

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

Decision notice

Date: 24 September 2018

Public Authority: Rural Payments Agency

Address: PO Box 69
Reading
RG1 3YD

Decision (including any steps ordered)

1. The complainant has requested information relating to the Rural Payments Agency's (RPA) collation and processing of land data and in particular relating to land parcels on a particular estate. Initially the RPA stated that the information is not held. It then changed its position at the internal review stage and said that the information is held but exempt from disclosure under regulations 12(4)(e), 12(5)(e) and 13 of the EIR.
2. During the Commissioner's investigation the RPA's position changed again. It was however then later established that the RPA does hold recorded information falling within the scope of the request and that it considered this information was exempt from disclosure under regulations 12(4)(e) and 12(5)(e) of the EIR.
3. The Commissioner's decision is that although regulation 12(4)(e) of the EIR applies, the public interest in favouring of maintaining this exception is outweighed by the public interest in disclosure.
4. In relation to the RPA's application of regulation 12(5)(e), the Commissioner has decided that this exception is not engaged.
5. The Commissioner requires the RPA to take the following steps to ensure compliance with the legislation:
 - The RPA should disclose the information withheld under regulations 12(4)(e) and 12(5)(e) to the complainant.

6. The public authority 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.

Request and response

7. On 10 April 2017, the complainant wrote to the RPA and requested information in the following terms:
 - “1. Any changes made to the Rural Land Register from 1 January 2016 to date in respect of land parcels on the [name of site redacted], resulting from approved grants for woodland creation.
 2. The precise reasons for such changes, including the information provided to you by Natural England and/or the Forestry Commission.
 3. The procedures you follow to ensure that changes in the boundaries of land parcels in the RLR resulting from woodland creation grants or schemes accurately reflect the boundaries set out in the terms of approved woodland creation grants.
 4. Whether and how the procedures set out in 3 above were in fact followed in the case of the changes referred to in 1 above.”
8. The RPA responded on 20 April 2017. It stated that the requested information is not held and cited regulation 12(4)(a) of the EIR.
9. The complainant responded on 21 April 2017. He pointed out that the RPA had referred to the land in question incorrectly by name in its response and provided further information to enable it to identify the requested information.
10. The RPA responded on 24 April 2017. It advised the complainant that it was unable to identify the land in question and asked for a map of the area to be provided.
11. The complainant responded the same day. It reminded the RPA of the name of the land in question and provided a map.
12. The RPA responded on 9 May 2017. It had now located the requested information but considered it was exempt from disclosure under regulations 12(4)(e) and 13 of the EIR.
13. The complainant requested an internal review on 29 May 2017.

14. The RPA carried out an internal review and notified the complainant of its findings on 24 July 2017. It upheld the application of regulation 13 of the EIR and also applied regulation 12(5)(e). In relation to the request for the internal procedures, the RPA agreed to provide this information.

Scope of the case

15. The complainant contacted the Commissioner on 26 July 2017 to complain about the way his request for information had been handled. He disagrees with the application of regulation 13 and 12(5)(e) of the EIR to the withheld information and believes this information should be disclosed.
16. During the Commissioner's investigation the RPA's position changed a number of times (information being held and exceptions applied, to information not being held) and there was protracted correspondence between the complainant, the ICO and the RPA regarding this matter between December 2017 and June 2018. In June 2018 it was established and agreed between the ICO and the RPA that the RPA does hold recorded information falling within the scope of the request and this was provided to the Commissioner. At the beginning of August 2018 it was identified that the Commissioner had not received the correct withheld information. The correct withheld information was then supplied to the Commissioner on 22 August 2018.
17. The withheld information consists of the following:
 - The documentation the RPA holds relating to two changes made to the Land Management System (LMS); one in February 2016 and one in May 2016.
 - The Spatial Data Capture Protocol.
18. Referring to the first bullet point, regulation 12(4)(e) has been applied to notes made on the LMS by RPA staff and 12(5)(e) to the documentation it received which instigated the changes made to the LMS. Regulation 12(4)(e) has been applied to the second bullet point.

Reasons for decision

19. The Commissioner will first consider the information the RPA holds relating to the two changes that were made to the LMS in February and May 2016.

20. The RPA has referred to the two changes as 'jobs'. It explained that these 'jobs' were created as RLE1 forms were received from the beneficiary and this process is used to map all changes, transfer, amendments and creation of new field parcels. The first 'job' was in February 2016. On this occasion a new parcel was created from land that was 'whitespace'. 'Whitespace' is the term it uses for land that has not been mapped or registered on LMS. A RLE1 form and map was received from the landowner and there is some corresponding notes on LMS relating to this 'job'. The second 'job' was in May 2016. It confirmed that a request to link a parcel was received. A RLE1 form and a map was received from the landowner and again there is some corresponding notes on LMS relating to this 'job'.
21. The RPA stated that there was no specific reason given as to why the land changed. It simply received notification from the beneficiary and then the changes were made.

The notes of the LMS

22. The RPA considers that regulation 12(4)(e) of the EIR applies to this element of the withheld information.
23. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
24. In accordance with regulation 12(1)(b) of the EIR, this exception is subject to the public interest test. So in addition to demonstrating that the withheld information falls within the definition of this exception, the public authority must consider the public interest arguments for and against disclosure and demonstrate in a given case that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.
25. When considering a request under the EIR a public authority should apply a presumption in favour of disclosure, in accordance with regulation 12(2).
26. The RPA confirmed that the exception covers all internal communications; not just those reflecting internal thinking including letters, memo's, emails, notes of meetings or any other documents if these are circulated or files so that they are available to others. It argued that disclosure would be likely to inhibit the effectiveness of the schemes it manages and processes in place. Instead it is important to protect the RPA's ability to exchange views freely and frankly for the purposes of deliberation so it is then able to make informed decisions. It

argued that it is required to protect the integrity of its decision making process.

27. The RPA said that disclosure could undermine its process which could then result in less robust, well considered and effective decision making. It advised that the exception ensures that there is the safe space available to enable it to consider its options in private and protect the safety of its officers.
28. The Commissioner considers this exception is drafted broadly and covers all internal communications, not just those actually reflecting internal thinking. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. A wide range of internal documents will therefore be caught. However, in practice the application of the exception will be limited by the public interest test.
29. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. However, it will not include any information recorded simply to be used by its author, for example as an aide-memoire, unless this records the contents of other communications.
30. The withheld information being considered here is the notes saved to the LMS regarding the documentation received for the two land changes and the actual physical changes made to the system for the land in question. The Commissioner notes that the exception does apply to information saved to electronic filing systems. The LMS is the RPA's electronic management system for recording and documenting land changes and it is used by the RPA as a whole for this purpose. The Commissioner is satisfied that the withheld information is more than, for example, aide-memoires. Instead the internal notes are for future reference for the employee that made the physical changes and others within the RPA. For these reasons, the Commissioner is satisfied that regulation 12(4)(e) of the EIR does apply.
31. With regards to the public interest test, the RPA confirmed that it recognised the public interest in openness and transparency and enabling the public access to information to enable them to understand the reasoning behind decisions that are made. However in this case it considered that the public interest rested in maintaining the application of this exception. It stated that there is a 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. It considers disclosure of the requested information may affect the ability of the RPA to comply with these specific applications and a lack of safe

space (in which it considers how to complete the process) may affect its ability to defend its position or adopt a new approach when training its staff on how to complete the process.

32. The Commissioner considers the public interest arguments should be focussed on the protection of internal deliberation and decision making processes. This reflects the underlying rationale for this exception – that it protects a public authority's need for a 'private thinking space'. The arguments should relate to the content and sensitivity of the particular information in question and the circumstances of the request.
33. The Commissioner has reviewed the withheld information and she does not consider it contains sensitive information or information on the internal thinking of the RPA in relation to, for example, policy making or decisions. Instead it seems to be the notes added to the system to reflect basically what changes have been made and the information provided to it that instigated these changes. The notes do not contain any information about any possible internal deliberations or thinking of the RPA in relation to these changes. The Commissioner therefore considers the public interest arguments in favour of maintaining the exception based on the contents of the requested information are fairly weak. The requested information does not appear to be the type of sensitive and candid information this exception is designed to protect.
34. The Commissioner accepts that there will be strong public interest arguments in favour of maintaining the exception in cases where disclosure would involve the release of sensitive and candid internal deliberations relating to specific topics or decision making and especially at a time when such topics and decision making are live and ongoing. However, in this particular case the Commissioner does not consider the requested information is of this nature or at least to the extent claimed.
35. The Commissioner considers that there will always be public interest arguments in favour of disclosure; general accountability and transparency. And public interest arguments in favour of allowing members of the public access to recorded information which will enable them to understand more clearly why specific decisions or actions have been taken. Considering the weakness of the arguments in favour of maintaining this exception, as currently presented by the RPA, the Commissioner considers the arguments in favour of disclosure are more compelling.
36. For the above reasons the Commissioner has concluded that although regulation 12(4)(e) of the EIR does apply, the public interest in favour of maintaining the exception is outweighed by the public interest in favour of disclosure. The information should therefore be disclosed.

The documentation the RPA received which instigated the changes on the LMS

37. The RPA has applied regulation 12(5)(e) of the EIR to this information.
38. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
39. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the RPA must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
40. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the RPA must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
41. Dealing with the first bullet point first, the withheld information consists of the documents submitted to the RPA by the landowner to instigate land parcel changes on the LMS. The Commissioner understands the land parcel changes were made to implement a woodland creation scheme, which is funded by public money under the Countryside Stewardship scheme. The Commissioner considers this information can be said to be commercial in nature. It relates to the commercial activities of the landowner; the creation of woodland on specific parcels of land they own in exchange for public funding.
42. Turning now to the second bullet point, the RPA and the complainant disagree that the withheld information is subject to confidentiality provided by law. The RPA considers that it is and that the landowner holds the expectation that the information will remain private and confidential. However, the complainant does not agree. He has stated that he believes he has obtained the requested information already or very similar from another public authority and that those implementing woodland creation scheme are informed that the information may be

shared and disclosed into the public domain because it involves the expenditure of public funds.

43. Either way, the Commissioner considers the application of the exception falls at the next two bullet points for the following reasons.
44. The RPA has argued that disclosure would adversely affect the commercial interests of the landowner. The information would be useful to their competitors and could be used for commercial gain. Firstly, the Commissioner does not consider the contents of the withheld information contain information of this nature and despite being afforded several opportunities to demonstrate that the information is exempt under the EIR the RPA has failed to do so.
45. Secondly, it is apparent that the RPA is arguing that disclosure would adversely affect the landowner having not consulted the landowner itself for its views on disclosure. In order to successfully argue that disclosure would adversely affect a third party, the public authority needs to demonstrate that the arguments are those of the third party or have at least originated from that third party. Otherwise the arguments submitted are mere speculation.
46. The Commissioner has seen no evidence to demonstrate that the third party in this case has been consulted and that the arguments presented to date originate from them. Without such evidence, the Commissioner cannot consider the application of this exception on this basis.
47. This is in line with the First-tier Tribunal hearing of *Derry City Council v the Information Commissioner (EA/2006/0014)*.
48. The RPA has submitted no arguments to suggest that it considers disclosure would adversely affect its own economic interests. Therefore the Commissioner has no alternative but to conclude that regulation 12(5)(e) of the EIR does not apply and the information should be disclosed.

The Spatial Data Capture Protocol

49. This information has been withheld under regulation 12(4)(e) of the EIR. As the Commissioner has already outlined the purposes of this exception above at paragraphs 23 to 25, it will not be repeated here.
50. The Commissioner notes that this information is an internal reference document providing advice to RPA staff on land parcel changes and how these should be recorded and actioned in accordance with the regulations and rules published by the European Commission. It is a document which has been created by the RPA for internal circulation. It therefore falls within the definition of 'internal communications'.

51. As the Commissioner is satisfied that regulation 12(4)(e) is engaged, she will now go on to consider the public interest test.
52. The RPA stated that it recognised the public interest in disclosure of information to maintain openness and transparency and to help the public understand how systems are maintained. However, in this case it felt there are stronger public interest arguments in favour of maintaining the exception. It went on to say that there is a public interest in ensuring that key controls and frameworks are managed in private so that officials can effectively collect and update land data information and discuss issues candidly. The RPA considers there is a need for safe space to enable ideas to be considered and decisions to be made. Disclosure of this protocol may affect the ability of its officials to deal with specific situations and a lack of safe space may affect its ability to defend its position or adopt a new approach when training its staff on how to complete the processes.
53. The Commissioner notes that the protocol is dated February 2017. It is the current protocol used by all staff within the RPA who are involved in the collection and update of the RPA's land data. It provides guidance and a framework to those staff on how land parcel boundaries and land covers should be captured. She accepts that all protocols and guidance are subject to change and update, but at the time of the request the Commissioner understands that this protocol was the RPA's settled and finalised guidance in operation for its staff. The Commissioner is not aware of any ongoing internal deliberations affecting this protocol at the time of the request and indeed if there had been any such live and candid discussions ongoing at this time it is not the information being requested here. The Commissioner is struggling to see what safe space and private thinking space was still required in relation to this information at the time of the request. She therefore finds the RPA's arguments in favour of maintaining the exception fairly weak based on the submissions she has received to date.
54. The Commissioner is struggling to see how disclosure of this information would affect the RPA's ability to deliberate freely and frankly or discusses options and ideas and reached informed decisions. She also fails to see how disclosure would hinder the RPA's ability to continue with this process and process future changes to its land data.
55. The Commissioner considers the public interest arguments in favour of disclosure are stronger. As always there is the public interest in accountability and transparency and in public authorities providing information to the public to enable them to understand more clearly the work that they do and the decisions they make. The withheld information here is guidance that is circulated at least internally to all staff responsible for collating and processing land data. It is not

sensitive or reflective of ongoing deliberation and decision making otherwise the Commissioner would question why it has been circulated to staff and considered the guidance and framework in operation now, to be used by staff managing land data processes.

56. The Commissioner considers there is a public interest in knowing how land data is managed, recorded and changed. The withheld information explains and justifies the RPA's processes in this regard and would enable members of the public to understand more clearly why certain processes are in place and why certain actions are taken.
57. For the above reasons, the Commissioner has decided that the public interest in favour of maintaining the exception is outweighed by the public interest in favour of disclosure. She therefore requires the RPA to disclose this information.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Samantha Coward
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