

Environmental Information Regulations 2004

Decision Notice

Date: 27 May 2008

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

Summary

The complainant asked the public authority for the size, exact position and date of 'restriction' of particular plots of 'restricted' land. The public authority's response was made under the Environmental Information Regulations 2004 ('EIR'). It stated that it had addressed part of the request on a previous occasion, and since it did not hold the requested information the exception in Regulation 12(4)(a) of the EIR applied. The Commissioner decided that the public authority's response was reasonable, but that it had failed to issue its decision within the time limit set out in Regulation 5(2) of the EIR.

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 Environmental Information Regulations 2004 ('EIR'). This Notice sets out his decision.

The Request

2. The complainant had made a request to The Land Registry in November 2005 for information relating to particular plots of 'restricted' land (ie land which the complainant believed to be subject to payments under a non-marketing of milk and dairy herd conversion premium scheme operated under European Union legislation). That request was subsequently brought to the attention of the Rural Payments Agency. After the Rural Payments Agency had dealt with the matter, the complainant made a complaint to the Information Commissioner. The Commissioner issued a Decision Notice (FS50104506) in that case on 29 January 2007.
3. On 19 May 2007 the complainant requested from the Department for Environment, Food and Rural Affairs (DEFRA) similar information, comprising, first, the *'size and exact position of the restricted land within ordnance survey parcel numbers 9589 0006 and 9000'* and, secondly, *'the date the land was restricted'*.
4. The complainant then wrote to the Commissioner on 16 June 2007, complaining that he had not received a response. He pointed out that the information was required for an Information Tribunal case.
5. The Commissioner notified DEFRA on 30 June 2007 that a response should be sent to the complainant within 20 working days, if that had not already been done.
6. The Rural Payments Agency (an agency of DEFRA) replied on 10 July 2007 that it, rather than DEFRA, would be responding to the complainant.
7. It issued a refusal notice on 13 August 2007. It pointed out that it had not received the request until the Commissioner had copied it on 30 June 2007. In its view the first part of the request repeated the previous request, to which it had responded on 26 January 2006 and 9 August 2006, and to which it had nothing to add. Regarding the second part of the request, it decided that this came under the exception in Regulation 12(4)(a), since it did not hold the requested information. It advised the complainant of his right to request an internal review and to complain to the Commissioner.
8. The complainant contacted the Commissioner again on 15 August 2007 but was informed that he should ask the Rural Payments Agency to conduct an internal review before complaining.
9. He did so on 19 August 2007.
10. The Rural Payments Agency replied on 19 September 2007. It repeated its previous response that it had not inherited any relevant records and therefore could not provide either the date on which the land in question had been 'restricted' or details of its size and exact position. It reminded the complainant of his right to contact the Commissioner.

The Investigation

Scope of the case

11. The complainant contacted the Commissioner on 5 October 2007 to complain about the decision.

Chronology

12. The Commissioner contacted the Rural Payments Agency on 28 January 2008 to clarify various issues.
13. The Rural Payments Agency replied on 6 March 2008.

Analysis

Procedural matters

14. Regulation 5(2) of the EIR states that a public authority that holds environmental information shall make it available *'as soon as possible and no later than 20 working days after the date of receipt of the request'*. In this case the complainant made his request on 19 May 2007, but the Rural Payments Agency did not provide a substantive response until 13 August 2007. The public authority therefore took 60 working days to respond to the information request. The Commissioner has had regard to the Rural Payments Agency's explanation that the request was originally made to DEFRA, which subsequently referred it on to the Rural Payments Agency, and the Agency had therefore not received the request until the Commissioner provided a copy on 30 June 2007. Nevertheless, the Commissioner takes the view that it was the responsibility of DEFRA and its executive agency the Rural Payments Agency to ensure that the request was addressed within the statutory time limit. In failing to do so, the Rural Payments Agency breached Regulation 5 of the EIR.

Exception – Regulation 12(4)(a)

First part of the request

15. The first part of the complainant's request was for the *'size and exact position of the restricted land within ordnance survey parcel numbers 9589 0006 and 9000'*. The Rural Payments Agency claimed that it had dealt with that request previously, in letters dated 26 January 2006 and 9 August 2006. In its letter of 26 January 2006 it had given the complainant the following information:

'TA0436 9589 – This space is unmapped and we hold no information on it.'

TA0436 0006 – Land parcel has changed and is now TA0436 0115 and measures 6.85 hectares.

TA0436 9000 – Land parcel has changed and is now TA0436 8785 and measures 8.23 hectares.'

It also enclosed two maps showing the position of the land parcels in relation to the complainant's house.

16. The complainant contacted the Commissioner on 30 January 2006 to complain about the way in which this request had been handled by the Rural Payments Agency. The Commissioner issued a Decision Notice (FS50104506) in the case on 29 January 2007. The complainant had specifically asked the Commissioner to consider his contention that the maps which had been supplied by the Rural Payments Agency did not relate to the Ordnance Survey parcel numbers which he had requested; he also claimed that Ordnance Survey land parcel 'TA0436 9589' should have been mapped because European Union law required all agricultural land to be measurable. In the Decision Notice the Commissioner concluded that the Rural Payments Agency had (eventually) complied with the request regarding land parcels 'TA0436 0006' and 'TA0436 9000', and therefore he did not require it to take any steps in relation to the request. He also concluded that the Rural Payments Agency did not hold the information requested about land parcel 'TA0436 9589'. The complainant subsequently appealed to the Information Tribunal (EA/2007/0014). At the time of issue of this Decision Notice that appeal was stayed.
17. It is clear that the complainant does not accept either the Rural Payments Agency's response to his previous request or the Commissioner's conclusions in the previous Decision Notice. However, the Commissioner's decision was that the Rural Payments Agency had provided the complainant with all of the relevant information which it held. If the complainant wishes to challenge that decision then the appropriate forum is the Information Tribunal.
18. Since the Commissioner's previous decision was that the Rural Payments Agency disclosed all of the relevant information in response to the complainant's original request, he considers in this case that it was reasonable for it to have responded to the first part of the current request by notifying the complainant that it had nothing to add to its previous response.

Second part of the request

19. The second part of the request was for *'the date the land was restricted'*. The Rural Payments Agency decided that this came under the exception in Regulation 12(4)(a), since it did not hold the requested information. Regulation 12(4)(a) states:

'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received...'

20. The Rural Payments Agency has explained that the non-marketing of milk and dairy herd conversion premium scheme had been administered by the Ministry of Fisheries and Food and the Milk Marketing Board during the 1980s. Their responsibilities had been taken over by the Intervention Board in 1994, which administered a different, Milk Quota, scheme. The Intervention Board had subsequently become part of the Rural Payments Agency in 2001. The Rural Payments Agency pointed out that the Intervention Board had not inherited any of the records when it took over administration of the milk quota scheme in 1994, and the Rural Payments Agency itself had *'never had any responsibility for administering'* the scheme.
21. The Commissioner asked the Rural Payments Agency to explain what action it had taken to ascertain whether it held relevant information. It stated that it had examined whether any records concerning the scheme had come to the Intervention Board by asking DEFRA to check whether it held any information. DEFRA had:

'carried out a high level check to identify the history of whether these records might have been retained within DEFRA. No records could be found therefore they concluded that any records concerning this scheme would have been destroyed in 2003, in accordance with The National Archives guidance on retention periods, as they were no longer required to be kept.'

22. The view of the Rural Payments Agency is that it never held any relevant information, and that its predecessor organisation (the Intervention Board) did not either. The Commissioner takes the view that it is plausible that the Rural Payments Agency did not inherit records relating to a scheme which appears to have ceased operation before 1994. The Commissioner has considered whether there was any legal requirement or business need at the time of the request for the Rural Payments Agency to hold the information. The complainant has claimed that there is a legal obligation for the land to be mapped, but there is no evidence that there was ever any obligation to keep a record of the date of any mapping. The Commissioner has also considered whether the Rural Payments Agency had any reason or motive to conceal the information, but cannot discern any such grounds for concealing it, were it to be held.
23. In reaching a decision the Commissioner has been guided by the decision of the Information Tribunal in *Linda Bromley v Information Commissioner and The Environment Agency (EA/2006/072)*. In its decision the Tribunal agreed that the test to be applied in cases where a public authority claimed that it did not hold any relevant information *'was not certainty but the balance of probabilities'*. The Tribunal also set the factors which should be considered:

'the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted.'

24. In the circumstances, the Commissioner has decided that there is no evidence that the Rural Payments Agency ever held information about the date on which the land in this case was restricted. Since the Rural Payments Agency never held the records, the Commissioner takes the view that it was reasonable for it to have asked DEFRA to conduct the search. DEFRA carried out a general search but no records could be found. The Commissioner considers that it was reasonable for the conclusion to have been drawn that any records concerning the scheme would have been destroyed in 2003, in accordance with guidance provided by The National Archives on retention periods.
25. Accordingly, on the balance of probabilities, the Commissioner has concluded that the Rural Payments Agency does not hold any information falling within the complainant's request. He therefore does not consider that there is any evidence of a breach of Regulation 5 of the Environmental Information Regulations in this regard.

The Decision

26. The Commissioner's decision is that the Rural Payments Agency's response to the request, referring the applicant to the decision which it had already reached in a previous request and claiming the exception at Regulation 12(4)(a) in respect of the information not held, was in accordance with the Regulations. However, the Commissioner has also decided that the Rural Payments Agency delayed in responding and therefore breached Regulation 5(2) of the EIR.

Steps Required

27. The Commissioner requires no steps to be taken.

Other matters

28. The Commissioner recognises that the Rural Payment Agency is an executive agency of DEFRA rather than a separate public authority. However, he would like to take this opportunity to remind both of these parties of the recommendations for the transferral of requests contained at section VI of the EIR Code of Practice, which provides an indication of what is likely to constitute good practice in the transfer of requests between agencies as well as public authorities. In particular, the Commissioner would like to draw attention to paragraph 33, which states:

'The authority receiving the initial request must always deal with that request in accordance with the EIR. When the authority receiving the original request does not hold all the information requested it must still deal with the request for information it does hold. The authority must also

advise the applicant that it does not hold part of the requested information, or all of it, whichever applies'.

The full text of the EIR Code of Practice can be obtained at:

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

Right of Appeal

29. 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.

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 27th day of May 2008

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Regulation 5(2) provides that –

'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 12(4)(a) provides that –

'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received...'