

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 November 2023

**Public Authority:** Department of Agriculture, Environment and Rural Affairs (DAERA)

**Address:** Ballykelly House  
Ballykelly  
Limavady  
BT49 9HP

### Decision (including any steps ordered)

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1. The complainant has requested information surrounding whistleblowing allegations about DAERA Portal Operations. DAERA disclosed some of the information but withheld the remainder under section 31(1) of FOIA (law enforcement), section 38 of FOIA (health and safety) section 40(2) of FOIA (personal information), and section 12(1) of FOIA (requests where the cost of compliance exceeds the appropriate limit).
2. The Commissioner's decision is that DAERA has correctly applied section 12(1) of FOIA to withhold the information. DAERA is not required to take any further steps.

### Request and response

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3. On 9 May 2022, the complainant wrote to DAERA and requested information in the following terms:

"Under the Freedom of Information Act, please provide me with the following:

- 1) A copy of the internal memos issued to staff by [name redacted] on 17/9/21, 5/11/21, and 11/2/22.
- 2) A copy of the recent DoF report into the whistleblower case within portal operations.

- 3) Copies of all correspondence from [name redacted] or others with internal audit in relation to this whistleblower case.
  - 4) The department's assessment of how much has been wrongly paid to staff in lead in payments".
4. DAERA responded on 9 June 2022 and confirmed that it holds some of the information falling within the scope of the complainant's request. It originally disclosed the internal memo of 17 September 2021 subject to redactions but withheld the remainder of the information under section 30 of FOIA (Investigations and proceedings), section 35(1) of FOIA (formulation and development of government policy), section 38 of FOIA (health and safety), section 40(2) (personal information) and section 12(1) of FOIA (cost of compliance). DAERA also confirmed that it did not hold the internal memo of 11 February 2022.
  5. Following an internal review DAERA wrote to the complainant on 7 April 2023. It withdrew its reliance on section 30 of FOIA due to the passage of time and the implementation of recommendations in the DAERA Portal Operations report and disclosed the report subject to some redactions. In addition, DAERA also withdrew its reliance on section 35(1) of FOIA and considered this to be disproportionate because the exemption did not cover operational and administrative matters.
  6. DAERA explained that due to security implications for Portal staff, details of shifts and rotas and monitoring locations were redacted by virtue of section 31 and section 38 of FOIA. It also withheld third party personal data as well as references to the whistleblower and details of staff on duty under section 40(2) of FOIA. In addition, DAERA also withheld in its entirety, the annexes to the report under section 31, 38 and 40(2) of FOIA. In relation to the internal correspondence between the Group Fraud Investigation Service and Veterinary Service, DAERA withheld the information under section 33(1) of FOIA. It also maintained its position to withhold information relating to part 4 of the complainant's request under section 12(1) of FOIA.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 13 April 2023 to complain about the way their request for information had been handled.
8. During the Commissioner's investigations, he wrote to DAERA to request further explanation on its reliance on the above exemptions. In particular, the Commissioner investigated DAERA's reliance on section 33(1) of FOIA. DAERA had relied on section 33 to withhold the complainant's request at point 3 namely:

“Copies of all correspondence from [name redacted] or others with internal audit in relation to this whistleblower case.”

9. For the exemption to be engaged, the Commissioner must be satisfied that the public authority has audit functions specified in section 33(1) and FOIA does not require these to be statutory functions. The Commissioner’s guidance<sup>1</sup> stipulates that internal audit functions carried out by public authorities only applies to audit or audit-type functions in respect of other public authorities. Public authorities that are the subject of an audit cannot claim the exemption in section 33; for example, in respect of papers or correspondence they hold about their audit.
10. In the Commissioner’s view, DAERA as a public authority was the subject of the audit conducted by Group Fraud Investigation Service (GFIS) following the whistle blow allegation and therefore is not entitled to rely on section 33 of FOIA to withhold correspondence about its own internal audit. Therefore, the Commissioner did not consider the exemption to be engaged and required DAERA to disclose the withheld information subject to the necessary redactions that apply under FOIA.
11. On 9 November 2023 DAERA informed the Commissioner that it had disclosed the withheld information to the complainant. However, it withheld the names and email addresses of junior and senior staff, line managers, details of the investigator and reference to the physical location of a Portal office under section 40(2) and section 38 of FOIA.
12. The Commissioner considers that the scope of his investigation is to determine whether DAERA were correct to rely on section 12(1) of FOIA as its basis for refusing to disclose the withheld information.

## Reasons for decision

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13. The Commissioner notes that during the internal review, the complainant questioned whether their request should have been considered under the EIR regime. The Commissioner view is that the requested information falls within the scope of the FOIA regime and that regulation 2(1) of EIR does not apply in this case.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1210/public-audit-functions-s33-foi-guidance.pdf>

## Section 12 of FOIA

14. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
15. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations')<sup>1</sup> at £600 for central government department. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for government departments.
16. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
  - (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
17. The complainant disagrees with DAERA's reliance on section 12 of FOIA and believes that the public authority must have some assessment of how much has been wrongly paid to staff in lead in payments.
18. In its original and internal review response to the information request, DAERA argued that it is not obliged to comply with the fourth part of the complainant's request because the cost of compliance exceeded £600. DAERA stated that the information requested would be complex to ascertain as it is aggregated within other allowances claimed.
19. It explained that the estimated number of records falling within the scope of the complainant's request is 5000. It states that to retrieve and review each record will take approximately 2 minutes. DAERA contends that it would take the public authority 166.67 hours to retrieve the information requested by the complainant. In other words, it is estimated that the total cost of complying with the complainant's request is £4166.75.

20. According to the Commissioner's guidance<sup>2</sup>, a public authority does not have to make a precise calculation of the cost of complying with a request. Instead, only an estimate is required, although, it must be a reasonable estimate. In accordance with the First-Tier Tribunal's decision in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
21. The Commissioner also notes that there is no statutory requirement to explain how the estimate has been calculated. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.
22. During the Commissioner's investigations he requested further information from DAERA regarding its reliance on section 12 of FOIA. On 26 September 2023, the public authority provided further explanation. It stated that whilst there were inadequate management checks in place and no cases of absenteeism were substantiated, this was not sufficient grounds to assume fraud or require the recoupment of monies. It says that this is not to suggest that there would not be instances of human error that could lead to over or underpayments. However, taking into account the request submitted by the complainant, it has considered the complex interplay of the various pay allowances.
23. DAERA says that it has already been explained to the complainant that it will be extremely resource intensive for the public authority to provide an accurate figure. DAERA says that due to the way the information is held, it would need to be calculated by reviewing individual timesheets or expenses claims, which will take 2 minutes to retrieve and review. Although it considers that the actual time and cost it will take to perform this exercise would likely exceed the estimated cost.
24. DAERA maintains that although remedial action has been taken, no attempt was made to recoup any "overpayments" as it would be difficult

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-12-requests-where-the-cost-of-compliance-exceeds-the-appropriate-limit/>

to prove they were unwarranted and given the complexities of those allowances the cost of calculating any past overpayments made was likely to exceed any funds that may be recouped.

25. In its response to the complainant's information request, DAERA advised that a refined request to reduce the cost of compliance to bring it within the appropriate limit would be suitable. It advised the complainant to refine their request bringing it within a particular timeline. Although DAERA also explained that the allowance referred to in the complainant's request would be particularly difficult to ascertain given that it is aggregated in other allowances claimed.
26. The Commissioner is therefore satisfied with the arguments provided by DAERA and he considers these arguments to be reasonable estimation of the work involved to meet the complainant's request at point 4. Equally the Commissioner is also of the view that to respond to the remainder of the complainant's request will exceed the cost limit. If one part of a request triggers the cost limit, this means that the whole request can be refused under section 12. Based on the evidence submitted by DAERA the Commissioner agrees that the volume of information to be retrieved would exceed significantly what it would be able to review within the appropriate cost limit of £600, or 24hours of work.
27. The Commissioner notes that in line with its obligations under section 16 of FOIA, DAERA provided the complainant with advice and assistance as to how they might be able to bring their request within the cost limit and the Commissioner is satisfied with this explanation.

**The Commissioner's view.**

28. The Commissioner concludes that section 12(1) of FOIA is engaged and DAERA was not obliged to comply with the request. As the Commissioner is satisfied that the request is exempt under section 12(1), he has not gone on to consider the application of section 31, section 38, and section 40(2) of FOIA.

## Right of appeal

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29. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.

31. 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 .....**

**Esi Mensah  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**