

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

Decision notice

Date: 20 December 2022

Public Authority: Department of Agriculture, Environment and Rural Affairs (DAERA)

Address: Ballykelly House
Ballykelly
Limavady
BT49 9HP

Decision (including any steps ordered)

1. The complainant has requested DAERA to disclose all records and correspondence relating to the environmental degradation of land at Drumgoland, Newtownbutler, Co Fermanagh. DAERA refused to disclose the requested information citing regulations 12(4)(a), 12(5)(b), (d) and (e) and 13 of the EIR.
2. The Commissioner's decision is that DAERA does not hold some of the requested information and therefore regulation 12(4)(a) of the EIR applies to this element of the request. For the information it does hold, the Commissioner is satisfied that regulation 12(5)(b) of the EIR applies and the public interest rests in maintaining the exception.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 25 November 2021, the complainant wrote to DAERA and requested information in the following terms:

"All records and correspondence, including Reinstatement Notice, between January 1st 2017 and June 22nd 2021, in respect of lands at Drumgolond, Newtownbutler, Co Fermanagh, owned by Lakeland Farms Ltd or [named redacted].

I ask that this includes any information held by your Department regarding my request. I understand that I do not have to specify particular files or documents and that it is the Service's responsibility to provide the information I require.

I accept this does legal advice received by the department is exempt from FoI legislation.

I accept redaction of individual names. I would like to receive the information in electronic format, if possible, or otherwise in hard copy."

5. DAERA responded on 26 November 2021. It stated that its position remained unchanged and referred the complainant back to its response to the same request, which was made on 11 August 2021.
6. The complainant requested an internal review on 11 January 2022.
7. DAERA carried out an internal review and notified the complainant of its findings on 10 February 2022. It upheld its previous position, which was that it does not hold some of the requested information and considers the remainder is exempt from disclosure under regulations 12(4)(b), 12(5)(b),(d),(e) and 13 of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 10 March 2022 to complain about the way their request for information had been handled. They believe the requested information should be disclosed.
9. The Commissioner can only consider the circumstances at the time of the time of the request; nothing which post dates that. He is satisfied that DAERA does not hold some of the information and the remainder is exempt from disclosure under regulation 12(5)(b) of the EIR. The following section of this notice will now explain why.

Reasons for decision

Regulation 12(4)(a)

10. Section 12(4)(a) of the EIR states that a public authority can refuse to disclose information if it is not held at the time of the request.
11. DAERA confirmed that it does not hold information regarding ownership of the land and advised the complainant where they could obtain this from.
12. DAERA advised that at time of the request there was ongoing enforcement and inspections in respect of the land named in the request. It was concerned over the environmental degradation of the land and was investigating those that caused that damage as a result of the activities carried out on that land and its use. It confirmed that it does not need to know who or what owns the land for the purposes of its functions and so does not hold this information.
13. It however directed the complainant to the body which can provide that information to them.
14. The Commissioner is satisfied that DAERA does not hold this information. It has explained how any investigation and action is taken against those using the land, rather than the landowner and therefore it has no need to hold this information. He is therefore satisfied that regulation 12(4)(a) of the EIR applies to this element of the request.
15. Regulation 12(4)(a) of the EIR is, in theory, subject to the public interest test. However, the Commissioner accepts that a public interest consideration cannot be carried out for information which is not held.

Regulation 12(5)(b)

16. Regulation 12(5)(b) of EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - the course of justice, ability of a person to receive a fair trial or
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
17. The Commissioner considers this exception is fairly broad and covers a wide range of judicial or quasi-judicial processes. The ability of a local planning authority to determine whether a breach of planning consent has occurred, and if so, whether remedial action is necessary would, for example, fall within the definition of this exception.

18. In this case the withheld information relates to an ongoing enforcement investigation into the environmental degradation of some land. At the time of the request an agreement had been reached with the individual concerned, prior to the matter going to court. The individual agreed to do what was required to put the land right over a number of years, with the agreement of DAERA. Ongoing inspections are required to ensure that the individual meets the agreement in place and if they do not the matter will be taken to court for prosecution. Ongoing inspections are also required to monitor the land and to make any changes to the agreement that may be required in order to fully restore its condition.
19. Similar to the planning breach example given above, the withheld information is information which falls within the definition of "an inquiry of a criminal or disciplinary nature". It all relates to an enforcement investigation DAERA has carried out and the ongoing inspections and monitoring of the informal agreement that was reached. The Commissioner is therefore satisfied that the withheld information is caught by 12(5)(b) of the EIR.
20. In terms of adverse effect, the Commissioner accepts that disclosure would adversely affect DAERA's ability to monitor and inspect the ongoing agreement in place in relation to this land. The co-operation of the individual concerned is required to ensure that the remedial action is carried out effectively and in the most cost effective way. Disclosure of the withheld information would discourage that individual from engaging with DAERA and potentially lead to matters having to be addressed via an expensive court case.
21. The withheld information is subject to a live investigation and there is always the prospect that the matter will have to go to court if the individual does not meet the terms of the agreement in place. Disclosure could therefore adversely affect DAERA's ability to enforce the matter and prosecute the individual if such formal measures are later required.
22. For the above reasons, the Commissioner is satisfied that regulation 12(5)(b) of the EIR is engaged.
23. In terms of the public interest test, the Commissioner acknowledges the public interest in openness and transparency and in allowing members of the public access to information which enables them to understand more fully how investigations and environmental concerns of this nature are dealt with.
24. However, this should not be at the expense of DAERA carrying out its statutory functions and its ability to investigate such matters, implement remedial action and hold those concerned to account. It is often in everyone's interests for such matters to be resolved amicably without

the need for expensive and lengthy court action. It is not in the public interest to damage the ongoing relationship it has with the individual concerned or DAERA's ability to instigate legal action at a later date should this be required.

25. For the above reasons, the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
26. As the Commissioner has accepted that DAERA was correct to cite regulation 12(5)(b) of the EIR and that the public interest favours maintaining the exception he does not need to consider the other exceptions cited.

Right of appeal

27. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

28. 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.
29. 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

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