

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 2 March 2009**

**Public Authority:** Veterinary Laboratories Agency (an executive agency of the Department for Environment, Food and Rural Affairs)

**Address:** New Haw  
Addlestone  
Surrey  
KT15 3NB

### **Summary**

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The complaint requested from the Veterinary Laboratories Agency (VLA) a copy of a post-mortem carried out on piglets in a farm. The VLA refused to disclose the post-mortem stating that the information was exempt under section 40(2) 'personal data' and section 43 'commercial interests' of the Act. In relation to section 43, VLA found that the public interest favoured maintaining the exemption.

The Commissioner has investigated and found that the request should have been dealt with under the Environmental Information Regulations 2004 (EIR). However, he concluded that the information was exempt under exception 13(1) 'personal data'. In failing to deal with the request under the correct legislation the VLA breached the requirements of regulation 14 of the EIR.

### **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.
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 Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## The Request

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3. The complainant made a request to the Veterinary Laboratories Agency (VLA) on 15 February 2008 for the following information in relation to a bio-security problem at a farm:

*"I would like to request under the Freedom of Information Act the release of post mortem report(s) into dead pig carcasses that the attached VLA form indicates were delivered for inspection on Monday 11<sup>th</sup>."*

4. The Commissioner notes that under the Act the VLA is not a public authority for the purposes of the Act itself, but is actually an executive agency of the Department for Environment, Food and Rural Affairs (DEFRA) which is responsible for the VLA. Therefore, the public authority in this case is actually DEFRA not the VLA. However, for the sake of clarity, this decision notice refers to the VLA as if it were the public authority.
5. The VLA responded on 22 February 2008 confirming that the information is held but refusing to disclose the information under section 43 of the Act. The VLA explained that disclosure *"could damage the commercial interests of one of more of the parties involved"*. The VLA went onto explain that it had balanced the public interest in withholding the information against the public interest in disclosure and concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.
6. The complainant requested in internal review of this decision on 27 February 2008.
7. The complainant wrote again to the VLA on 8 April 2008 following a telephone conversation earlier that day. The complainant explained that it was no longer imperative for him to have access to the full report and stated that as a compromise he considered that the following information could be released in lieu of the report:
- A detailed but non technical summary written statement of the report into the autopsy related to the carcasses.
  - A written summary of [the vet's] report of their site inspection and advice which we understand that [individual's name] and other employees of the VLA have been privy to.
  - The VLA's written interpretation of whether the contents of these reports justified or continues to justify a total exclusion from the site, as asserted by the owner, for bio security and health and safety reasons.
  - The VLA's written advice regarding precautions which should be taken related to bio security and health and safety related to this bio security incident.
8. However, the complainant stated that if all this information could not be provided, in writing, he would revert back to the request for the full report.

9. The VLA responded on 24 June 2008 with the outcome of the internal review. The internal review upheld the application of section 43 to the information requested on 15 February 2008 and also found that section 40(2) applies. In relation to the 'compromise' request of 8 April 2008 the VLA explained that VLA vets had not visited the farm and were not in a position to provide professional advice.

## The Investigation

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### Scope of the case

10. On 20 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The VLA did not provide sufficient explanation to support the application of the exemptions.
  - The VLA had backtracked on its offer to explore a compromise solution.
11. The Commissioner investigation has focused on determining if the post mortem report requested on 15 February 2008 should have been disclosed. The Commissioner did not investigate the 'compromise' request as, the complainant in his email to the VLA dated 8 April 2008 stated:

*"If all this information cannot be provided in writing, I would revert back to the request for the full report, which I believe the Council is entitled to under the Freedom of Information Act, as set out in the forwarded e-mails below"*

### Chronology

12. The Commissioner wrote to the VLA on 14 August 2008 to inform it that a complaint had been received from the complainant. In response to this on 28 August 2008 the VLA provided the Commissioner with the information withheld in relation to the 15 February 2008 request.
13. The Commissioner began his investigation by writing to the VLA on 31 October 2008. The Commissioner asked the VLA to explain in more detail its reliance on sections 43 and 40(2) to withhold the information requested on 15 February 2008. The Commissioner also informed the VLA that he was considering if the request should have been dealt with under the Environmental Information Regulations 2004 (EIR). In this respect, the Commissioner asked the VLA some questions to help determine if the information is environmental and asked for the VLA's thoughts on this point.
14. The VLA responded on 8 December 2008 providing the Commissioner with its findings regarding the correct legislation under which the request should have

been dealt. The VLA accepted that the information could have been dealt with under the EIR and explained that it was therefore relying on exceptions 12(5) (a) and (f) and 13(1) under those regulations to withhold the information. In relation to the compromise request suggested by the complainant on 8 April 2008, the VLA explained that the four pieces of information requested by the complainant were not held.

15. The Commissioner wrote again to the VLA on 11 December 2008 asking for some details of the circumstances which led to the post mortem being undertaken by it and for further explanation to support its reliance on the exceptions 12(5) (a) and (f).
16. The VLA responded on 19 January 2009 providing the Commissioner with more information on the background to the post mortem and with more details regarding its reliance on 12(5) (a) and (f).

### **Findings of fact**

17. The VLA carries out laboratory analysis, including post-mortem examinations, on samples submitted by veterinary practitioners as part of their routine disease investigations on farms.
18. The complainant is a member of Warwick District Council planning department. Warwick District Council were involved in a public inquiry into appeals against enforcement notices relating to the unauthorised erection of a farrowing house, fattening pens and use of land for stationing a caravan at the farm which is the subject of the request. When the Council attempted to visit the farm they were told that they could not gain access due to a bio-security problem.

### **Analysis**

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#### **Procedural matters**

#### **Regulation 2 - Interpretation**

19. The VLA dealt with the request under the Act. However, having considered the nature of the information held the Commissioner takes the view that the information requested is environmental information as defined by the Environmental Information Regulations (EIR). The Commissioner's findings on this are contained within a confidential annex to this decision notice.

#### **Regulation 14 – Refusal to disclose information**

20. Regulation 14 'Refusal to disclose information' states that if a request for environmental information is refused, this refusal should be made in writing no later than 20 working days after the date of the request. The refusal must specify any exception being relied upon under regulations 12 (4), 12(5) or 13 and the

matters considered in reaching a decision with respect to the public interest under regulation 12(1) (b).

21. By failing to deal with the request under the correct legislation and therefore failing to issue a refusal notice which meets the requirements above the VLA have breached the requirements of regulation 14 despite meeting the requirement in terms of timeliness.

**Exception: 13(1) 'Personal Data'**

22. The VLA are relying on exception 13(1) and (2) (a) as its grounds for withholding the information. Section 13(1) states that where the information requested includes personal data of which the applicant is not the data subject and disclosure would contravene any of the data protection principles set out in the Data Protection Act (DPA), a public authority is entitled to withhold that information. The VLA state that all of the information is being withheld as it is the personal data of the farmer.
23. In order to rely on the exception provided by 13(1), the withheld information must therefore constitute personal data as defined by the DPA. The DPA defines personal information 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,*  
*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

24. The post-mortem requested relates to the death of three piglets at a farm. The Commissioner considers that this is the personal data of the farmer as it relates to his business and home life (as both are linked). In his *"Data Protection Good Practice Note: The use and disclosure of information about business people"*, the Commissioner recognises that information about people who run businesses, and the business they run, is personal information about that person.<sup>1</sup>

*"Information about a person's business, activities, possessions and so on is generally personal information about that person. ... information that relates not just to a business activity but also a business person's private life will need to be considered more carefully. An examples of this is when a business address is also the home address of the business person and their family.*

25. The VLA have stated that disclosure of the post-mortem would contravene the first data protection principle, which states that:

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/use\\_and\\_disclosure\\_of\\_information\\_about\\_business\\_people\\_v1\\_final.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/use_and_disclosure_of_information_about_business_people_v1_final.pdf)

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
  2. at least one of the conditions in DPA Schedule 2 is met.
26. In considering whether disclosure of the post-mortem would be fair and therefore in accordance with the requirements of the first data protection principle, the Commissioner has considered the following:
- The individuals reasonable expectations of what would happen to their personal data;
  - Whether the individuals specifically refused to consent to the disclosure of the requested information; and
  - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual.
27. The VLA explained that the farmer would not have expected his personal information to be disclosed. They point out that the farmer did not have to use the VLA to carry out the post-mortem but could have approached his private veterinary surgeon who could have chosen to use a private diagnostic laboratory under which the issue of disclosure would not have arisen as the private laboratory would not be covered by the Act. The information was obtained by the VLA from the farmer solely for VLA to diagnose the cause of death of the piglets and the subsequent information relating to the cause was reported to the farmer via his private veterinary surgeon. VLA further pointed to the standard VLA sample submission form which refers to VLA's data protection statement:
- “Defra / VLA may need to release information including personal and commercial information, on request, under the Environmental Information Regulations, or the Freedom of Information Act 2000. However, Defra / VLA will not allow any unwarranted breach of confidentiality nor will we contravene our obligations under the Data Protection Act 1998. VLA may use the name, address and other details provided to contact you about occasional customer research aimed at improving our services.”*
28. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:
- ‘Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.’*

29. In the circumstances of this case the Commissioner notes that the information relates to an individual's business. In most cases the Commissioner would consider that information about people acting only in a business capacity should not expect the same degree of privacy in relation to their business activities as they can in relation to their private lives. However the Commissioner considers that in this case the farmer's business also relates to his private life as his business address is also his home address and the activities he undertakes as a farmer are closely linked to his private life and activities. In this case no clear distinction between the public and private can be made as the nature of the individual's business is inextricably linked to their lifestyle and private life.
30. The Commissioner also accepts that given the circumstances discussed in the above three paragraphs, it would have been reasonable to assume that the farmer would have had a reasonable expectation that the information in the post-mortem would not be disclosed. Further the VLA explained that it has twice contacted the farmer, in relation to this request, who has refused to consent to the disclosure of the information.
31. The VLA also explained that disclosure would cause the farmer unnecessary or unjustified distress and damage as depending on the findings of the post-mortem the information disclosed could have a serious impact on his reputation as a pig farmer and in turn this may affect his business and livelihood.
32. The Commissioner accepts that disclosure of the information would not be fair. In considering if disclosure would breach the first data protection the Commissioner has considered if disclosure would be in accordance with Schedule 2, condition 6 of the DPA as it is this condition which is key to determining if disclosure would be fair. This condition contains a three part test which must be satisfied:
- there must be legitimate interest in disclosing the information,
  - the disclosure must be necessary for a legitimate interest of the public and,
  - even whether disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.
33. The VLA acknowledges that the public has a legitimate interest in knowing that Defra (and the VLA) are working to promote animal health and welfare. Annual summaries of diseases and infections are published on the respective websites. The data is anonymised to protect the identity of the farms and the disclosure of the information relating to this individual farm would not add to this knowledge in any beneficial way. It is also not possible to redact this information as the request itself specifies the farm by name. The Commissioner acknowledges that the complainant believes disclosure of this information will provide him with information to help him determine if the farmer was correct in refusing planning inspectors access to his land. The Commissioner considers that disclosure would inform the complainant of the circumstances of the piglets death but he does not consider that this information alone would assist the complainant with determining if the farmer was justified in his actions. The Commissioner does acknowledge that it could be argued that disclosure of the information would demonstrate that a process had been followed correctly even if this does not show the full picture.

However, the Commissioner does not consider that this legitimate interest is sufficient to outweigh the infringement into the farmer's privacy.

34. Further the VLA consider that it is rarely in the public interest to disclosure information regarding the individual disease states of farms; however when there is a potential public interest, such as public safety, information can be disclosed. A recent example of this has been during the foot and mouth disease outbreaks to help control transmission. This was due to the way that foot and mouth virus can be spread and the severity of its impact on the farming community. The same would not be applicable in this case.
35. The VLA acknowledge that whilst the complainant may have a legitimate interest in knowing that the farmer did not mislead him in denying him access to his property at the time, this does not amount to a legitimate public interest. The post-mortem and laboratory results contained within would not have helped him determine whether the farmer banning him from his property was appropriate.
36. The Commissioner considers that it can be argued that there is a legitimate interest in the public knowing that a farmer has not sought to block access to property in the context of a planning enquiry. The Commissioner recognises that greater openness in relation to planning issues in general is reflective of the fact that there is a need to ensure confidence in relation to the way decisions are taken. However, although the information the VLA holds would assist the public in reaching a more informed view he considers that the weight given to this legitimate interest is lessened in this case due to the fact that the VLA only holds the material as the farmer didn't use a private vet.
37. The Commissioner also considers that there is a legitimate interest for the public to be made aware of potential instances of livestock diseases. He also considers that whilst the VLA publishes statistics on disease this existing mechanism does not satisfy this interest as the statistics are high level collection of information and do not provide specific details of the instances of disease outbreaks at specific farms. The report would add to the public understanding of the issues but he does not consider that this is enough to justify the unwarranted intrusion into the farmer's personal life.
38. The Commissioner has balanced the legitimate interests against the rights and freedoms of the individual and notes that the process in place to protect the public appear to have been followed and therefore less weight has been given to the legitimate interests in ensuring public safety. In addition the Commissioner notes that the farmer was under no obligation to involve the VLA in determining the cause of death of the piglets; had he used a private veterinary surgeon and private diagnostic laboratory the results would not have been made public and other post-mortems undertaken for other farms done in this way are also not made public. Disclosure in this case could therefore bring unwarranted attention to this farm without similar scrutiny being undertaken on other farms which had not made use of the VLA's services.
39. For these reasons the Commissioner accepts that exception 13(1) is engaged by virtue of section 2(1) (i).

40. The Commissioner has not gone on to consider exception 12 as he has determined that the information is exempt by virtue of exception 13(1).

## **The Decision**

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41. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:

i. The application of exception 13(1) by virtue of section 2(a) (i) to the withheld information

42. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

i. By failing to issue the complainant with a refusal notice in accordance with the requirements of the EIR the VLA breached the requirements of exception 14(3)

## **Steps Required**

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43. The Commissioner requires no steps to be taken.

## Right of Appeal

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43. 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).  
Website: [www.informationtribunal.gov.uk](http://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 served.

**Dated the 2nd day of March 2009**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## Legal Annex

### Regulation 2 - Interpretation

#### Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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

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- (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 these 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 sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and  
“working day” has the same meaning as in section 10(6) of the Act.

### **Regulation 13 - Personal data**

**Regulation 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.

**Regulation 13(2)** The first condition is –

- (a) in a case where the information falls within any 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 the 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(a) (which relates to manual data held by public authorities) were disregarded.

**Regulation 13(3)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

**Regulation 13(4)** In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

**Regulation 13(5)** For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

#### **Regulation 14 - Refusal to disclose information**

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

**Regulation 14(4)** If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

**Regulation 14(5)** The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.