Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **29 April 2013**

Public Authority: **Department for Environment, Food and Rural Affairs (Defra)**

Address: **Nobel House**
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested from Defra information relating to its 2010 and 2011 public consultations on pesticides[1]. In response, Defra provided some information, advised that other parts were not held and withheld some under variously regulations 12(4)(d) (unfinished documents), 12(4)(e) (internal communications) and 13 (personal data) of the EIR.

2. During the course of the Commissioner's investigation, Defra agreed to disclose a number of items of information it had previously withheld. For the remaining elements, the Commissioner is satisfied that Defra identified all the relevant information covered by the requests and was correct to apply regulations 12(4)(d), 12(4)(e) and, in part, regulation 13 to aspects of this information. However, he also considers that Defra misapplied regulation 13 to the names of stakeholders recorded in the information. He therefore requires this information to be disclosed to ensure compliance with the legislation. In addition, the Commissioner

[1] The identical requests were also made to the Chemicals Regulation Directorate, a directorate of the Health and Safety Executive (HSE). The arising complaint is covered in the decision notice issued under FER0452045, which arrives at the same findings.

has found that Defra breached regulation 5(2) (time for making information available) by its handling of the requests.

3. The public authority must take the above step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 23 May 2011 the complainant wrote to Defra with five requests for information relating to the 2010 and 2011 consultations on pesticides. The wording of the requests is reproduced in the annex (A) attached to this notice. The complainant followed this up the same day by clarifying that request 5 was supposed to say "gave to Ministers (including the DEFRA Secretary of State)".

5. Defra provided its substantive response to the requests on 18 August 2011. In each case the requests were dealt with under the EIR, with the exception of a limited amount of information which was processed in accordance with the access rights provided by the Data Protection Act 1998 (DPA). Defra produced a schedule of documents it held that were subject to the requests, explaining that it did not possess any information covered by requests 3 – 5. In respect of the records it did hold, Defra disclosed a significant amount but redacted some documents and withheld others in full under various exceptions. These were: regulations 12(4)(d), 12(4)(e) and 13 of the EIR.

6. The complainant wrote to Defra again on 14 October 2011 and questioned not only its decision to withhold information but also what she considered to be the limited scope of the information it had considered pursuant to the requests. Defra subsequently carried out an internal review, the outcome of which was provided to the complainant on 9 December 2011.

7. Defra found that it had not complied with the time limits set out in the EIR when responding to the requests and apologised for this breach. It also accepted that a limited amount of additional information could be disclosed but considered that it had correctly applied the exceptions to the balance of the information. Finally, Defra clarified that, in its view, all information relevant to the requests had been located and considered.

Scope of the case

8. The complainant contacted the Commissioner on 8 June 2012 to complain about the way her requests for information had been handled. Specifically, the complainant has asked the Commissioner to consider both Defra's decision to withhold information and the possibility that it has not identified all pertinent information it holds that is covered by the requests.

9. During the course of the Commissioner's investigation, Defra chose to revisit the information that it had previously withheld. It subsequently decided that a number of documents could now be released, albeit subject to some redactions of personal data. Consequently, the Commissioner does consider further the disclosed information in the body of this notice.

Reasons for decision

10. As mentioned above, the complaint refers both to Defra's application of exceptions contained in the EIR and the claim that Defra has not identified all information relevant to the requests. The Commissioner considers these different components of the complaint in turn.

Regulation 5 – Duty to make environmental information available

12(4)(a) – information not held

11. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request. Any claim that requested information is not held is covered by an exception under regulation 12(4)(a) of the EIR and therefore requires a formal refusal notice. The Commissioner considers that the question of whether Defra holds further information covered by the scope of the request has two strands:

    - Whether Defra has correctly interpreted and acted on the full scope of the requests.

    - Whether Defra has carried out appropriate searches for information.

12. It is clear that there is a significant difference between what information the complainant *intended* should be caught by the terms of her requests and what Defra considers *is* actually covered by these terms. From the point of view of the complainant, it is argued that the requests were

deliberately phrased so as to encompass a wide range of information. This would include:

"[…] *any written communications that mentioned me and/or my campaign, and/or related campaign submissions, that went between the aforementioned Ministers' Private Offices, as well as any written communications that went between the aforementioned Ministers' Private Offices and DEFRA officials, and/or CRD officials* […]"

13. Defra, in contrast, consider that the interpretation being argued for is an unnatural reading of the request, particularly when in its view the requests specify the information required. It states:

[The] *requests clearly explain what information is being sought, both in terms of the consultations, the pesticides legislation, and which Department/officials provided the information and to whom. The requests are for advice, documents, briefings etc. that Defra Policy Advisers (and CRD) gave to Ministers/CSA and those are the requests we fulfilled.* […] *I do not think it is a reasonable interpretation to read this as* ***any*** *communications referring in* ***any way*** *by* [the complainant] *between officials (as the complainant seems to) but, rather, as anything that was intended for, and received by, a Minister or the CSA. Neither, does the complainant ask for anything provided from Ministers to Defra officials in response to any of these or other communications and the request cannot reasonably be interpreted as meaning to include such communications.*

14. Defra further clarified that it had not included any information submitted before the 2010 consultation that was not about the consultation itself as it considered this fell outside the scope of the requests.

15. When considering whether it was appropriate for Defra to act on a particular interpretation of a request, or requests, it is necessary for the Commissioner to refer to regulation 9 of the EIR. In some ways this mirrors section 16 of FOIA. Regulation 9(1) of the EIR says that a public authority shall provide advice and assistance, so far as it would be reasonable to do so, to applicants and prospective applicants.

16. In practice, the Commissioner considers that a public authority will have a duty under regulation 9 to help an applicant clarify a request where it is aware that the request has more than one objective reading and it therefore needs further information in order to identify the information that is actually wanted. This duty will not arise, however, where in the circumstances it is reasonable for a public authority to conclude that there is only one *objective* interpretation of the request. The key here is that a request is applicant and motive blind which means that a public authority should not go behind the phrasing of the request.

17. In this case the Commissioner has found that the duty set out at regulation 9 did not arise. This is because he agrees with Defra that the directions of the requests are clear and that Defra's interpretation of them was consistent with an objective reading of the requests. Moreover, he does not consider there is more than one objective reading that would have necessitated Defra's return to the complainant for clarification. He has therefore proceeded on this basis.

18. It is for the Commissioner to next consider the steps Defra has gone to in order to locate relevant information. Where there is any contention about whether or not further information is held by a public authority, the Commissioner will apply the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will bear in mind the direction and quality of searches undertaken by a public authority as well as considering, where appropriate, any other reasons offered to explain why additional information is not held.

19. Defra has explained that Ministers' Offices do not retain emails and other correspondence. Instead, the onus for filing rests with the business area responsible for the subject of the correspondence – this being in this case the Pesticides Team in Defra's Chemicals and Nanotechnologies Business Area. Defra has gone on to describe the way in which relevant information is stored:

    All correspondence that is for the attention of the pesticide policy team is stored on an electronic Accredited Shared Drive (ASD). The Chemicals and Emerging Technologies team's shared drive is accessible only by members of staff in the branch (i.e. no other Defra employee has access to it). In this shared-drive there are a number if subject folders where the pesticide policy team file documents relating to 'Pesticides', 'Biocides' and 'Detergents'. The 'Pesticide' folder contains many sub-folders according to the theme of the correspondence. Defra undertook a detailed search of all relevant sub-folders in an effort to locate all information falling within the scope of [the complainant's] *requests for information.*

20. For completeness, as well as carrying out these searches, the Pesticides Policy team has specifically contacted officials who may have insight into this matter for their views. Defra has also confirmed that all documentation administered by Defra's Pesticide Policy team on the 2010 and 2011 consultations remain on the ASD and have not been destroyed.

21. In order to make a decision on whether a public authority has located all information relevant to a request, the Commissioner does not need to be absolutely certain in his view. Rather, as mentioned, he only needs to

find that it is reasonable to conclude that this is the case on the balance of probabilities.

22. Bearing in mind the scope of the requests, the Commissioner is satisfied to the required standard that Defra has adequately explained where relevant information would be stored and what steps have been taken to retrieve this information. Furthermore, he notes there is no suggestion that Defra has destroyed any information which might potentially have been covered by the requests.

23. Regulation 12(1)(b) requires that all exceptions, including regulation 12(4)(a), are subjected to a public interest test. It is clearly difficult for the Commissioner to do this given his finding that the public authority does not hold additional requested information to which the public interest could apply. However, he has concluded that the public interest favours maintaining the exception.

Regulation 12(4)(d) – information still in the course of completion

24. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data. The exception has been applied to the document referred to as CRD 14c in the schedule of documents produced by Defra for the complainant.

25. This document itself was sent as an annex to submissions entitled 'Consultation on pesticides legislation: Write-round to Cabinet Committees'. This was provided as a draft document by an official at the Chemicals Regulation Directorate (CRD), a directorate of the Health and Safety Executive, for the attention of Lord Henley, Defra's minister.

26. The Information Tribunal in *Secretary of State for Transport vs the Information Commissioner* (EA/2008/0052)[2] found that drafts are unfinished documents for the purposes of regulation 12(4)(d), and remain unfinished even upon completion of a final version. In accordance with this finding, the Commissioner is satisfied that the exception is engaged in respect of the draft letter. Therefore, as required by regulation 12(1)(b) of the EIR, he has gone on to consider

[2] http://www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20(EA-2008-0052)%20-%20Decision%2005-05-09.pdf

the public interest test attached to the exception. In doing so, he has been mindful of the EIR's express presumption in favour of disclosure.

Public interest arguments in favour of disclosure

27. In its submissions on the public interest test, which essentially cover the same ground for both regulations 12(4)(d) and 12(4)(e), Defra has acknowledged that there is a strong public interest in transparent decision making by government departments, especially where a consultation process is involved. The benefits of transparency are that not only does it encourage greater involvement in government consultations but that it also promotes public trust in decision-making as a result of the accountability that transparency brings.

28. The issues at the heart of the requests also lend significant weight to the public interest in disclosure. As recognised by Defra, and forcefully argued by the complainant, there is a specific public interest in understanding more about the development of government policy on the testing and use of pesticides. This is because of the wider consequences that pesticides could potentially have on public health and safety, wildlife and countryside. Information that therefore records the process leading up to the government's adoption of a position on the back of these consultations will therefore be of particular interest. Reinforcing the strength of these arguments is also the weight attached to the public interest in transparency inherent in the EIR itself.

Public interest arguments in favour of maintaining the exception

29. Defra has made the following arguments in favour of withholding the information:

    - Public authorities should have the necessary space to think in private so that sound policy decisions can be made. This need is acute where, as here, policy development was "at a formative stage and remained 'live' at the time of the request."

    - Leading on from the first point, disclosure would prejudice ministerial deliberation on policy by undermining ministers' rights to determine how to conduct policy discussion. Specifically, the release of information of this nature would focus attention on the process by which a decision was reached rather than on the policy itself.

    - Ministers discuss policy with officials and other advisers in the expectation that their detailed consideration of policy options will remain private. The public interest in disclosure of this information is not sufficient to outweigh the importance of safeguarding this confidentiality.

- There is a strong public interest in protecting cabinet collective responsibility. By disclosing the level at which the policy was discussed, disclosure would weaken the perception of collective responsibility.

- Ministers are rightly answerable for the decisions they make. However, they are entitled to exercise discretion over the procedures they adopt in reaching those decisions.

30. Each of these arguments has been considered by the Commissioner even if they have not been referred to in more detail below.

Balance of the public interest arguments

31. The Commissioner recognises that the broader public interest in disclosure is strong in this case. The issues themselves were touched on by Lord Henley in response to the 2010 consultation on pesticides:

We have to protect the public and environment from harm and we'll do so by following sound scientific and other robust evidence.

By making a small number of changes to our existing approach, we can continue to help feed a growing population with high-quality food that's affordable, while minimising the risks of using pesticides."[3] (15 December 2010)

32. In contrast, there is a significant campaigning body which have argued that the government's position, on the back of the consultations, does not do enough to protect the public from the health risk they say is posed by the utilisation of pesticides.

33. In his guidance[4], the Commissioner points out that a key factor in "assessing the weight of the public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. There is always an argument for presenting a full picture of how a decision was made or a policy position arrived at" (paragraph 25). Yet, the Commissioner also acknowledges in his guidance that if "the

[3] http://www.defra.gov.uk/news/2010/12/15/pesticides/

[4] http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.aspx

process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it more difficult to bring the process to a proper conclusion" (paragraph 15).

34. The question for the Commissioner is therefore whether the inherent interest in the content of the information, combined with the EIR's presumption of disclosure, is sufficient to outweigh the arguments advanced for withholding the information. In the Commissioner's view, they are not.

35. A key factor in forming this view relates to the timing of the request. Returning to the Commissioner's guidance, it states that a public authority may argue that it needs a 'safe space' in which to carry out its decision-making away from public scrutiny, and that disclosing this material would harm that safe space. The guidance goes on to say at paragraph 15:

This is an argument about protecting the integrity of the decision making process. Whether it carries any significant weight in the public interest test will depend very much on the timing of the request. If the process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it difficult to bring the process to a proper conclusion. However, if the process is effectively complete (for example if the public authority has made a policy announcement or published a final version of draft documents), then it is more difficult to argue that the safe space is needed.

36. It is true that by the time of the request, the consultation to which the document refers had been completed. However, the Commissioner also recognises that work on the pesticides legislation continued after this time. He therefore accepts Defra's arguments that the broader policy development was "at a formative stage and remained 'live' at the time of the request."

37. It is in this context that the Commissioner considers significant weight should be placed on the deliberative process as it relates to policy making. As rightly pointed out by Defra, it is ultimately in the public interest that ministers have the right to determine how to conduct policy discussion away from public scrutiny and possible criticism. As mentioned in the aforementioned guidance, this space will make it easier for officials to bring the process to its proper conclusion.

38. In saying this, the Commissioner has also borne in mind the fact that the nature of the consultations was to garner external views on the implementation of legislation. This, in effect, allowed an opportunity for

the interested parties to have their views heard and taken into account. That such an opportunity existed, in the opinion of the Commissioner, would serve to diminish the public interest in disclosure. Equally, the Commissioner considers that disclosure would only have limited value for the purposes of transparency and accountability, especially when bearing in mind the volume of information that has already been made available.

39. The Commissioner has therefore decided that, in all the circumstances, the public interest favours the maintaining the exception. As he has come to this conclusion, the Commissioner has not been required to consider Defra's application of regulation 12(4)(e) of the EIR to the same information.

Regulation 12(4)(e) – internal communications

40. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has recently published guidance[5] on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications'.

41. The Commissioner has first considered the question of whether the information in question can reasonably be described as a 'communication'. As the Commissioner's guidance demonstrates the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it. In this case, the exception has been applied to: a pair of sentences contained in a briefing note (CRD 4) produced by the CRD for the Secretary of State of Defra in connection with an arranged meeting; and two sentences contained in a submission (CRD 14) connected to the cabinet write-round referred to as part of this notice covering regulation 12(4)(d). There is no doubt that the withheld information forms part of a record constituting a communication for the purposes of the exception. He has therefore next considered whether each record is an 'internal' communication.

[5] http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

42. There is no definition of what is an 'internal' communication within the EIR. Consequently, in its absence, the Commissioner will form a view by considering the relationship between a sender and recipient, the circumstances of the case and the nature of the information in question. These factors will dictate whether a communication produced by the CRD for Defra can properly be called internal. Defra is a central government department while the CRD is a directorate of the Health and Safety Executive (HSE), which is one of the Department for Work and Pensions' Non Departmental Public Bodies.

43. Regulation 12(8) of the EIR states that for the purposes of the exception, internal communications includes communications between government departments. The Commissioner's guidance further explains at paragraph 22 that internal communications include:

"[…] *communications between an executive agency and its parent department, as an executive agency is part of the parent department for the purposes of the EIR. Communications between executive agencies, or between an executive agency and another central government department, will therefore also be internal communications."*

44. In *Department for Environment, Food and Rural Affairs vs The Information Commissioner and Teresa Portmann* (EA/2012/0105)[6], the Tribunal considered Defra's argument that its communications with the Marine Management Organisation – a non-departmental public body - represented internal communications. The Tribunal found that the exception did not apply, commenting as follows:

"If Parliament had intended a non-departmental public body in general, or the MMO specifically, to be included within the definition in regulation 12(8) EIR as to the extent of "internal" in the governmental context it would have done so in the framing of the regulations or by amending them at a later date." (paragraph 26)

45. This finding would, on the face of it, appear effectively to undermine the possibility that the exception would cover any information contained in a record exchanged between a non-departmental public body and Defra. However, the Commissioner appreciates that there will be exceptions to this rule. For example, section 84 of FOIA defines a government

[6] http://www.informationtribunal.gov.uk/DBFiles/Decision/i940/EA-2012-0105_2012-11-13.pdf

department as "including any body exercising statutory functions on behalf of the Crown". Consequently, transferring this across to the EIR and notwithstanding its independent status, a non-departmental public body may potentially constitute a government department where it has specifically been designated in the legislation creating the authority as a Crown Body. This is pertinent in the circumstances of this case.

46. In particular, section 10 of the Health and Safety at Work etc. Act 1974, which established the HSE, states that the functions of the Executive and of its officers and servants *shall be performed on behalf of the Crown*, thus meaning it is a Crown Body. Taking this into account, the Commissioner has decided that the withheld sentences contained in the briefing and submission are potentially subject to regulation 12(4)(e). This finding would equally apply where, as in this case, the withheld information contained in the briefing constitutes the advice given by an HSE lawyer who had transferred to TSol (Treasury Solicitors) at the time of the briefing.

47. In relation to CRD 14, the Commissioner is also aware that the document had been copied in to, among others, individuals from the Food Standards Agency (FSA). A communication sent externally (directly or by cc) to a third party, as well as being circulated internally, is not an internal communication. Consequently, the exception will only apply if communications between the HSE and the FSA could otherwise be considered internal.

48. Regulation 12(8) of the EIR states that, for the purposes of the exception, internal communications includes communications between government departments. As mentioned previously, the Commissioner has found that the HSE constitutes a governmental department because it has been designated as a Crown Body. In respect of the FSA, the Commissioner understands that unlike many other government departments it does not report to a specific minister – emphasising the fact that it works at 'arm's length' from government. Nevertheless, the Commissioner considers the important issue for the purposes of the exception is the fact that it is a government department. As such, the Commissioner has decided that the CRD 14 does represent an 'internal' communication.

49. The Commissioner's next step is therefore to consider the public interest test attendant to the application of the exception.

Public interest arguments in favour of disclosure

50. The same arguments for disclosure have effectively been repeated for regulation 12(4)(d) and regulation 12(4)(e). The Commissioner has not therefore felt it necessary to state these arguments again here,

confirming instead that full consideration of these arguments has been given.

Public interest arguments favour of maintaining the exception

51. In addition to the arguments similarly advanced for the application of regulation 12(4)(d), Defra has claimed that the weight in favour of withholding the information in relation to CRD4 is strengthened in this case because it attracts legal professional privilege – representing advice given by a legal advisor in their professional capacity.

52. The Commissioner's guidance on regulation 12(4)(e) of the EIR acknowledges at paragraph 67 that internal communications may include legal advice from in-house lawyers, which will attract legal professional privilege. However, it also goes on to state the following:

" […] *public interest arguments under this exception must be focussed on harm to internal deliberation and decision-making processes. Broader arguments about the principle of legal professional privilege will not carry any inherent weight under this exception. The course of justice exception in regulation 12(5)(b) is likely to be more appropriate for legal advice and we would advise public authorities to use that exception instead."* (paragraph 67)

53. Defra has confirmed that it is not seeking to apply regulation 12(5)(b) of the EIR in addition to regulation 12(4)(e).

Balance of the public interest arguments

54. The Commissioner considers that the inherent public interest in disclosure of CRD 4 is relatively low. Ultimately, it sheds little light on the bigger issues relating to the pesticides consultations but refers to procedural details relating to a specific meeting with a government minister. This, in the view of the Commissioner, greatly weakens the case for disclosure. CRD 14, on the other hand, does tell us more about the process of decision-making, although again the Commissioner considers this is fairly limited in scope.

55. In saying this, the Commissioner appreciates that the emphasis of the EIR is on transparency and, therefore, the Commissioner must find in favour of disclosure if the weights of the respective arguments are in the balance. Furthermore, in respect of CRD 4 particularly, it could legitimately be argued that the force of any claim relating to 'safe space' will have diminished once the meeting had taken place – the space needed to make decisions no longer being required.

56. However, in opposition to this view, the Commissioner accepts that there will be times when it is important to maintain the confidentiality of advice required by senior officials. This, in the Commissioner's view, is one of those times because of the likelihood that disclosure of either CRD 4 or CRD 14 would discourage senior officials from obtaining full advice in the future – the so-called 'chilling effect'. Ultimately, it is in the public interest for a senior official to be able to call on full and frank advice when entering into discussions without fear that this advice may later be disclosed – a fear that may serve to stifle the advice-giving process.

57. When this factor is considered alongside the relatively narrow interest that the public would have in disclosure of the information itself, the Commissioner has found that the public interest favours maintaining the exception.

Regulation 13 – personal data

58. Regulation 13 says that to the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority should not disclose the personal data if it would breach any of the data protection principles.

59. The information to which the exception has been applied comprises names of civil servants and other stakeholders, including members of trade organisations. The Commissioner is satisfied that the withheld names are personal data from which the data subjects can be identified. He has therefore gone to consider whether disclosure would breach a data protection principle.

60. The relevant principle for the purposes of the request is the first, which requires the fair and lawful processing of personal data. Should these conditions be met, the Commissioner is then required to consider whether disclosure would meet one of the conditions in schedule 2 of the DPA

61. Reflecting the arguments of Defra, the Information Commissioner considers separately below the names of the junior civil servants and the names of other stakeholders.

The names of junior civil servants

62. The Commissioner has been guided in this case by his findings on FS50177136[7], which involved the Cabinet Office. In that decision, the Commissioner considered the application of section 40(2) of FOIA - the equivalent provision to regulation 13 in the EIR - to the names of junior civil servants who were members of the secretariat responsible for a committee.

63. In the Cabinet Office case, the Commissioner decided that the civil servants in question would "typically have managerial responsibility and whilst they are not members of the "Senior Civil Service" are still relatively senior employees." On this basis, the Commissioner decided that the officials would have a reasonable expectation that their names would be disclosed in the course of carrying out their work. As there was nothing to suggest that disclosure would be unfair or unlawful, the Commissioner went on to consider condition 6 of schedule 2 of the DPA. This sets out a three-part test that must be satisfied before the condition will be met:

- There must be legitimate interests in disclosing the information.
- The disclosure must be necessary for a legitimate interest of the public.
- Even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.

64. The Commissioner accepted that there was a legitimate interest in disclosure as it would serve to promote even greater transparency and accountability. However, the Commissioner also felt that this interest had already been met through the Cabinet Office's decision to release the names of the Senior Civil Servants who attended the committee. The Commissioner therefore concluded that disclosure failed to satisfy schedule 2 of the DPA and so the information was exempt information under section 40(2) of FOIA.

[7] http://www.ico.org.uk/~/media/documents/decisionnotices/2008/FS_50177136.ashx

65. The Commissioner considers that the same principles can be transplanted here. In this case, Defra has argued that the junior civil servants "did not have a significant level of involvement in the public consultations and in considering the fairness of disclosing their names account must be taken on the basis of the roles and functions they perform, the degree to which they are the decision makers, and the level of accountability that they hold. Although a small number were involved in researching or analysing policy options this was only to help inform decisions to be taken by senior officers or ministers."

66. Like the Cabinet Office case, the Information Commissioner considers that it would be reasonable for civil servants, even junior civil servants, to expect to have their names disclosed in a work capacity. Similarly, he is not aware of any legal impediment to disclosure. Ultimately, however, the Commissioner considers that any legitimate interest in disclosure had already been satisfied by Defra's release of the names of the senior officials referred to in the relevant documents. It therefore follows that section 40(2) of FOIA is engaged because disclosure would not meet one of the conditions in schedule 2 of the DPA and so would breach the first data protection principle.

Names of stakeholders

67. The remaining individuals whose names have been withheld by Defra can broadly be described as stakeholders concerned with the implementation of pesticides legislation. In many cases these are industry representatives, such as members of the Crop Protection Association and the Horticultural Trades Association.

68. In respect of the members of the trade organisations, Defra has argued that it would not be fair to disclose their names because they were not acting in a personal capacity at the meetings recorded in the documents but rather in an 'official' one on behalf of the organisations they represented. Furthermore, Defra has advised that it has not been possible to consult with the data subjects and so it is unaware whether the members would have any specific concerns about the release of their names into the public domain in this context.

69. The Commissioner considers that the fact that a data subject has not consented to disclosure should be taken into account in any analysis of fairness. However, he also feels that this is not absolutely determinative in the decision as to whether the data subject's personal data will be disclosed.

70. It is clear that all of the documents in which the names appear refer to high-level discussions and events regarding the pesticides consultations and legislation. The seniority of the members of the trade organisations is commensurate with the nature of the discussions, with the individuals representing the higher tiers, if not the highest, of an organisation. Similarly, the other stakeholders hold senior positions in their respective fields.

71. The Commissioner considers that each representative would have entered the discussions knowing there would be scrutiny of the government's actions regarding important pieces of legislation. This would, in the Commissioner's view, significantly weaken any expectation of anonymity; with this expectation further weakened by the seniority of the individuals in question. The one exception to the above, is the presence of a journalist at one of the events recorded in the documents provided to the complainant. The Commissioner recognises that a journalist does not represent a 'vested' interest like members of trade organisations. However, he also considers that a journalist, working in their professional capacity in these circumstances, is unlikely to have any significant expectation of confidentiality.

72. The Commissioner considers that the potential distress or damage caused by disclosure to any of the stakeholders would be slight. Ultimately, the fact that discussions had been attended by a representative concerned by, or otherwise interested in, the adoption of pesticides legislation would not seem unusual or outside the remit of those individuals. For these reasons, the Commissioner considers that it would be fair to disclose the information for the purposes of the first data protection principle. Furthermore, he has not been presented with, nor is he aware of, any reasons that would make disclosure unlawful. Accordingly, the Commissioner has gone on to decide whether the release of the names would be in accordance with condition 6 of schedule 2 of the DPA.

73. As mentioned above, the Commissioner accepts that there is a legitimate interest in the disclosure of the names of the contributors to discussion relating to an area of policy that will have a very meaningful impact, including on human health and safety. The question that arises then is whether the legitimate aim in pursuing the information can be achieved by means that interfere less with the privacy of the data subjects. This refers to the necessity of disclosure described by the second part of the test at condition 6. In the Commissioner's view, it cannot.

74. The Commissioner is aware that in certain instances Defra has disclosed the name of the relevant organisation, even where it has refused to disclose the identity of the representative of that organisation. This would go a long way towards satisfying the legitimate interest because, in essence, it is knowledge of the organisations themselves that took part in discussions, and had an opportunity to lobby on this issue, that holds greatest importance, rather than the identity of the individuals who represented the organisations. However, the Commissioner also believes that public confidence in the consultation process and the eventual implementation of legislation is only possible where there is transparency about the influential individuals involved.

75. Finally, the Commissioner considers that the interference with the rights, freedoms and interests of the various individuals through disclosure to be slight. Essentially, the release does not tell us anything sensitive about that individual, bearing in mind the context of the information in which their names were recorded.

76. The Commissioner has therefore concluded that disclosure would not contravene the first data protection principle and so section 40(2) of FOIA is not engaged in respect of this category of information.

Procedural Issues

Regulation 5(2) – timeframe for making information available

77. Regulation 5(2) of the EIR states that requested information should be made available as soon as possible and no later than 20 working days after the date of request. The Commissioner has found that Defra did not respond within the statutory timeframe and so breached regulation 5(2).

Right of appeal

78. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

79. 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.

80. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed .....

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A – Schedule of requests

Request	Terms of request
1.	Please can I request under FOI or EIR, whichever is the relevant one, any advice(s) and briefing(s) and any other documentation/correspondence that the **PSD/CRD** gave to Ministers (including the DEFRA Secretary of State) a) proper to, and/or at the time of, the Government's response to the 2010 DEFRA Consultation on pesticides; b) following the publication of the Government's response to the 2010 DEFRA Consultation; c) prior to Government's response to the 2011 March DEFRA Consultation on pesticides. (This request obviously includes in relation to anything relating to myself and my campaign, and my submissions to Ministers both written and verbal, **including any advice(s) and briefing(s) and any other documentation/correspondence sent to Lord Henley by PSD/CRD prior to the meeting I had with him on 6th July 2010, as well as thereafter**; as well as any statistical breakdown and analysis of the submissions to the DEFRA consultations).
2.	Please can I request under FOI or EIR, whichever is the relevant one, any advice(s) and briefing(s) and any other documentation/correspondence that the **DEFRA Policy Advisors** gave to Ministers (including the DEFRA Secretary of State) a) proper to, and/or at the time of, the Government's response to the 2010 DEFRA Consultation on pesticides; b) following the publication of the Government's response to the 2010 DEFRA Consultation; c) prior to Government's response to the 2011 March DEFRA Consultation on pesticides. (This request obviously includes in relation to anything relating to myself and my campaign, and my submissions to Ministers both written and verbal, **including any advice(s) and briefing(s) and any other documentation/correspondence sent to Lord Henley by PSD/CRD prior to the meeting I had with him on 6th July 2010, as well as thereafter**; as well as any statistical breakdown and analysis of the submissions to the DEFRA consultations).

3.	In addition, I am not sure whether there was nor not, but please can I also request under FOI or EIR, whichever is the relevant one, any advice(s) and briefing(s) and any other documentation/correspondence that the **PSD/CRD** gave to the Chief Scientific Advisor (Bob Watson) a) prior to, and /or at the time of, the Government's response to the 2010 DEFRA Consultation on pesticides; b) following the publication of the Government's; c) prior to the Government's response to the 2011 March DEFRA Consultation on pesticides. (This request obviously includes in relation to anything relating to myself and my campaign, and my submissions to Ministers both written and verbal).
4.	In addition, I am not sure whether there was nor not, but please can I also request under FOI or EIR, whichever is the relevant one, any advice(s) and briefing(s) and any other documentation/correspondence that the **DEFRA Policy advisors** gave to the Chief Scientific Advisor (Bob Watson) a) prior to, and /or at the time of, the Government's response to the 2010 DEFRA Consultation on pesticides; b) following the publication of the Government's; c) prior to the Government's response to the 2011 March DEFRA Consultation on pesticides. (This request obviously includes in relation to anything relating to myself and my campaign, and my submissions to Ministers both written and verbal).
5.	In addition, I am not sure whether there was nor not, but please can I also request under FOI or EIR, whichever is the relevant one, any advice(s) and briefing(s) and any other documentation/correspondence that the **Chief Scientific Advisor (Bob Watson)** gave to the Chief Scientific Advisor (Bob Watson) a) prior to, and /or at the time of, the Government's response to the 2010 DEFRA Consultation on pesticides; b) following the publication of the Government's; c) prior to the Government's response to the 2011 March DEFRA Consultation on pesticides. (This request obviously includes in relation to anything relating to myself and my campaign, and my submissions to Ministers both written and verbal).