

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

Decision Notice

Date: 1 August 2011

Public Authority: Big Lottery Fund
Address: 1 Plough Place
London
EC4A 1DE

Summary

The complainant submitted four requests to the Big Lottery Fund (the Fund) all of which focused on its decision not to award funding for a particular application under its Village SOS initiative. The Fund disclosed some information but withheld further information on the basis of sections 36(2)(b)(ii), 40(2) and 42 of the Act. The complainant subsequently contacted the Commissioner and it was agreed to focus the Commissioner's investigation on two issues: the application of section 42 to withhold one email and whether further information was held falling within the scope of the fourth request. In considering this complaint the Commissioner concluded that all of the requested information constituted environmental information and therefore the requests should have been handled under the Environmental Information Regulations (EIR). Nevertheless, the Commissioner is satisfied that the Fund does not hold any further information falling within the scope of the fourth request and furthermore that the Fund was entitled to rely on regulation 12(5)(b) – the EIR equivalent to section 42 – to withhold the email in question.

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 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.

Background

3. In 2010 the Big Lottery Fund (the Fund) invited villages across the UK to apply for funding with ideas for enterprises that would revive their communities, create new jobs and improve the quality of life of local people. The initiative was called Village SOS and six winning village business schemes were selected by the Fund to receive lottery funding.
4. This complaint relates to requests submitted to the Fund concerning its decision to refuse funding for one particular project, the Shepherds Purse Biosphere in Mitcheldean, Gloucestershire.

The Request

5. The complainant submitted the following requests to the Fund on 1 September 2010:
 1. All correspondence (including all documents, letters, emails, records, phone conversations) relating to Defra guidance on State Aid issues regarding the Village SOS application from Shepherds Purse, including the names of the individuals involved.
 2. Minutes of all meetings where the Shepherds Purse Bioshelter project was discussed, as well as details of all correspondence regarding the Shepherds Purse project between staff and board members.
 3. Details of measures taken to safeguard against BIG Lottery vested interests to reject work that did not fit with timescales

due to state aid guidance from Defra (please see previous appeal letter for further details).

4. Reasoning and justification for feedback included in the rejection letter. For example, we understand that BIG Lottery considered our project to be less replicable than other projects, but no explanation has been offered as why this seemingly illogical conclusion was considered to be the case.
6. The Fund responded on 29 September 2010 and explained that it considered the exemption contained at section 42 of the Act to apply to the requested information but it needed further time to consider the public interest test.
7. On 13 October 2010 the Fund contacted the complainant again and provided him with a substantive response to his requests. In relation to request 1 it:
 - Disclosed emails between the Fund and Defra. No exemptions within the Act were used to redact information but irrelevant information which focussed on other projects was removed.
 - Disclosed internal Fund emails referring to Defra's guidance but with the contact details of individuals redacted on the basis of section 40(2). Again, information which focussed on other projects was removed.
 - Two emails were withheld on the basis of section 42.
8. In relation to request 2 the Fund:
 - Disclosed minutes of meetings where the Bioshelter project was discussed with information being removed if it related to other projects.
 - Disclosed correspondence between the Fund's staff and Village SOS Committee members relating to the Bioshelter project.
9. In relation to request 3, the Fund provided a descriptive response to this question and noted that a copy of the Chair's note had already been provided to the complainant.
10. In relation to request 4, the Fund again simply provided the complainant with a descriptive response to this question rather than providing any specific recorded information.
11. The complainant contacted the Fund on 18 October 2010 and asked it to conduct an internal review of its handling of his requests. He specifically asked the Fund to review the following points:
 - Whether all of the advice from Defra was released in line with request 1.

- Whether there was any additional information that fell within the scope of the requests that had not been provided to him;
 - The application of section 42 to withhold the two emails.
 - Whether the Fund had responded adequately to request 4.
12. The Fund informed him of the outcome of internal review on 10 November 2010. The review explained that:
- All of the advice received from Defra which fell within the scope of request 1 had been already disclosed. However the response explained that two additional emails had been located which had not previously been provided. These were disclosed with the internal review response with personal email addresses and contact details redacted on the basis of section 40(2).
 - Section 42 had been incorrectly applied to withhold the email from Fund's Head of Legal Services to Defra which fell within the scope of request 1 and this was now being disclosed. However, it had been correctly relied upon to withhold the email from Fund's Head of Legal Services to the Fund's Commercial Consultant & Head of Commercial Property.
 - The initial response should have considered whether the Fund held any recorded information which would have fulfilled request 4. Having now done so the review explained that the complainant was already in possession of the majority of documentation the Fund held which would have answered this request. The only documentation which had not been provided was a spreadsheet recording Committee members' comments. This was disclosed to the complainant as part of the review with redactions being made on the basis of sections 36(2)(b)(ii) and 40(2) to the members' names.
 - Section 40(2) had been correctly applied to withhold contact details of staff members from the initial disclosures.

The Investigation

Scope of the case

13. On 15 December 2010 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The Commissioner subsequently confirmed with the complainant that the scope of his complaint focused on two issues:
14. Firstly, in relation to request 1 the complainant disputed whether section 42(1) has been correctly relied upon to withhold the email from the Fund's Head of Legal Services to the Fund's Commercial Consultant

& Head of Commercial Property dated 12 April 2010. The complainant argued that the exemption was not engaged and even if it was then the public interest favoured disclosure.

15. Secondly, the complainant also disputed whether the Fund had provided him with all the information it held which fell within the scope of request 4.
16. The complainant provided submissions to support both points of complaint which the Commissioner has not re-produced here but has set out in the Analysis section below.

Chronology

17. The Commissioner contacted the Fund on 3 February 2011 and asked it to provide copies of the withheld information falling within the scope of the complainant's requests.
18. The Fund provided this information on 20 April 2011.
19. The Commissioner contacted the Fund again on 11 May 2011 and explained that having reviewed the requested information he was of the opinion that this constituted environmental information as defined by the Environmental Information Regulations (EIR). Therefore the Fund should have dealt with these requests under the EIR rather than under the Act. However, the Commissioner noted the similarity of section 42 of the Act to the exception contained at regulation 12(5)(b) and therefore he was prepared to simply consider whether the withheld email was in fact exempt from disclosure on the basis of this exception for same reasons the Fund had identified to support the application of section 42. The Commissioner also noted that in relation to the second point of complaint the nature of his investigation was not affected by the fact that this request should have been considered under the EIR rather than the Act. The Commissioner did however ask the Fund to respond to a number of queries in relation to the complaint concerning request 4.
20. The Fund provided the Commissioner with a response to his queries on 28 June 2011. In providing this response the Fund noted that it did not dispute the Commissioner's decision to consider these requests under the EIR – and following the approach set out above - rather than under the Act.

Analysis

Exceptions

Regulation 12(5)(b)

21. Regulation 12(5)(b) provides an exception for information where disclosure would adversely affect:

‘the course of justice, the 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’
22. The First Tier (Information Rights) Tribunal in the case of *Kirkaldie v the Information Commissioner and Thanet District Council* (EA/2006/001) found that the exception ‘covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation’ (para 21). This view was supported by the Tribunal in the case of *Creekside Forum v Information Commissioner and DCMS* (EA/2008/0065). The Tribunal found that ‘...whilst regulation 12(5)(b) does not explicitly name legal professional privilege, its function and substance fall under the umbrella of ‘the course of justice’. (para 29).
23. The Commissioner therefore accepts that legal professional privilege is a concept covered by regulation 12(5)(b).
24. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
25. The Commissioner understands that the category of privilege the Fund is relying on is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and answer which can usually be found by inspecting the documents themselves.

26. The Commissioner has reviewed the withheld information in question, namely an email from the Fund's Head of Legal Services to the Fund's Commercial Consultant and Head of Commercial Property on 12 April 2010, and is satisfied that its dominant purpose was the provision of legal advice. The email therefore attracts legal advice privilege.
27. Legal professional privilege is an established principle which allows parties to take advice and discuss legal interpretation freely and frankly in the knowledge that such information will be retained in confidence.
28. The Commissioner notes the view of the Tribunal in the case of *Rudd v Information Commissioner and The Verderers of the New Forest* (EA/2008/0020), which found that:

'the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system' (para. 29)

29. The Commissioner is therefore satisfied that the disclosure of legally privileged information would have an adverse effect on the course of justice and the exception contained at regulation 12(5)(b) is therefore engaged.

Public interest test

30. Like all exceptions under the EIR, regulation 12(5)(b) is subject to the public interest test. The Commissioner has gone on to consider the public interest test arguments submitted by the Fund in its application of section 42 and has considered them in relation to regulation 12(5)(b). Regulation 12(2) of the EIR sets a presumption in favour of disclosure and the Commissioner has borne this requirement in mind in carrying out his assessment of the public interest test.

Public interest arguments in favour of maintaining the exception

31. The Fund argued that releasing the advice would undermine the principle of legal professional privilege and therefore the quality of legal advice provided may not be as full and frank as ought to be if there is a risk that it would be disclosed in the future.

32. The Fund emphasised that it is clearly vital that public authorities are able to obtain full and frank legal advice to aid them in complying with their legal obligations and conducting their business accordingly. As legal advice has to be necessarily fair, frank and reasoned, it is inevitable that it is likely to highlight the strengths and weaknesses of a course of action. If legal advice were to be routinely disclosed, public authorities may be reluctant to seek advice as it could contain information which may damage their position. Subsequently, public authorities not seeking legal advice may be less able to properly comply with legal obligations.

Public interest arguments in favour of disclosing the requested information

33. The Fund acknowledged that there was a clear public interest in the work of government being closely examined to encourage the discharging of public functions in the most efficient and effective way. It also accepted that there is an important public interest in the work of public bodies being transparent and open to scrutiny to increase diligence and protect the public purse.
34. The complainant explained that he was concerned as to the potential disparities between the advice provided to the Fund by Defra regarding state aid issues and how the Fund then used this advice to consider the Shepherds Purse application. In particular, the complainant was concerned that inaccurate information was used in the reports submitted to the Village SOS Committee about the impact of state aid issues on the Shepherds Purse application and that such information may have had a fundamental impact on the rejection of the project. In light of these concerns about how the application was handled the complainant argued that there was a compelling argument in the Fund disclosing **all** information related to its consideration of the application and that this position attracted further weight if the withheld email actually revealed inconsistencies in respect of the topic on state aid funding.

Balance of the public interest arguments

35. In considering the balance of the public interest under regulation 12(5)(b), although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

36. Consequently, although there will always be an initial weighting in terms of maintaining the exception, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:
 - how recent the advice is; and
 - whether it is still live.
37. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
 - the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
38. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of decision making process.
39. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
40. At the time the request was submitted the advice was only five months old and therefore the Commissioner accepts that the advice was clearly very recent. Furthermore, the Commissioner accepts that the advice was still live given that it formed part of the Fund's decision making process regarding the Shepherds Purse application and the complainant informed the Commissioner when he submitted his

complaint in December 2010 that an independent review of the Fund's handling of the application was ongoing.

41. With regard to the public interest arguments in favour of disclosing the information, the Commissioner notes that the Tribunal, in *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052) felt that the disclosure of the requested legal advice was necessary because of the crucial lack of transparency by the public authority in question. In the circumstances of this case the Commissioner does not believe that the Fund could be correctly accused of such a fundamental lack of transparency. By the time of the internal review with the exception of this email and the names withheld on the basis of section 40(2) and 36, the Fund did not withhold any further information falling within the scope of the requests (albeit that the Commissioner accepts that the complainant disputes whether further information is in fact held). Furthermore the Commissioner notes that the Fund did provide the complainant with further details about its decision not to support the application through its own complaints process. Nevertheless the Commissioner recognises the complainant's ongoing concerns regarding how the Fund actually reached its decision regarding the Shepherds Purse application, in particular the disagreements regarding the relevance of state aid issues, and he accepts that disclosure of the withheld email could perhaps provide further insight into the Fund's decision making.
42. The Commissioner is also conscious that in the *Merseytravel* case the Tribunal emphasised the fact that the level of money involved, and the number of people affected by the decisions based upon the legal advice, were key considerations in its conclusion: the amount of money involved was estimated to be around £70m with approximately 80,000 people directly affected. In the *Pugh* case quoted above the legal advice focused on pension funds with a value estimated to be around £1bn.
43. In the circumstances of this case the grant sought by Shepherds Purse from the Fund was £433,840 – a significant sum of money although obviously far less than the relevant figures in the cases cited in the previous paragraph. Furthermore, whilst the Commissioner would not wish to underestimate the potential benefits that a successful application could have brought to the village of Mitcheldean and the surrounding area, the successful application would presumably have been unlikely to have had a direct influence on such a large number of people as in the example quoted above.
44. In conclusion, when taking into account the strong inbuilt weight in favour of protecting legal professional privilege as well as the fact that this information is recent and live, the Commissioner believes that the

public interest in maintaining the exemption outweighs the public interest in disclosing the information. In reaching this conclusion the Commissioner wishes to emphasise that he has not ignored the complainant's strongly held view that disclosure of the email is necessary to hold the Fund accountable for its decision in respect of Shepherds Purse; it is simply that the Commissioner finds the public interest in protecting the principle of legal professional privilege more compelling in the circumstances of this case.

Regulation 12(4)(a) – information held by a public authority

45. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that:

‘it does not hold that information when an applicant's request is received’

46. In cases such as this where, in relation to request 4, there is some dispute as to whether a public authority holds information falling within the scope of the request the Commissioner has been guided in his approach by a number of Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held.¹ In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

47. To re-cap, request 4 sought:

‘Reasoning and justification for feedback included in the rejection letter. For example, we understand that BIG Lottery considered our project to be less replicable than other projects, but no explanation has been offered as why this seemingly illogical conclusion was considered to be case’.

48. As noted, the Fund's initial response of 13 October 2010 simply provided the complainant with a descriptive response to this request rather than providing any specific recorded information.

49. The internal review response correctly noted that in dealing with this request the Fund should have considered the records and documentation it held in relation to the reasoning set out in the

¹ See *Linda Bromley v Information Commissioner* (EA/2006/0072)

rejection letter. Having now done so the Fund explained that the complainant was already in possession of the majority of documentation the Fund held which would have answered his query. This consisted of the decision/rejection letter (dated 14 May 2010) and the response to his subsequent letter of complaint (the Fund's response being dated 27 July 2010). The only documentation which had not been provided was a spreadsheet recording committee members' comments. This was disclosed to the complainant as part of the internal review with redactions being made on the basis of sections 36(2)(b)(ii) and 40(2) to the members' names.

50. The complainant's primary reason why he believes that the Fund may hold more information falling within the scope of request 4 is based upon what he considers to be the apparently inconsistent reasoning provided by the Fund for the rejection of the application, particularly when this reasoning is seen in the context of some of the documents disclosed to him under the Act. In the complainant's opinion the inconsistent nature of the reasoning suggests that there may be further documents which explain how the Fund's reasons to reject the application allegedly shifted. The Commissioner also understands that the complainant's suspicions that further information may be held were also based upon the disagreement between the Fund and Shepherds Purse surrounding the relevance of state aid issues to the application.
51. For the sake of clarity the Commissioner has set out below the key documents in which these inconsistencies apparently appear:
52. The Commissioner understands that the Village SOS Committee considering the applications was given an 'Assessment Report' on each application which was prepared by the Fund.
53. The minutes of the Village SOS Committee meeting held between 4 May and 7 May 2010 record at point 10.3 its conclusions about Shepherds Purse:

'Although this project had a number of good qualities, the Committee felt that the beneficiaries were not sufficiently involved in the planning and running of the project. For this reason, the Village SOS Committee agreed not to award this application.'
54. The extract from the spreadsheet disclosed at the internal review recorded the following Committee members' comments about Shepherds Purse:

'Weak. [Name redacted] project changed, lacked focus. Presentation lacked strength. [Name redacted] didn't have a detailed analysis. [Name redacted] truly innovative with both

strengths and weaknesses, how they overcame challenges was good however presentation unprepared and not professional enough. Felt fun rather than business. Deliberation: unsecured funding, lack of community involvement in the design of the project. Concern over the two approaches, changed from stage one. No focus on outcomes. Planning permission issues'.

55. The rejection letter sent to Shepherds Purse on 14 May 2010 explained that there were two reasons why the application had been rejected: firstly because of concerns over the untested nature of the technologies on a commercial level and secondly because of concerns as to whether a specialist project such as a Bioshelter could be replicated by viewers of the television show in their own villages.
56. The Fund's response to the complainant's letter dated 27 July 2010 also reiterated that the application had been rejected on the basis that there was limited scope for it being replicated by other villages.
57. Based upon the above extracts the Commissioner has some sympathy with the complainant's argument that the rejection of the application would appear to be inconsistent. This is because the letters of 14 May and 27 July 2010 place significant weight on the problems with the project being replicated in other villages as the basis upon which to reject the application. However, neither the comments recorded in Committee minutes nor the extract from the spreadsheet disclosed at the internal review stage make any explicit reference, if any, to concerns around the project being replicated. Furthermore the version of the Assessment Report which the complainant has provided to the Commissioner did not include any comment regarding the concerns about the project being replicated.
58. Therefore, bearing in mind the specific circumstances of this case and the general approach in cases such as this described above, the Commissioner asked the Fund to respond to two points. Firstly to explain to him the process for informing applicants to the Village SOS scheme that their application had been rejected and secondly the steps the Fund have taken in order to locate any relevant information falling within the scope of request 4.
59. With regard to the first issue the Commissioner asked the Fund to describe the process by which the rejection letters were compiled, including covering the following points:
 - What documents would the author of the letters have had access to when compiling the rejection letters? Simply the documents identified above, e.g. Assessment Report, Committee Minutes and the spreadsheet containing the Committee's comments?

- Alternatively, would the author have had access to further recorded information, e.g. informal notes made by the Committee members?
 - Would it be standard practice for the author of the rejection letter to have discussed the application with colleagues before responding (and thus the reasoning set out in the rejection letters may also be based on oral discussions rather than simply on the content of recorded documents)?
60. With regard to the second issue, the Commissioner asked the Fund to respond to the following points:
- What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve all relevant information?
 - If further information were held would it be held as manual or electronic records?
 - If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials and on networked resources and emails.
 - If searches included electronic data, which search terms were used?
 - Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
 - If recorded information was held but is no longer held, when did the Fund cease to retain this information?
 - Does the Fund have a record of the document's destruction?
 - What does the Fund's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the Fund describe the way in which it has handled comparable records of a similar age?
 - If the information is electronic data which has been deleted, might copies have been made and held in other locations?
 - Is there a business purpose for which the requested information should be held? If so what is this purpose?
61. In response the Fund provided the Commissioner with the following description as to where the concerns about the project being replicated came from:
62. The concerns around replication originated from the Committee during the final day of its deliberations. Although the word 'replication' is not explicitly stated in the spreadsheet recording the comments of the Committee, this is what the Committee was driving at when it was talking about the weaknesses of the project. The concerns were around the project being an untested technologically advanced project and

- how easily other communities would be able to engage with the concepts and replicate within their own villages.
63. Not all of the points made during the Committee's discussions could be captured on the spreadsheet itself and therefore some information was passed on verbally by the Head of Programme Management who was present at the Committee to the Grant Officers drafting the reject letters.
 64. The concern regarding replication was not recorded in the Committee minutes (as opposed to the spreadsheet) as these only record the decision made and the general reject reasons used by the Fund's grant management system, Merlin. Merlin's reject reasons are understandably generic and are often a best fit and therefore do not always provide enough feedback to the applicant. Consequently, when the Fund start to compose the reject letters it looks to ensure that exact, specific and detailed feedback is given to each applicant. The reject reasons in the reject letter sent to Shepherds Purse were the reasons that the Committee felt were most tangible and useful pieces of feedback for the applicant.
 65. With regard to the Commissioner's questions set out above at paragraph 59, the Fund explained that the reject letter for each unsuccessful application was drafted by the Grants Officer who had assessed the application. The Grants Officer reviewed the Committee spreadsheet and received verbal feedback from the Head of Programme Management. The Head of Programme Management provided greater context and clarity on the information recorded in the spreadsheet.
 66. The Grants Officer also had access to the assessment report. However, the Committee minutes and informal notes made by Committee members (if indeed any existed) were not available to the Grants Officer when drafting the reject letter. The Grants Officer would have verbally discussed the content of the reject letter with senior colleagues to ensure that the text was accurate and consistent with other reject letters prepared by the Village SOS team.
 67. With regard to the Commissioner's questions set out above at paragraph 60 the Fund explained that the Grants Officer for the project would have held information relevant to the request or would have known where any relevant information was held. The Grants Officer searched the project's paper file and his email records for information relevant to the request. The Village SOS networked folder was also searched. The Village SOS Programme Managers (the line managers to Grants Officers) also searched their email and paper records for any relevant information. Generally, all relevant information is held on the

applicant's file. The Grants Officer conducted a search of his records manually, reviewing each email received during the period of Committee feedback to determine if any were relevant. The Programme Managers conducted searches of their emails using 'Shepherds Purse' as a key word.

68. The Head of Programme Management and Senior Policy Adviser (who also attended the Committee meeting) held informal notes of the Committee meeting which would have been relevant to this request. However, these notes were destroyed in June/July 2010 which was before the complainant's request of 1 September 2010 was submitted. These notes were destroyed because they were no longer needed and there was no legal requirement to retain such documents.
69. On the basis of the Fund's responses to the Commissioner's detailed questions, the Commissioner is prepared to accept that on the balance of probabilities the Fund has disclosed to the complainant all of the recorded information falling within the scope of request 4. The Commissioner has reached this conclusion for two reasons. Firstly, in his opinion the explanation provided to him which sets out where the concerns about the Shepherds Purse project being replicated came from provide a reasonable and logical explanation to support the fact no such concerns are in fact contained in recorded documentation. Secondly, the Commissioner is satisfied that the nature of searches undertaken by the Fund were sufficiently detailed so that if any further recorded information was held it would have been located.
70. The Commissioner notes that regulation 12(4)(a) is a qualified exemption and thus subject to the public interest test at regulation 12(1)(b). However, given that regulation 12(4)(a) applies in scenarios where information is simply not held by a public authority, as opposed to situations where information is held but is exempt from disclosure or the principle of confirm or deny applies, the Commissioner does not consider it possible to apply the public interest test in this situation. This is because there is no rational consideration of the public interest that could be carried out as there would be no practical consequence of the Commissioner concluding that the public interest favoured disclosing the information given that the information is not held. Thus it could not be disclosed and moreover the EIR does not place any duty on public authorities to create information which has been requested.

Procedural Requirements

71. The fact that the Fund considered and refused the requests under the Act rather than under the EIR, means that it did not cite the exceptions upon which it later relied upon when refusing these requests. The Commissioner has therefore concluded that the Fund breached

regulation 14(3) which requires a public authority which refuses a request for environmental information to cite the exceptions upon which it is relying on.

The Decision

72. 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 email falling within the scope of the first request which was withheld is exempt from disclosure on the basis of regulation 12(5)(b) and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure.
 - The Fund does not hold any further recorded information falling within the scope of request four other than already disclosed to the complainant and thus the Fund was entitled to rely on regulation 12(4)(a).
73. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- The Fund breached regulation 14(3) by failing to issue a refusal notice citing the exceptions in the EIR upon which it later sought to rely on.

Steps Required

74. The Commissioner requires no steps to be taken.

Right of Appeal

75. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

76. 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.
77. 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 1st day of August 2011

Signed

**Alexander Ganotis
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Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Prejudice to effective conduct of public affairs

Section 36(2) provides that -

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) would, or would be likely to, prejudice-

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

Personal information

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

(a) in a case where the information falls within any of 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 this Act would contravene-

1. any of the data protection principles, or
2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Environmental Information Regulations

Regulation 12(4)

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

- (c) it does not hold that information when an applicant's request is received;
- (d) the request for information is manifestly unreasonable;
- (e) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (f) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (g) the request involves the disclosure of internal communications.

Regulation 12(5)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect

–

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the 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;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

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).