

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 25 August 2021

Public Authority: Rural Payments Agency
(Executive Agency of the Department for Environment, Food and Rural Affairs)

Address: North Gate House
21-23 Valpy St
Reading
RG1 1AF

Decision (including any steps ordered)

1. The complainant requested copies of ministerial submissions about a farm payment appeal. The Rural Payments Agency (“the RPA”) disclosed some information, but withheld one paragraph. It relied on Regulation 12(4)(e) of the EIR (internal communications) as its basis for doing so.
2. The Commissioner’s decision is that Regulation 12(4)(e) of the EIR is engaged in respect of this request, but that the public interest favours disclosure. As the RPA did not comply with the statutory time limits for either issuing a response or completing an internal review (reconsideration), it breached Regulations 5(2) and 11(4) of the EIR respectively.
3. The Commissioner requires the RPA to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, a copy of the withheld information.
4. The RPA must take these steps 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.

Background

5. The request relates to a long-running dispute between a farming company ("the Farm") that the complainant is involved with and the RPA over the amount of Single Farm Payment Scheme Payments that the Farm is entitled to receive.
6. In 2013, the RPA wrote to the Farm and advised it that, following inspections, in 2012, of the land being claimed for, it had determined that almost three quarters of the claimed-for land was ineligible as it either was not or could not be used for grazing – a view it confirmed after a further review of its decision. The Farm appealed this decision to the Independent Agricultural Appeals Panel (IAAP) – which can make recommendations to the Minister of State for Farming as to whether the RPA's decision should be upheld or varied.
7. IAAP considered the appeal on 5 November 2014 and provided its verdict shortly afterwards. It recommended that the Minister allow the appeal as it considered that the RPA had overestimated the amount of ineligible land. IAAP did not state definitively the amount of land it considered to be eligible, but stated that it would be "substantially more" than that previously calculated by the RPA.
8. The RPA wrote to solicitors acting on behalf of the Farm on 8 January 2015 and confirmed that the Minister had accepted IAAP's recommendation. Having re-calculated the entitlement, the RPA now considered that the Farm had only over-claimed SPS by 4.6 hectares and imposed a much-reduced penalty.
9. On 22 January 2015, the solicitors wrote back to the RPA arguing that even this, substantially-reduced, penalty was too high and failed to reflect the amount of land the Farm had actually claimed SPS in respect of. Following a further response from the RPA in February 2015 to say that its appeals process had been exhausted, the Farm's solicitors threatened to seek a judicial review.
10. On 6 May 2015, the RPA wrote to the Farm's solicitors again. It now revised down its estimate once again to just 0.77 hectares of over-claim which would not result in a further penalty.

Request and response

11. On 8 July 2020, the complainant wrote to the RPA and requested information in the following terms:

"Can you please let me have a copy of the Ministers [sic] written decision as I have never been supplied with a copy of it.

"Can you please let me have a copy of any RPA submissions to the Minister following the appeal hearing (whether before or after the Minister's written decision)."

12. The RPA responded on 27 November 2020. It provided some information, but redacted personal information. It also redacted the final paragraph from its submission to the Minister. It stated that it was relying on Regulation 12(4)(e) of the EIR to withhold this information.
13. Following an internal review the RPA wrote to the complainant on 9 February 2021. It upheld its original position.

Scope of the case

14. The complainant contacted the Commissioner on 18 February 2021 to complain about the way his request for information had been handled. He was unhappy that he had been denied access to the final paragraph.
15. The Commissioner wrote to the complainant on 26 July 2021 setting out that, based on the documentation submitted, she was confining the scope of her investigation to determining whether or not the RPA was entitled to rely on Regulation 12(4)(e) of the EIR to withhold the remaining information. The complainant responded on 2 August, providing some further background information and reinforcing his earlier public interest arguments but was otherwise content with the scope.
16. At the same time as writing to the complainant, the Commissioner also wrote to the RPA and asked for a submission as to why it considered the exception applied. Given the links between the complainant and the Farm, she also asked the RPA whether it had considered the possibility that the requested information might be his personal data.
17. The RPA responded on 20 August 2021, it confirmed that it had considered whether the information was the complainant's own personal data, but concluded that it was not – as information available via Companies House indicates that the Farm is not a company wholly controlled by the complainant. Having reviewed the relevant entry, the Commissioner is satisfied that the information is not the complainant's personal data.

18. The Commissioner considers that the scope of her investigation is to determine whether the RPA is entitled to rely on Regulation 12(4)(e) of the EIR to withhold the requested information.

Reasons for decision

Is the requested information environmental?

19. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*
 - (d) reports on the implementation of environmental legislation;*
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
20. As it is information relating to farming payments, the Commissioner believes that the requested information is information on a measure affecting the elements of the environment. For procedural reasons, she has therefore assessed this case under the EIR.

Regulation 12(4)(e) – internal communications

21. Regulation 12(4) of the EIR states that:

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

(e) the request involves the disclosure of internal communications.

22. The exception is class-based, meaning that information will be covered by the exception if it is information of a particular type. There is no need to demonstrate that its disclosure will cause harm in order for the exception to be engaged.
23. Neither the EIR itself, nor the EU Directive from which it is derived define what an “internal communication” is. However, guided by the original memorandum explaining the then-proposed new Directive, the Commissioner considers that this exception is designed to protect a public authority’s internal “thinking space.”
24. The two requirements for the exception to be engaged are (unsurprisingly) that the information must be “internal” (ie. it must not have been shared outside the public authority) and that it must be some form of communication (ie. it must have been created for the purpose of conveying information from one person to another).
25. Taking the second test first, the submission as a whole was intended to convey or communicate information from the RPA to the Minister. Namely, information about the findings of the IAAP. The Commissioner is therefore satisfied that the withheld information forms part of a communication.
26. The complainant contended that, whilst the information may be a communication, he argued that it was not an “internal” communication. He argued that the information originated from IAAP (which is independent of DEFRA) and was therefore not being shared internally. In the alternative, he argued that the RPA is a separate entity from DEFRA and therefore the communication was not one which was “internal.”
27. The Commissioner considers that, where an executive agency communicates with its parent department, that communication will still be an “internal” communication for the purposes of the EIR. Regulation 12(8) of the EIR makes clear that communications between government departments are internal communications and executive agencies are under the ultimate control of the relevant Secretary of State – as opposed to non-departmental public bodies: which are independent.

28. Whilst the submission as a whole may communicate a decision from IAAP, the communication was sent from the RPA and, in particular the redacted paragraph includes the RPA's own assessment of the outcome of the appeal. The Commissioner therefore accepts that the withheld information is an internal communication and therefore Regulation 12(4)(e) of the EIR is engaged.

Public interest test

29. Even when the requested information is an internal communication, a public authority may still be required to disclose it – unless it can demonstrate that the balance of the public interest favours maintaining the exception.
30. In explaining why the balance of the public interest should favour maintaining the exception, the RPA explained that:

"There is a strong public interest in ensuring that the RPA is able to maintain its private thinking space within which discussions can be had candidly on how to handle specific issues. Furthermore, this ensures a safe space for a decisions to be reached and preserves the space for ministers and officials to hold frank and free discussions in future, without fear of later being released to the public, and this therefore in fact aids effective decision-making. Additionally, knowing that such communications may be released to the public would inhibit future communications between ministers and their advisors and restrict the decision-making process...

"...Public authorities should have the necessary space to think and deliberate in private, which in turn informs effective decision making. To release this information may inhibit this in future, and lead to restricted decision making. The information requested is specific to this business and therefore could only loosely be said to relate to the public interest in transparency."

31. The complainant argued that he had a strong interest in the particular information. He noted that RPA had persistently miscalculated the penalty to be applied and that it appeared to have altered its final decision (which the RPA had previously informed him that it could not do) without further recourse to the Minister. There was, the complainant argued, a public interest in understanding what had happened.

The Commissioner's view

32. The Commissioner considers that the balance of the public interest narrowly favours disclosure.

33. In its submission, the RPA also noted that:

"the withheld information...is based on legal advice, and therefore, had the subject of the request been a natural person and responded to under a SAR, it is likely to have been considered as exempt from disclosure under legal professional privilege..."

"...When considering the relevant exceptions under EIR, Regulation 12(5)(b) was initially considered, however, following further consideration and consultation with our legal team, it was concluded that Regulation 12(4)(e) was applicable and fully engaged."

34. The Commissioner considers that the RPA should be well aware that it is entitled to cite as many exceptions, for the same information, as it believes would apply.

35. As the RPA has clearly already given consideration to applying Regulation 12(5)(b) of the EIR to this information, but rejected it, the Commissioner considered that it would be unfair on the complainant to seek any submissions on the matter. It is the responsibility of the public authority to determine the exceptions on which it wishes to rely.

36. Equally, the Commissioner has not given any weight in her considerations to the possibility that disclosure might undermine the principle of legal privilege. She has confined herself solely to those matters relevant to the exception – namely the effect that disclosure might have on the quality of the RPA's internal thinking and decision-making.

37. This request was made more than five and a half years after the submission was conveyed to the Minister and the Minister's decision promulgated. The RPA no longer needs (and has not needed for some time) a safe space in which to consider its decision or in which to decide how to communicate that decision.

38. Equally, the Commissioner is not persuaded that a so-called "chilling effect" is either particularly likely or would be severe. Civil servants are (or, at least should be) well aware of the possibility that their advice may one day be subject to an EIR or FOIA request. The Commissioner expects officials to be robust and not easily deterred from providing reasoned advice or discussing controversial matters.

39. The withheld information does not reflect a process of internal decision-making in which individual officers' opinions are identified. It reflects a settled recommendation, from the RPA, as to the decision the Minister should take. The Commissioner can see no good reason to suggest why the RPA would fail to make recommendations to the Minister in future or why it would not provide the reasoning behind its recommendation.
40. Whilst the Commissioner does not consider that the arguments in favour of maintaining the exception are strong, she does not consider that the arguments for disclosure are strong either.
41. Firstly, she notes that the RPA is not the body that makes this decision. That decision is made by the Minister – who is not bound by the recommendations of either the RPA or IAAP.
42. Secondly, the Commissioner also notes that, whilst this information is clearly of great importance to the complainant, it is of little wider public interest. Whilst the complainant would presumably have needed to devote a considerable amount of time and resources to challenging the Minister's decision throughout 2013, 2014 and 2015, the end result was that the RPA did not eventually levy a penalty. That decision is now more than six years old (five, at the point of the request) and such interest as there might have been at the time has dwindled considerably. In the absence of any compelling reason to suggest any contemporary relevance, the Commissioner considers that the point must be rapidly approaching at which such little public interest as there might once have been has evaporated altogether.
43. Nevertheless, the Commissioner also recognises that, whilst not bound by the RPA's recommendation, the Minister is likely to give considerable weight to those recommendations – particularly when the recommendation is to depart from IAAP's findings (although the Commissioner is not confirming whether this did, or did not, happen in this particular instance). There is some public interest in understanding this part of the overall decision-making process
44. Equally, she does recognise that the complainant had to battle the RPA for around two years to get it to agree with his calculation of the payment due. There will be some, albeit limited, public interest in understanding why the matter dragged on so long and the withheld information would shed some (limited) light on that matter.
45. The Commissioner is also mindful of the EIR's presumption in favour of disclosure, set out in Regulation 12(2). Given that there are no compelling factors either in favour of maintaining the exception, or in disclosure, the balance must therefore favour disclosure of the information.

Procedural matters

Timeliness of response

46. Regulation 5(2) states that requested information should be made available by the public authority *"as soon as possible and no later than 20 working days after the date of receipt of the request."*
47. In this particular case, the RPA did not issue its response to the request until four and a half months after originally receiving it.
48. In its internal review, the RPA accepted that it had not met the statutory deadlines, but argued that there were a number of "mitigating factors." These included the Covid-19 pandemic and Brexit, but the RPA also drew attention to the fact that the request had been submitted by :

"The request was a response to a letter the CEO sent in July 2019, over 12 months earlier. Noting the time span of this and that the requested information related to an issue in 2014, suggests that the requestor did not act in a way that would suggest it would be particularly urgent."
49. The RPA also pointed to the fact that the requestor had submitted his request by post which, in its view further suggested that he "did not see the request or response as urgent."
50. Finally, the RPA noted that there was a "large body of information to collate and review across RPA and Defra stakeholders" which would have "posed additional and significant logistical challenges." It argued that:

"with the benefit of hindsight...it might have been an option to refuse the request under Regulation 12(4)(b) (manifestly unreasonable)."
51. The Commissioner wishes to point out to the RPA that the EIR do not permit any distinction between requests that are considered "urgent" and ones that are not. There is a statutory deadline of 20 working days for responding to each request – although Regulation 7 allows a public authority to extend that up to 40 working days if the information involved is particularly complex or voluminous.
52. Nor is a public authority allowed to prioritise requests according to the means by which they are received. With requests submitted by post, the 20 working day deadline begins on the day that the request is received by the public authority, not the date on which the requestor puts it in the post. The public authority is also considered to have complied with the request once it has posted its response – not on the day on which the requestor receives that response. Whilst this means that, in practice,

the requestor will see a delay of greater than 20 working days between posting a request and receiving a response, the time allowed for the public authority to consider and compile its response remains the same.

53. Given the relatively limited nature of the request, it is not clear to the Commissioner why such a large volume of information would fall within its scope – although it is possible that the RPA was conflating this particular request with others submitted by the same individual. Nevertheless, even if the RPA is correct, it does not mean that it met its statutory obligations.
54. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the RPA has breached Regulation 5(2) of the EIR

Timeliness of reconsideration (internal review)

55. Regulation 11 of the EIR states that:

- (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
- (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
- (3) *The public authority shall on receipt of the representations and free of charge—*
 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*
- (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*
- (5) *Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—*
 - (a) *the failure to comply;*

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.

56. The complainant sought an internal review (by email this time) on 4 December 2020. The RPA did not complete its internal review until 9 February 2021 – the 43rd working day following the date of the request.
57. From the evidence presented to the Commissioner in this case it is clear that, in failing to carry out an internal review within 40 working days the RPA has breached Regulation 11 of the EIR.

Right of appeal

58. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.
60. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF