

Decision Notice



Decision 077/2008 Mr P and the Scottish Ministers

Cross compliance policy affecting EU Direct Payment Schemes

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr P requested specific information from the Scottish Ministers (the Ministers) in connection with the recently introduced cross compliance policy affecting EU Direct Payment Schemes. Mr P requested this information under the terms of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (EIRs). The Ministers responded by providing some information to Mr P but they withheld other relevant information and relied on the exemption in section 35 of FOISA for doing so.

Mr P was not satisfied with this response and asked the Ministers to review their decision. The Ministers carried out a review and, as a result, notified Mr P that they were upholding their original decision in respect of their reliance on section 35 of FOISA. The Ministers also advised that they had considered the request under the terms of the EIRs and were withholding the information under the exception in regulation 10(5)(b).

Mr P remained dissatisfied with the Ministers' decision and applied to the Commissioner for a decision.

Following an investigation during which the Commissioner decided that the information withheld from Mr P was environmental information, the Commissioner found that the Ministers were correct to rely on the exception in regulation 10(5)(b) of the EIRs for refusing to disclose this to Mr P. However, the Commissioner found that the Ministers were not correct to rely on the exemption in section 35 of FOISA for withholding the information.

Relevant statutory provisions and other sources

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation - definition of "environmental information"); 10(1), (2) and (5)(b) (Exceptions from duty to make environmental information available); 17 (Enforcement and appeal provisions)

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 21(4) (Review by Scottish public authority); 35(1)(g) and (2)(c) (Law enforcement).

The full text of each of the provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. Mr P submitted an information request to the Ministers on 6 September 2007, stating that he was making this request under the terms of both FOISA and the EIRs. He requested the following information in connection with the recently introduced “cross compliance” policy affecting EU Direct Payments Schemes, including, but not exclusively the single Farm Payment Scheme, made to individuals or estates where there had been proven or suspected incidents of pesticide abuse/misuse against protected species:
 - the date the policy was announced, by which minister, and the date on which the policy came into force in Scotland
 - the regulation or statutory instrument or similar appropriate legal documentation which set out the policy for Scotland
 - details of all cases to date where EU direct payments had been reduced and/or refused, including the type of payment affected (i.e. SFPS); the name and location of the property affected; the payment applicant’s name; the sums of money involved in that reduction or refusal; and the date the decision was formally made
 - the exact reason(s) for those payments to be cut or withheld in each case
 - whether any person involved in having a payment cut or withheld appealed against that decision: who was it, and if so, what was now the position with that appeal?
2. The Ministers responded to Mr P on 4 October 2007. In making their response the Ministers provided Mr P with information which purported to address the first, second and fourth points of his information request and partially address the third and fifth points. The Ministers withheld other information from Mr P (specifically, details of the recipient of the payments and payment details which could identify them), on the basis that disclosure could prejudice substantially their right to a fair appeals process and therefore the information was exempt under section 35 of FOISA.
3. Mr P wrote to the Ministers on 12 October 2007 requesting a review of their decision. In particular, Mr P argued that his request had not been dealt with in full as it had not been dealt with under the EIRs as he had requested. He also challenged the Ministers’ refusal to provide information and in particular their reliance on section 35 of FOISA, asking additional questions in relation to his fifth point and reiterating his third.
4. A response to Mr P’s request for a review was provided by the Ministers on 8 November 2007. The Ministers upheld their original response to Mr P’s request in withholding certain information from him and relying on the exemption in section 35 of FOISA for doing so. They also addressed the additional questions Mr P had raised in relation to the fifth part of his information request. Finally, they advised Mr P that it was not clear to them that the requested information was environmental information for the purposes of the EIRs, but that even if it were the withheld information would also be exempt from disclosure under the exception in regulation 10(5)(b) of the EIRs.



5. Mr P wrote to the Commissioner's Office on 19 November 2007, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. In particular, he questioned the Ministers reliance on section 35 of FOISA and their view that the EIRs did not apply to the information he had requested.
6. The application was validated by establishing that Mr P had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 21 November 2007, the Ministers were notified in writing in terms of section 49(3)(a) of FOISA that an application had been received from Mr P and were asked to provide the Commissioner's Office with the information which had been withheld from Mr P. The Ministers responded with the information requested on 7 December 2007 and the case was then allocated to an investigating officer.
8. A letter was sent by the investigating officer to the Ministers on 11 December 2007, seeking comments on Mr P's application and specifically asking questions about the application of regulation 10(5)(b) of the EIRs.
9. A response was provided by the Ministers on 24 December 2007, in which they explained that as a result of a further FOI request made by Mr P the information previously withheld had now been disclosed to him. The investigating officer entered into correspondence with Mr P to establish whether he wished to continue with his application as he now had the requested information. Mr P advised that he did not wish to withdraw his application: he considered that the Ministers had disclosing the relevant information to him on their own terms rather than in response to his request, and expressed particular concern at their dismissal of the relevance of the EIRs.
10. The investigating officer entered into further correspondence with the Ministers to seek submissions from them as to why they did not release the requested information to Mr P at the time of his request, but did release this to him at a later date in response to a subsequent request. A response was provided by the Ministers on 6 February 2008. The Ministers' arguments, insofar as they are pertinent to the decision to withhold the information in response the original request and request for review, will be considered more fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions and other information presented to him by both the Ministers and Mr P and is satisfied that no matter of relevance has been overlooked.
12. In their submissions to the Commissioner's Office, the Ministers provided a copy of the information that they withheld from Mr P, together with an explanation of their view that they considered that the exemption in section 35 of FOISA and the exception in regulation 10(5)(b) of the EIRs were engaged, together with their views on the application of the public interest test.

FOISA v EIRs

13. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore **must** be dealt with under the EIRs
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.



14. Having considered the submissions made by the parties and the information withheld from Mr P, together with the categories of environmental information defined in regulation 2(1) of the EIRs, the Commissioner takes the view that the withheld information could be interpreted as being environmental information, given that it relates to the application of an EU policy affecting payments made to individuals or businesses where there have been proven or suspected incidents of pesticide abuse/misuse against protected species. Clearly, protected species are covered by the term “biological diversity”, which is one of the elements of the environment listed in the definition of environmental information (see the text of regulation 2(1)(a) in the Appendix), and the Commissioner is satisfied that the sanctions recorded in the withheld information are among the “measures or activities designed to protect those elements” referred to in that part of the definition contained in regulation 2(1)(c). Therefore, while he has concluded in other cases pertaining simply to agricultural subsidy payments that the information in question is not environmental, the Commissioner is satisfied in the circumstances of this particular case that the withheld information does fall within the definition of environmental information in regulation 2(1) of the EIRs.
15. While noting that the Ministers did not deal with Mr P’s request under the EIRs in response to his original request, the Commissioner also has to accept that they did so (however reluctantly) in response to his request for review. Taking account of the terms of section 21(4) of FOISA, the Commissioner takes the view that it was perfectly appropriate for the Ministers to reach a different conclusion on the application of the EIRs at this point from that reached in response to the initial request and therefore cannot identify any failure of the authority in this respect.
16. Having concluded that the information under consideration in this case is environmental information, and given that the Ministers have not chosen to apply section 39(2) of FOISA to it, the Commissioner must now go on to consider how the Ministers dealt with (or should have dealt with) Mr P’s request under both the EIRs and FOISA. In doing so, the Commissioner will consider the submissions made by the Ministers in relation to regulation 10(5)(b) of the EIRs and section 35 of FOISA, taking account also of all other relevant information provided by the Ministers and Mr P.

Regulation 10(5)(b) of the EIRs

17. The information which had been withheld from Mr P in this case concerns the name and address of a particular business, together with full details of the relevant infraction, the amounts of reduction in payments imposed by the Ministers and the date on which they were imposed.
18. Regulation 10(5)(b) of the EIRs states:

“A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.”



19. Paragraph 90 of the Scottish Executive's guidance for Scottish public authorities and interested parties on the implementation of the EIRs (paper 2005/21 – September 2005) suggests that this exception “may relate to present proceedings or proceedings likely to take place in the future. It could include any information which, if disclosed, could prejudice the enforcement or appropriate administration of the law, which includes the prevention, investigation or detection of a crime, or the apprehension or prosecution of offenders”. It should be noted, however, that this guidance has no statutory force.
20. In determining whether the withheld information would fall within the scope of this exception, the Commissioner has also been mindful of the explanation given in *The Aarhus Convention: An Implementation Guide*, where the principles behind the exception are set out in the following way (page 59):

“The course of justice refers to active proceedings within the courts. The term in the course of implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused.”
21. Although there is no definition within the EIRs as to what would constitute substantial prejudice, it is the Commissioner's view that in order for a public authority to be able to rely on this exception it would have to show that the risk of damage being caused by disclosing the information was real or very likely, not hypothetical. The harm caused would have to be significant, not marginal, and it would have to occur in the near (certainly the foreseeable) future and not in some distant time.
22. The Ministers argued that if the information had been released to Mr P in response to his request then this would prejudice substantially the recipient's right to a fair appeal process. They took the view that the right of the business in question to appeal against the reduction in their support scheme payments might have been prejudiced by the release of the information before any appeal had been concluded or the period for the appeal to be submitted had expired (there being in any event a perception of prejudice raised by disclosure), referring to the likelihood of adverse publicity (with consequent reputational damage) and the possibility of attempts to pressurise or influence the outcome of the appeal.
23. The Ministers explained that there was a right of appeal against decisions made in respect of subsidy in such circumstances. There was a 3 stage appeal process, including an internal review of the decision, an independent review by an external panel and finally an appeal to the Scottish Land Court.
24. At the time of Mr P's request and his request for a review, the recipient whose information was withheld from Mr P still had the opportunity of appealing and the deadline for submitting an appeal against the Ministers decision had not expired. Clearly, therefore, the appeal process remained “live” (or at least potentially so) at this time.



25. The Commissioner is persuaded on the basis of the submissions he has received from the Ministers that the release of the withheld information to Mr P at the time of his request or his request for review would have prejudiced substantially, or would have been likely to prejudice substantially, the ability of the named business to receive a fair trial. Noting that at least the preliminary stages of the process in question are customarily conducted in private, the Commissioner is satisfied in this particular case that any prior release of the withheld information (in advance of the exhaustion or expiry of the appeal process) would have carried with it a significant risk of substantial prejudice to the fairness of the process.
26. The Commissioner is therefore satisfied that the Ministers were correct to rely on the exception in Regulation 10(5)(b) for the information withheld from Mr P.

Public interest test

27. Regulation 10(1)(b) of the EIRs provides for a public interest test. Having concluded that an exception in the EIRs applies (in this case regulation 10(5)(b)), an authority is required to consider whether, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
28. The public interest test is similar to that in section 2(1)(b) of FOISA. The public interest is not defined within the act but it has been described as “something that is of serious concern and benefit to the public”, not merely something of individual interest. It has been held that public interest does not mean “of interest to the public” but “in the interest of the public”.
29. The Ministers recognised a public interest in the process of appeals of the kind under consideration here being seen to be transparent and in statutory obligations being properly enforced. However, the Ministers also argued that prior to the conclusion of any possible appeal this public interest is outweighed by that in ensuring that the appeal process was absolutely fair.
30. In his application to the Commissioner, Mr P expressed his own views on the application of the public interest in respect of the information withheld. It is Mr P’s view that given that bird of prey persecution “is currently at record high levels in Scotland and is increasing”, and that the use of cross compliance legislation is a new development in this area which is being vigorously pursued by Ministers, this is an area of substantial public and legal interest. Mr P also argues that there is a very strong public interest in enabling detailed public discussion about the purpose and application of the cross compliance regulations. He believes that if someone has been fined or penalised, and disclosing this information would help prevent further crimes, then the public interest in the wider pursuit of justice would be strengthened by the disclosure of that fact.
31. The Commissioner accepts that there is a public interest in ensuring that legislation is appropriately enforced by regulators and that where there is a breach of legislation suitable action is taken to pursue those who contravene it. The Commissioner also accepts that bird of prey persecution in Scotland is a matter of public interest and appreciates that this public interest can be furthered by the publication of details of those persons who do contravene the relevant legislation and of the sanctions imposed on them.



32. On the other hand, where that legislation includes a mechanism which allows individuals or businesses to appeal against a decision to impose a punishment or fine (a reduction in support payment in this case), then there is a strong public interest in allowing those individuals or businesses to go through due process to ensure that they receive a fair hearing and that the correct decision is made on their case. In this case, taking account of the arguments he has accepted above in relation to substantial prejudice, the Commissioner considers that there would be a strong public interest in the relevant information remaining withheld until either the appeal process has been exhausted or the deadline for taking any appeal forward has passed.
33. The Commissioner is therefore of the view that on balance (at the time of the applicant's request for information and request for review), having considered all the circumstances of the case, the public interest in the section 10(5)(b) exception being maintained outweighed the public interest in the information being made available and therefore concludes that the information was properly withheld under that exception.

Section 35(1)(g) – Law enforcement

34. The Ministers also relied on the exemption in section 35(1)(g) of FOISA for withholding the information from Mr P. In order for a public authority to be able to rely on this exemption, it must show that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise by any public authority (including a Scottish public authority for the purposes of FOISA) of its functions for any of the purposes mentioned in section 35(2) of FOISA.
35. The Ministers cited the purpose under section 35(2)(c) of FOISA as being relevant in this case, i.e. to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
36. It is apparent from the information available to the Commissioner that the Ministers have a duty to enforce the regulatory framework associated with the cross compliance policy, which derives from EU legislation and is implemented in Scotland by regulation. Failure by farmers to comply with the Statutory Management Requirements introduced as part of the policy can result in their support payments being reduced by Ministers. The appeal process associated with these arrangements has been described above. In the circumstances, the Commissioner is satisfied that the information withheld from Mr P relates to the Ministers carrying out a statutory function in respect of the enforcement of the cross compliance policy, and therefore that the information relates to a relevant function and purpose under section 35(1)(g), read together with section 35(2)(c).



37. The Commissioner is now required to consider whether release of the withheld information to Mr P at the time of his request and his request for a review would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise by the Ministers of that function. Having considered the withheld information and all relevant submissions, the Commissioner is not satisfied that it would have done so, or would have been likely to do so. The Commissioner is of this view as it is clear that at the time of Mr P's request and his request for a review the Ministers had identified that there were circumstances in the case which justified regulatory action, i.e. a contravention of the cross compliance policy, and had in consequence taken regulatory action by reducing the business's support payments. As a consequence, the Commissioner cannot uphold the Ministers reliance on the exemption in section 35(1)(g) of FOISA.
38. As the Commissioner is not satisfied that the Ministers have fulfilled the tests required under section 35(1)(g), read in conjunction with section 35(2)(c) of FOISA, he is not required to consider the application of the public interest test in section 2(1)(b). He is satisfied that the Ministers were not justified, by the time of Mr P's request for information, in withholding the information under that exemption.

DECISION

In this decision, the Commissioner has considered a request for information that he has judged to be environmental information as defined within regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). As set out above, authorities are obliged to consider such requests in accordance with the requirements of both the EIRs and the Freedom of Information (Scotland) Act 2002 (FOISA). This decision therefore has considered whether the Scottish Ministers acted in accordance with each of these laws, at the time of Mr P's request for information and request for review.

EIRs

The Commissioner finds that the Scottish Ministers complied with the requirements of the EIRs in withholding the information under regulation 10(5)(b).

FOISA

The Commissioner also finds that the Scottish Ministers did not deal with Mr Edwards request for information in accordance with Part 1 of FOISA, incorrectly claiming the information to be exempt under section 35(1)(g) (read in conjunction with 35(2)(c)) and therefore failing to deal with the request in accordance with section 1(1).

In the circumstances, the Commissioner does not require the Ministers to take any action.



Appeal

Should either Mr P or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
9 July 2008



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

- (2) The purposes are-

...

- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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 paragraph (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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (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 paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and



- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
- (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- ...
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
- ...