information Act (the FOIA) are also public authorities for the purposes of the EIR. The Commissioner notes that under the FOIA the Rural Payments Agency (RPA) is not a public authority itself, but is actually an executive agency of the Department for Environment, Food and Royal Affairs (DEFRA) which is responsible for it and therefore, the public authority in this case is actually DEFRA not the RPA. However, for the sake of clarity, this Decision Notice refers to the RPA as if it were the public authority.
6. The complainant initially made a request for information to the RPA on 4 August 2017. This was in relation to the construction of a compost facility at Ballygawley by *[name redacted]* and was in the following terms:

"1. What decision (if any) has been made by the RPA or any government department or body in respect of the availability or otherwise of funding to assist [name redacted] with the facility described above?

2. What was the factual and legal basis for any such decision?

3. When was any decision made?

4. Which body made the decision?"

The RPA responded on 11 August 2017 and answered the questions asked. The complainant followed this up on 16 August 2017 with a second information request in the following terms:

*"... please provide copies of
1) the request for funding (i.e. operational programme), or at least the parts of that request relevant to the Project,
2) subsequent correspondence between the producer organisation and RPA regarding funding for the Project, and,
3) any decision letter/correspondence from the RPA approving the operational programme, at least insofar as dealing with the Project"*

7. The RPA responded to this request on 1 September 2017 and stated that any information held was exempt from disclosure by virtue of the exception at regulation 12(5)(e) of the EIR. The complainant requested an internal review of this decision on 21 September 2017.
8. Following an internal review the RPA wrote to the complainant on 13 November 2017. It stated that it upheld the decision to withhold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 30 November 2017 to complain about the way their request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine whether the RPA has correctly engaged the exception from disclosure at regulation 12(5)(e) and, if so, where the balance of the public interest lies.

Reasons for decision

11. Regulation 12(5)(e) of the EIR states that a public authority may refuse a request to the extent that disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
12. In common with all the exceptions provided by Regulation 12(5) for it to be engaged the public authority must be able to demonstrate that disclosing the withheld information 'would' have an adverse effect. This means that it must be more likely than not that the alleged harm would actually occur.
13. The specific exception provided by 12(5)(e) can be broken down into a four stage test. Firstly, the information must be of a commercial or industrial nature. Secondly, the information must be protected by a legal duty of confidence. Thirdly, that confidentiality is required to protect a legitimate economic interest, and finally the disclosure of the information needs to adversely affect that confidentiality.
14. The information that is being withheld by the RPA can be categorised as follows:
 - For request 1 (the request for funding) – an application containing specific information on the company's specific business.
 - For request 2 (correspondence regarding the funding) – an email and letter discussing the funding for the project.
 - For request 3 (decision letter/correspondence) – a letter from the RPA.
15. The Commissioner has viewed this withheld information and notes that there is significant detail on the operation of the company applying for

funding and the nature of the application is to seek funding for the construction of a compost facility.

16. In respect of the first test the Commissioner accepts that as the information relates to a proposed development and the funding of this the information is of a commercial nature.
17. Consideration of whether the information is protected by confidentiality can involve looking at whether there is a common law duty of confidence, a contractual duty of confidence or a duty of confidence imposed by statute.
18. From the arguments presented by the RPA it seems it is argued there is a common law duty of confidence. In explaining this the RPA points to EU regulation 1306/2013¹ which relates to the financing and monitoring of agricultural policy. This is in relation to Common Agricultural Policy (CAP) which in an EU policy to provide financial support to farmers in member states and part of this (pillar 2) is payments for rural developments.
19. The Commissioner notes that clause 52 states that "it is essential each Member State has a special department responsible for monitoring the scrutiny of commercial documents provided for in this Regulation ... Information collected during that scrutiny should be protected by professional confidentiality."
20. However there is also, contained in Chapter IV of the Regulation, information on transparency. This requires Member States to publish certain information on beneficiaries. The RPA has explained that in order to meet this requirement information on the amount of money being claimed per year can be accessed via Defra's CAP Payment Search website². This ensures compliance with Regulation 1306/2013 as it publishes details of recipients of CAP subsidy payments but does not publish the full application made. The RPA stated this is because there has been considerable effort made to protect the confidentiality of the information whilst also disclosing and publishing a level of detail to be transparent and meet the aims of the Regulation.
21. In light of this the Commissioner accepts that information provided to the RPA as part of an application and the subsequent correspondence

¹ <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32013R1306>

² <http://cap-payments.defra.gov.uk/>

between the parties would have been imparted with an expectation of confidence. It is clear from the Regulation that this type of information was intended to be afforded some degree of professional confidentiality.

22. In addition to this the Commissioner notes the information is not trivial; it concerns an application for a new development. The information is clearly not in the public domain as it has only been shared between the relevant parties and the obligation of confidence can be implied in this case. Those involved in the development are clearly aware of the importance and sensitivity of the information.
23. She is satisfied that the information therefore has the necessary quality of confidence and was imparted in circumstances importing an obligation of confidence.
24. Turning to points three and four of the test of commercial confidentiality; the RPA argues the confidentiality of the information is needed to protect the economic interests of the third party who made the application for funding.
25. The RPA considered that disclosing information about a company's revenue and earnings would be of interest to competitors and would impact on its ability to compete competitively. In further explaining, the RPA points to the Commissioner's guidance³ and that legitimate economic interests includes retaining or improving market position and ensuring competitors do not gain access to commercially valuable information. Protecting a commercial bargaining position in the context of existing or future negotiations will prevent the loss of revenue or income.
26. When considering if disclosure would cause harm the Commissioner will consider the timing of the request and whether it *would* cause harm to an economic interest. However, before considering this the Commissioner must take account of the fact that all of the arguments presented by the RPA relate to the interests of a third party.
27. The Commissioner's guidance is clear that if a third party's interests are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. Speculative arguments will not be sufficient. This is in line with the decision by the Information Tribunal in

³ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

the case of *Derry City Council v The Information Commissioner* (EA/2006/0014). In this case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air, but as the arguments expressed only represented the council's own thoughts on the matter rather than any concerns expressed by Ryan Air itself, the Tribunal rejected the arguments made.

28. In this case the RPA have not indicated the third party has been consulted and the Commissioner has genuine concerns that the arguments it has been presented with are speculative and not based on any knowledge of the third party's concerns.
29. In the event the Commissioner was to accept that these arguments, advanced by the RPA on behalf of the third party, were based on knowledge of the third party's concerns; the Commissioner still has concerns with the level of detail provided in these arguments.
30. The arguments made by the RPA relate, broadly, to the belief that disclosing the application, correspondence and approval letter would adversely affect the third party's economic interests by allowing prospective competitors to gain access to commercial information potentially causing a prejudicial impact on the commercial interests of the third party company and affecting its profits. The RPA argued that it is reasonable to conclude that *"information about a company's revenue and/or earnings would clearly be of interest to competitors and disclosure thus potentially place it at a disadvantage."*
31. The Commissioner is mindful the submissions provided by the RPA make no direct reference to any specific part of the withheld information, for example pointing to specific sections of the application form, nor do they link any information to specific adverse effects. In relation to the argument that the information contained in the various documents would benefit competitors the Commissioner has, again, not been directed to any specific instances of this but does accept that there is some financial information and high level descriptions of business operations that this could apply to.
32. Whilst the Commissioner accepts that disclosure of information which would allow a competitor to adopt or undermine a company's strategies to be able to undercut or gain a competitive advantage would result in genuine adverse effects, she has not been provided with direct evidence in this case.
33. Having considered the submissions, the apparent lack of consultation with the third party and the fact that the information pre-dates the request by several years so most likely does not represent an up to date

picture of the third party's finances or operating model; the Commissioner can only conclude the RPA has sought to withhold the information on a general basis.

34. In cases where a public authority has failed to provide adequate arguments in support of the application of an exception the Commissioner does not consider it to be her responsibility to generate arguments on its behalf. The Commissioner considers the RPA has had adequate opportunities to set out its position and her initial letter made it clear that it would have just one chance to justify its decision.
35. On the basis of the arguments provided the Commissioner has concluded that the RPA has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person.
36. The Commissioner has concluded that disclosure would not adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.

Right of appeal

37. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

38. 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.
39. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF