

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

### **Decision Notice**

**Date: 30 September 2010**

**Public Authority:** Department for Environment, Food and Rural Affairs  
**Address:** Ergon House  
Horseferry Road  
London SW1P 2AL

### **Summary**

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The complainant submitted a request for information relating to birds DNA which was made up of various questions. The public authority declined to disclose the information, citing section 14 of the Freedom of Information Act 2000 (the Act). Subsequently the public authority considered the request under the Environmental Information Regulations 2004 and cited regulation 12(4)(b).

The Commissioner is satisfied that the public authority has applied regulation 12(4)(b) appropriately. He is also satisfied that the public interest in maintaining this exception outweighs the public interest in disclosing the information. However he identified procedural shortcomings in the way in which the public authority handled the request for information.

### **The Commissioner's Role**

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1. 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.

## Background

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2. In 1994 the complainant was investigated by the Royal Society for the Protection of Birds (RSPB), police and members of the former Department of the Environment (DoE) about his possession of eggs of protected species. The complainant could not provide substantiated evidence regarding his ownership of the parent birds of the eggs in his possession.
3. Around this time on behalf of the DoE, Nottingham University was establishing a DNA test (Single Locus Probes) to identify parent birds of such eggs. Two scientists were involved in this.
4. When the police brought the prosecution against the complainant they called on DNA evidence which was based on the work done by the two scientists at Nottingham University.
5. The Commissioner notes that the complainant has continued to submit requests for information to the public authority during the course of his investigation.

## The Request

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6. The Commissioner notes that under the EIR, Animal Health (AH) is not a public authority itself, but is an executive agency of the Department for Environment, Food and Rural Affairs (Defra). Therefore although the public authority in this case is Defra not AH, for the sake of clarity, this Decision Notice refers to AH as if it were the public authority.
7. On 20 April 2009 the complainant submitted the following request for information which was made up of 26 points that the complainant wanted answered:

*'Dear Sir or Madam,  
Reference; releasing evidence and the letter from Animal Health  
date*

*I am sorry to have to ask questions in such a simplistic way  
however I feel that my questions are being negated by the clever  
use of words or the mono interpretation of my words.*

*Why did Defra give tax payer's money to Nottingham University for at least 12 years in relation to DNA profiling then suddenly stop?*

*Did anyone else receive funding for 12 years in the same manner as Nottingham University?*

*How much money was given to Nottingham University over 12 years by Defra?*

*Who has they [sic] accounts for the funding of Parkin and can I see them?*

*What has Defra got to show for 12 years of paying tax payer's money to Nottingham University in relation to Parkin's DNA profiling?*

*Why was the single locus probes designed by virtue of tax payers money not patented even though the DoE SAID THEY WERE GOING PATENT THE PROBES TO GET SOME DEGREE OF THE MONEY BACK FOR FUNDING THE PROBES?*

*Why [was] the use of the single locus probes was suddenly even after 12 years if public funding?*

*Did Parkin or Wettin receive any money from DOE directly?*

*Why did Defra stop using Nottingham University after 12 years of bank rolling the DNA work by Nottingham University with tax payer's money?*

*Why did it take 12 years for Nottingham University and the DOE to release Parkin's probes for testing to just another contractor of Defra/DOE yet both refused all independent requests to tests[sic] the probes?*

*Could I have copies of the letters that were sent to Nottingham University to release the probes to anyone who wanted to test them or details of how the information was passed onto to [sic] Parkin and Nottingham University the DOE to release the probes?*

*What occurred to the work that was done by Nottingham University over 12 years of public funding, including the work done on the feathers?*

*What steps can be taken for there to be an inquiry into the 12 years funding of the DNA work and the fact it was flawed?*

*What checks were made on whether or not Parkin was giving value for money in relation to DNA profiling, in accord with the DOE duty of care not to wasting [sic] tax payer's money? Who recommended the RSPB member known as Parkin to do research on DNA profiling? Was it the RSPB?*

*What were the problems with the single locus probes and why did Defra send a letter to Parkin telling him his project will end in tears?*

*Why has Animal Health after over thirty years of close cooperation decided not to work with the RSPB anymore?*

*Do you not think it is a conflict of interest that Parkin worked on the Council for the RSPB and this point is compounded by the fact that he did not disclose the fact until recently?*

*Please give me a complete break down of all the funding of the RSPB in the future and over the last thirty years by DOE.*

*Please explain in totality and in great detail what benefits have been achieved by each grant of money given to the RSPB and Parkin by DOE.*

*How many registerable birds have been killed or injured due to the activities of DOE inspectors and police raids?*

*Did the Watchdog Programmes and the Wings Haven case have any influence on the funding of the RSPB?*

*As the Falconry Directly have asked my [sic] to handle a legal page on their website could you supply me with in the interests of falconry and the public with all the laws that affect birds of prey and all the laws that control Animal Health?*

*If you do not know the answers to my questions then please ask someone who does for example Hepworth or tell me who does have the answers.*

*The documents that I have sent in the past will be useful in answering my questions.*

*My argument is not with you personally as I understand that is your job to try and protect the DOE from further scandals.*

*Please note that I have been waiting for a long time for answers.'*

8. On 11 May 2009 the public authority issued a refusal notice, citing section 14 (1) of the Act (vexatious or repeated requests). It confirmed that it had sent all the information requested by the complainant to him previously and that it had disclosed all the information it held on DNA profiling in birds of prey to him.
9. On 20 May 2009 the complainant requested an internal review.
10. On 5 October 2009 the public authority confirmed that it had carried out an internal review. It explained that it was upholding its original decision on the same ground. It also reiterated that it had already disclosed information on the DNA profiling of birds in response to previous requests from the complainant.

## **The Investigation**

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### **Scope of the case**

11. On 3 September 2009 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:
  - He had been accused of lying.
  - Some of his requests were made for the purpose of clarifying questions and points he had made in the past and so that he could obtain legal advice.
  - He had proof that information given to him in the past was incorrect.

### **Chronology**

12. On 30 March 2010 the Commissioner asked the public authority for any further information regarding its application of section 14.
13. On 8 April 2010 the public authority responded providing a detailed explanation of its application of section 14. Subsequently the Commissioner contacted the public authority explaining that he considered that the request should have been considered under the EIR.

14. On 25 May 2010 the public authority confirmed that it had sent a letter to the complainant confirming that it was withholding the information under regulation 12(4)(b).

## Analysis

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### Substantive Procedural Matters

#### Exceptions

#### Regulation 12(4)(b) – manifestly unreasonable

15. As mentioned above, the Commissioner considers that the requested information should have been considered under the EIR initially. This is because he considers that the DNA profiling of birds is a measure under regulation 2(1)(c) to protect the eggs of birds of prey which in turn is an element of biodiversity, which is one of the elements under regulation 2(1)(a).
16. Regulation 12(4)(b) states that a public authority may refuse to disclose information if the request for information is manifestly unreasonable. The EIR does not provide a definition of this; however it is the Commissioner's view that 'manifestly unreasonable' means that it should be obvious that a request is unreasonable.
17. There is no single test for deciding whether a request might be considered as manifestly unreasonable. Therefore each case has to be judged on its own merits, taking into account all of the circumstances of the request. The Commissioner considers that the reasoning provided by the public authority in its application of section 14, is appropriate for its application of regulation 12(4)(b).
18. In his Awareness Guidance No 22 'Vexatious and repeated requests' the Commissioner has outlined a list of criteria to consider when deciding whether a request for information is vexatious or not:
  - Could the request fairly be seen to be obsessive?
  - Is the request harassing the authority or distressing the staff?
  - Would complying with the request impose a significant burden in terms of expense and distraction?
  - Is the request designed to cause disruption or annoyance?
  - Does the request lack any serious purpose or value?

19. It is not necessary for all of the above criteria to apply. However it is the Commissioner's view that at least one of the above criteria must apply and that generally, the more criteria that do apply, the stronger the case will be. In this particular case, the Commissioner accepts that the arguments submitted by the public authority to support its use of this exception can apply to more than one of the above criteria.
20. In addition the Commissioner will also consider the wider context and history of the request. In some cases although a request may not be vexatious on its own, when considered in context it may form part of a wider pattern of behaviour which makes it vexatious. However the Commissioner recognises that it is the request and not the requester which must be vexatious in order for the exception to apply.

### **Can the request fairly be seen as obsessive?**

21. It is the Commissioner's view that obsessive requests are usually a very strong indication of vexatiousness. Relevant factors can include the volume and frequency of correspondence, requests for information the requester has already seen, or a clear intention to use the request to reopen issues that have already been debated and considered.
22. The public authority confirmed that the complainant had been in correspondence with it over a period of several years. From November 2007 to April 1 2010 the complainant had sent 305 requests over half of which appeared to be connected to his prosecution in 1995 (between May 2009 and April 2010 the complainant submitted 103 requests to the public authority). The public authority also explained that on 18 August 2008 the complainant submitted 35 requests.
23. The public authority explained that since 1994 the complainant has been in regular correspondence with its Wildlife Licensing and Registration Authority on matters relating to his conviction. He has questioned the evidence presented against him by the Police and has made accusations of unprofessional activities by employees of Defra and the RSPB. The complainant has been repeatedly advised to submit his complaints to the police for investigation.
24. The public authority also explained that it had contacted the complainant by email on 26 September 2007. It advised him that if he continued to send requests for information that had already been disclosed, these would be declared vexatious. The complainant continued to send in large volumes of requests for information and posted his various requests for information to the public authority and various other public authorities including the police on the following website: [www.whatdotheyknow.com/user/derek\\_canning\\_11b\\_hons](http://www.whatdotheyknow.com/user/derek_canning_11b_hons).



25. The Commissioner is satisfied that the complainant has made a substantial amount of requests for information relating to the same themes. The Commissioner notes that the complainant has continued to send requests for information to the public authority on a regular basis, all connected to the same topic. It is reasonable to say that the public authority has been subjected to a continual flow of correspondence relating to the same theme for several years. Therefore the Commissioner is satisfied that this request together with the voluminous requests also received by the public authority from the complainant would be viewed by any reasonable person to be obsessive.

**Is the request harassing the authority or causing distress to the staff?**

26. As explained in paragraph 19, in some cases there will be an element of overlap between the different criterion in paragraph 18.
27. The Commissioner must consider the effect the complainant's actions have had on the public authority. He can take into account the history of the case and the manner of any previous dealings with the complainant. Although a complainant may not have intended to cause distress, the Commissioner must consider whether that was the effect their actions had. A complainant's reasons for making a request may in themselves be reasonable. However, a request can be considered manifestly unreasonable because of the effect it has had on a public authority and its staff.
28. As discussed above, the Commissioner is satisfied that the public authority has received a continual stream of requests and complaints from the complainant over a number of years relating to issues about the DNA profiling of birds. The public authority has confirmed that these requests have often been sent to several members of staff at a time within both the public authority and Defra and has resulted in work being duplicated unnecessarily. The public authority has also argued that this, in turn, has resulted in serious consequences for its resources and could be seen as a deliberate attempt to bombard both it and Defra with emails to cause maximum disruption.
29. The public authority has also confirmed that the tone of some of the correspondence has a hostile and harassing tone and makes serious, unfounded allegations against Defra, other organisations, members of staff or other individuals. For example in an email sent to a member of its staff, the complainant alleged that the member of staff should feel great shame at her criminal activities in relation to his case. He alleged



that the member of staff sat throughout his court case and deliberately withheld information which meant he was sent to jail. He also alleged that the member of staff had conspired to pervert the course of justice by helping other people to create a sham.

30. The public authority also explained that it felt the complainant's excessive, repeated and often lengthy correspondence was sent as part of a deliberate campaign to harass staff and cause disruption to it and Defra's work. The public authority explained that the complainant had fixated on named individuals and had used hostile and offensive language in his general correspondence and in requests. The public authority also explained that the complainant had rung a member of staff at his home at 10pm on one occasion.
31. The Commissioner is satisfied that there is sufficient evidence to suggest that the request shows that the complainant is asking for information he already has. He notes that towards the end of the request the complainant states that information he has sent to the public authority previously would be useful in answering his questions.
32. The Commissioner is therefore satisfied that the cumulative effect of the complainant's actions over the past few years, whether intentional or not, could be seen by any reasonable person as harassing the public authority and its staff.

**Would complying with the request impose a significant burden in terms of expense and distraction?**

33. The public authority explained to the Commissioner that although the individual request in itself would not impose a significant burden, in the past responses had gone on to generate further, numerous requests. The public authority pointed out that since submitting this present request, the complainant had submitted a further 103 requests. The public authority went on to explain that emails sent by the complainant are very often large (in excess of 5mb) and sometimes written in a rambling style which makes them difficult to understand. This in turn leads to a greater amount of time trying to deal with them. The public authority explained that a significant burden was being created by trying to deal with the multiple requests submitted by the complainant.
34. The public authority also explained that the level of requests and the work required to meet the requests was deflecting its staff from conducting their core responsibilities in relation to animal health and welfare. It was also impacting on the level of service that could be provided to other customers.

35. Although the public authority provided explanations about the remaining two criterion the Commissioner is satisfied that, based on the information above, the regulation 12(4)(b) exception is engaged. He will now consider the public interest test.

### **The public interest test**

36. Regulation 12(1)(b) requires that a public interest test is carried out where regulation 12(4)(b) is cited. The test is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner also notes regulation 12(2) which states: '*A public authority shall apply a presumption in favour of disclosure.*' He also notes the decision in the Tribunal case of *DBERR v Information Commissioner (EA/2008/0096)* in which it stated: "public authorities may be required to accept a greater burden in providing environmental information than other information" (paragraph 39).

### **The public interest in disclosing the information**

37. The Commissioner accepts that disclosure would promote transparency concerning the public authority and provide information about environmental legislation connected with birds, including the licensing of birds. As discussed in the above paragraph the Commissioner notes the Tribunal decision in *DBERR* that there may be a greater burden on public authorities to provide environmental information.
38. However, the Commissioner considers that there is little wider public interest in disclosing this information. The complainant's present request and previous requests relate to information that, in essence, is connected with DNA bird profiling. The complainant's wider aim is to overturn his conviction for trapping and selling wild birds in 1995. The Commissioner is of the opinion that the issues in question affect a relatively small number of people – the complainant and other people who deal with birds.

### **The public interest in maintaining the exception**

39. The Commissioner accepts that there are compelling arguments in favour of maintaining the exception in this case due to the public interest in protecting the integrity of the EIR and ensuring that they are used responsibly. Although public authorities are encouraged to act in a transparent and accountable way which benefits the public as a whole, it is not the intention of the EIR to require public authorities to tolerate harassment of officials by individuals who demonstrate obsessive behaviour when requesting information.

40. If the Commissioner were to find such behaviour appropriate, this would seriously undermine the purpose of the EIR. The Commissioner is strongly of the view that public authorities should be able to concentrate their resources on dealing with legitimate requests rather than being distracted by requests that have little or no merit and where the wider public interest would not be served by the disclosure of information.
41. It is the Commissioner's view that, even if initially the complainant had genuine reasons for making his requests for information, the complainant has pursued issues which had already been responded to. He has also made requests for information which has already been disclosed to him. Allowing the continuation of this through the EIR would not be in the public interest.
42. The Commissioner is also satisfied that if the public authority was required to respond to this request it would place a significant burden on it in terms of time and expense. It would also distract staff from dealing with other matters and divert a disproportionate amount of resources from its core business.
43. Considering the nature of previous requests and the number of requests made to the public authority during the Commissioner's investigation, the Commissioner has concluded that it is unlikely that any response to this request would satisfy the complainant. He also considers that a response would more than likely lead to further requests for information. These factors lessen any public interest in requiring the public authority to respond to this request.
44. In the Tribunal decision of *Mr A Welsh v Information Commissioner (EA/2007/0088)* the Tribunal stated that the legislation should not be brought into disrepute by setting the threshold for vexatiousness too high. The Tribunal stated:

*" ... there is a danger that settling the standard of vexatiousness too high will diminish public respect for the principles of free access to information held by public authorities enshrined in FOIA. There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested ..."*  
(paragraph 26).

45. In view of the above, it is the Commissioner's view that in all the circumstances of this case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
46. Therefore the Commissioner finds that the public authority were entitled to withhold the information requested by the complainant because the request is manifestly unreasonable.

## The Decision

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47. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
  - The application of regulation 12(4)(b)
48. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
  - Regulation 14(3)(a) in that the public authority did not explain what exception it was relying upon in its refusal notice of 11 May 2009, because it had considered the request under the Freedom of Information Act 2000 instead of the EIR.

## Right of Appeal

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49. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

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 sent.

**Dated the 30<sup>th</sup> day of September 2010**

**Signed .....**

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

## Legal Annex

### **Regulation 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(4)** 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;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

### **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.