

Environmental Information Regulations 2004

Decision Notice

Date: 16 December 2010

Public Authority: Natural England
Address: Regulatory Services
Burghill Road
Westbury-on-Tyrm
Bristol BS10 6NJ

Summary

The complainant submitted a request for information relating to bird licensing. The public authority responded and cited regulation 12(4)(b) – manifestly unreasonable. The request was made up of various quotes and questions about the quotes. The Commissioner is satisfied that the public authority has applied regulation 12(4)(b) correctly and that in this case the public interest in maintaining the exception outweighs the public interest in disclosing the information. However, the Commissioner found that the public authority had breached regulations 14(2) and 14(3)(b).

The Commissioner's Role

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.

The Request

2. On 20 March 2009 the complainant submitted the following request for information:

'Could you explain please section 5 of the proposed General Licence:

With the exception of the birds listed in Appendix 3 of this licence (which may be sold without a ring), any bird sold under this licence must be ringed with a legible individually numbered metal close ring, which is a ring or band in a continuous circle (without any break, join, or any signs of tampering since it was manufactured) and which cannot be removed from the bird when its leg is fully grown. The ring must meet the ringing requirements of the country in which the bird was bred. For any bird sold under this licence which is on Schedule 4 of the Act, the close ring must meet the marking requirements of CITES (see Note e).

*I am totally confused **sorry**.*

The above proposal must allow for the sale of birds fitted with rings from the EU it states The ring must meet the ringing requirements of the country in which the bird was bred.

Why was this added if birds need to be rung with a ring supplied by a Defra approved supplier?

Please could you explain.

This proposed licence specifically excludes bird species listed in Schedule 3 Part 1 of the Wildlife & Countryside Act 1981. The reason for this exception is because existing legislation already permits the sale of the bird species listed in Schedule 3 Part 1 provided that the requirements set out in the Statutory Instrument 1982/1220 can be met, i.e. the birds in question must be fitted with a closed ring issued by a Defra approved supplier and have accompanying documentary evidence of captive breeding.

We are talking about schedule three birds not fitted with BBC or IOA rings, the above proposed General Licence allows for the sale of the birds not fitted with BBC or IOA rings but comply with the EU ringing regulations.

Am I correct?

With regards ringing requirements

If I am correct the WML-A20 allow the sale of birds fitted with correct rings which comply with the ringing regulations but are not issued by the BBC or 10A.

E.G Birds fitted with continental rings, Rings that comply with the ringing regulation which states the bird must be ringed with a legible individually numbered metal close ring, which is a ring or band in a continuous circle (without any break, join, or any signs of tampering since it was manufactured) and which cannot be removed from the bird when its leg is fully grown.

So if a birds ring complies with the EU ringing relation above the WML-A20 can be used.

It states that for British to be sold and shown in the UK they must have BBC or 10A rings on.

I believe my law we do not need to ring British and also we can ring birds with an correct size ring but we are not allowed to show it or sell it.

But we could use the WML-A20 to sell if we comply with the conditions of the WML-A20 licence am I correct?

With regards your reply below.

*You also make reference to the issue by Natural England being used as supporting evidence in terms of proof of captive breeding – I refer you to the specific comments I made in my letter to you of 23rd September 2008, which I have repeated below for ease of reference: **It is important to note that acceptance by Natural England of any documentation in support of a licence application does not guarantee acceptance in a court of law as proof of captive breeding. As with the operation of any legislation, although guidance can be given, if challenged, definitive interpretation can only be provided through the legal process.***

I totally agree but it must be better than going to court without it'.

3. On 22 April 2009 the public authority responded. It explained that it considered the complainant's two requests of 20 March 2009, together with his one request of 31 March 2009, two requests of 4 April 2009

and one request of 7 April 2009 to be manifestly unreasonable under regulation 12(4)(b).

4. On 24 April 2009 the complainant requested an internal review.
5. On 26 May 2009 the public authority confirmed it had carried out an internal review. It explained that it was upholding its original decision on the same ground.

The Investigation

Scope of the case

6. During the Commissioner's investigation the public authority clarified that it was the first request of 20 March 2009 as set out above, which triggered its application of regulation 12(4)(b).
7. 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 has been asking a number of questions with regard to a number of different aspects including restriction of trade.
 - He has been misinformed.
 - Some of the information provided by the public authority is incorrect.
 - He has tried to show the public authority that it is incorrect both with its advice and understanding of the matter.
 - He believes that the public authority has tried to investigate him and find ways to stop him applying for licences and asking questions.
 - He has asked for clarification on some questions and points he has made in the past.
 - He has proof that the information given to him in the past was incorrect.

Chronology

8. On 6 May 2010 the Commissioner contacted the public authority about the complaint.

9. On 9 June 2010 the Commissioner requested clarification about which of the requests for information was the one to which the refusal notice of 22 April 2009 was referring.
10. On 17 June 2010 the public authority confirmed that the refusal notice was in response to the first request for information it had received from the complainant on 20 March 2009. It also explained that this request was followed 10 minutes later by another email (with attachments) asking when the public authority was going to answer some points raised by him in an earlier request for information of 28 January 2009. The Commissioner notes that the request of 28 January 2009 was made up of 15 questions which all related to birds and licensing.
11. The public authority also provided further arguments as to why it considered regulation 12(4)(b) applied.

Analysis

Exceptions

Regulation 12(4)(b) – Manifestly Unreasonable

12. Regulation 12(4)(b) states that a public authority may refuse to disclose information if the request is manifestly unreasonable. While the EIR does not define 'manifestly unreasonable' it is the Commissioner's view that 'manifestly' means that a request should be obviously and clearly unreasonable – there should be no doubt as to whether the request is unreasonable. Therefore, it will apply where it can be demonstrated that a request is vexatious or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.
13. In his Awareness Guidance on 'Vexatious and repeated requests' (3 December 2008) the Commissioner provides criteria to help decide whether a request is vexatious or not, as listed below. Even though the public authority has cited regulation 12(4)(b) in this particular case, the Commissioner considers that the same criteria can be used.
 - 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?
14. It is not necessary for all of the above to apply. However, it is the Commissioner's view that at least one of the above criteria must apply for a request to be considered vexatious; the more criteria that apply, the stronger the case will be. He also accepts that arguments put forward by the public authority to support its application of this exception can apply to more than one of the above criteria.
 15. In this particular case the public authority has indicated that the request was obsessive; harassing/distressing; would impose a significant burden; and lacked any serious purpose or value.
 16. When considering whether a request can be deemed vexatious and whether one or more of the criteria apply, the Commissioner will also consider the wider context and history of the request. In some cases a request may not be vexatious in its own right but when considered in context, forms 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 for the exception to apply.

Can the request fairly be seen as obsessive?

17. It is the Commissioner's view that obsessive requests are usually a very strong indication of vexatiousness. Relevant factors include the volume and frequency of correspondence, requests for information the requester has already seen or a clear intention to use a request to reopen issues which have already been debated and considered.
18. The public authority confirmed that from July 2007 to 20 March 2009 it had received 71 requests, containing 85 questions, 29 of which were repeat or modified questions relating to the same or similar topics.
19. The public authority also explained that from 20 March 2009 to 16 October 2009 it received 21 requests for information from the complainant. These requests contained 35 questions, of which 4 were repeated or modified questions relating to the same or similar topics, and included 3 further requests, containing 14 questions, made by the complainant on 20 March 2009.
20. The public authority confirmed that the complainant had continually used the information access regimes to revisit and reopen matters which had already been addressed. For example one of the requests submitted by the complainant on 20 March 2009 related to ringing requirements and ring tampering. However these issues had already

been dealt with in a series of communications between the complainant and public authority from 26 August 2008 to 26 November 2008. The public authority provided a snapshot of this correspondence and the Commissioner is satisfied that the information in the snapshot provided was related to ring tampering.

21. The Commissioner is also satisfied that the complainant has made a substantial number of requests for information under the EIR. The public authority provided a schedule showing the dates of requests from July 2007 up to October 2009. The schedule also provided a summary of each question, how many of the questions were repeat questions, and the dates on which they had been answered.
22. The history of requests and contact with the public authority shows that a response to one request has often led to further requests being made. The Commissioner notes that some of the evidence provided by the public authority relates to events that took place after the request to which this complaint relates, and is therefore not relevant to the issue of whether the public authority was justified in concluding that this particular request was vexatious. On the basis of the evidence that is relevant, however, the Commissioner is satisfied that continued behaviour of this nature could be viewed by any reasonable person as obsessive.
23. In conclusion, for all of the reasons above, the Commissioner is satisfied that the request can be fairly seen as obsessive.

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

24. In the Information Tribunal (the Tribunal) decision of *DBERR v Information Commissioner (EA/2008/0096)* the Tribunal stated that: *"public authorities may be required to accept a greater burden in providing environmental information than other information"* (paragraph 39). This decision was based upon the presumption in favour of disclosure provided in the EIR (Regulation 12(2)) and the obligations which apply to the UK via the Aarhus Directive.
25. The Commissioner has considered the evidence provided by the public authority, together with the Tribunal's findings in the case of *DBERR* above.
26. In the present case the Commissioner notes that from July 2007 to March 2009 the public authority received 71 requests from the complainant. There were 85 questions, 29 of which were repeat or modified questions relating to the same or similar topics. The public

- authority provided the Commissioner with a snapshot of a series of correspondence between 27 April 2008 and 6 August 2008 containing what the complainant had asked for and its responses.
27. The Commissioner notes that the complainant requested information and the public authority provided it. The complainant then went on to ask a number of questions for clarification on, in this instance, bird licensing requirements.
 28. He further notes that the complainant submitted requests for information and once he received the information he would then ask for clarification. He would then put in another request for information which was similar (if not the same). The public authority would then respond, indicating where information had been disclosed to the complainant previously.
 29. The public authority explained that responding to so many requests had at times placed a large burden on its resources and had diverted it away from its core responsibilities. It also explained that the request of 20 March 2009 was in fact a continuation of previous requests seeking both similar and, in some instances, the same information which had already been disclosed to the complainant.
 30. Further, the public authority explained that responding to the request would place a further burden upon it in terms of time and public expense and would disproportionately distract it from other business.
 31. The public authority pointed out that, from past experience, if it had responded to the request it would, more than likely, have led to further requests being received from the complainant.
 32. The Commissioner considers that, from the evidence provided, the complainant uses the EIR to revisit issues and complaints which have already been dealt with. He accepts that revisiting previous requests for information which have already been addressed would distract the public authority from dealing with other issues including requests for information from other applicants.
 33. The Commissioner also considers that it would be an inappropriate use of public resources to continue to revisit and respond to information requests which have already been dealt with.
 34. For all the reasons above, the Commissioner considers that if the public authority had responded to this request it would have led to a significant burden on the public authority in terms of expense and distraction.

Does the request lack any serious purpose or value?

35. The Commissioner accepts that the public authority has disclosed extensive information to the complainant when it responded to requests on legislative requirements. It has also provided guidance on how to contact other public bodies which could address some of the complainant's concerns. For example, it informed the complainant he should contact the Department for Environment, Food and Rural Affairs regarding changes in legislation.
36. The Commissioner notes that the request in question is made up of questions and the complainant's own views. He also notes that the complainant quotes something he wrote to the public authority six months previously and then goes on to agree with his own statement.
37. The Commissioner accepts that the public authority has provided the complainant with information in the past and that it is unlikely that any response will satisfy the complainant. Therefore, it is his view that this request no longer has any serious purpose or value.

Conclusion

38. The Commissioner is satisfied that the above three criteria all apply in this particular case and that regulation 12(4)(b) is therefore engaged.

The public interest test

39. 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*'.

The public interest in disclosing the information

40. The Commissioner accepts that disclosure would promote transparency and provide information about environmental legislation connected with birds, including the licensing of birds. As discussed in paragraph 23 the Commissioner notes the Tribunal decision in *DBERR* that there may be a greater burden on public authorities to provide environmental information.
41. 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 birds in a particular context, including legislation, licensing and ringing of birds. He 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 on a professional or commercial basis.

The public interest in maintaining the exception

42. The Commissioner accepts that there are compelling arguments in favour of maintaining this exception in this particular case due to the public interest in protecting the integrity of the EIR and ensuring that the regulations 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.
43. 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.
44. It is also the Commissioner's view that, even if initially the complainant had genuine reasons for making his requests for information, he has pursued issues to which he has already received a response. 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.
45. The Commissioner is satisfied that if the public authority were 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 resource from its core business.
46. Considering the nature of previous requests and the number of requests made to the public authority since this Notice, the Commissioner has concluded that it is unlikely that any response to this request would satisfy the complainant, but instead would more than likely lead to further requests for information. As already discussed, the present request for information was a continuation of a previous request for information. These factors lessen any public interest in requiring the public authority to respond to this request.

47. 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).

48. 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. Therefore he considers that the request is manifestly unreasonable.

Procedural Requirements

49. Regulation 14(2) provides that if a public authority refuses to disclose requested environmental information it should let the applicant know as soon as possible and no later than 20 working days after the receipt of the request.
50. The complainant requested the information on March 20 2009 and the public authority did not respond until 22 April 2009. Therefore, the Commissioner finds that the public authority has breached regulation 14(2).
51. Regulation 14(3)(b) provides that if a public authority refuses to disclose information under regulation 12, it must provide an explanation of what it took into account when it considered the public interest.
52. The Commissioner notes that the public authority did not provide such an explanation in relation to the public interest. Therefore, he finds that the public authority has breached regulation 14(3)(b).

The Decision

53. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- the application of regulation 12(4)(b).
54. However the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- regulation 14(2), in that the public authority failed to provide a refusal notice within the statutory time for compliance;
 - regulation 14(3)(b), in that the public authority failed to provide an explanation of what it took into account when it considered the public interest.

Right of Appeal

55. 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.

Website: www.informationtribunal.gov.uk

56. 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.
57. 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 16th day of December 2010

Signed

**Jon Manners
Group Manager**

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

Legal Annex

Regulation 12

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5);
and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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

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.