

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

**Decision notice**

**Date:** 29 March 2019

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

**Address:** Dundonald House  
Upper Newtownards Road  
Ballymiscaw  
Belfast  
BT4 3SB

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the Northern Ireland Environment Agency, an executive agency of the Department of Agriculture, Environment and Rural Affairs (DAERA), seeking a copy of a file covering pollution at his trout hatchery business. The DAERA sought to withhold the information falling within the scope of the request on the basis of regulation 12(5)(b) (course of justice) of the EIR. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of regulation 12(5)(b) and that in all the circumstances of the case the public interest favours maintaining the exception. However, the Commissioner has concluded that the DAERA breached regulation 11(4) of the EIR by failing to complete the internal review within 40 working days.

**Request and response**

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2. The complainant submitted the following request to the DAERA on 4 October 2017:

*'I am making a request under the FOI act for a copy of the file covering pollution at my trout hatchery from Jan 2015 to the present day'.*

3. The DAERA responded on 31 October 2017 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of regulation 12(5)(b) (course of justice) of the EIR.
4. The complainant contacted the DAERA on 21 December 2017 in order to ask for an internal review of this decision.
5. The DAERA informed him of the outcome of the internal review on 20 June 2018. The review upheld the decision to withhold the information falling within the scope of the request on the basis of regulation 12(5)(b) of the EIR.

### Scope of the case

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6. The complainant initially contacted the Commissioner on 20 April 2018 in relation to the DAERA's failure to complete an internal review in relation to his request. Following the completion of the internal review the complainant contacted the Commissioner again on 21 June 2018 in order to complain about the DAERA's decision to withhold the information he requested on the basis of regulation 12(5)(b) of the EIR. He was also unhappy with the length of time it took the DAERA to complete the internal review.

### Reasons for decision

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#### Regulation 12(5)(b) – the course of justice

7. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

*'the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature'*

8. 'Adversely affect' means there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

### The DAERA's position

9. In its internal review response the DAERA explained that the investigation into the pollution was still ongoing at the time of the request and it was not yet in a position to refer a file to the Public Prosecution Service. In light of this the DAERA argued that disclosure of the withheld information would adversely affect all three elements regulation 12(5)(b).
10. In respect of the course of justice element it argued that disclosure would circumvent any future application of the court procedure rules and weakening or removing any future ability of a judge to impose reporting restrictions, protect the identity of witnesses, hear elements of the case in closed session or rule evidence inadmissible.
11. The DAERA also argued that release of prosecution material, such as the withheld information, would adversely affect the ability of a person or organisation to receive a fair trial. The DAERA acknowledged that whilst there will be a quantity of uncontested fact accepted by the prosecution/plaintiff and the defendant, it remained the case that material gathered for an investigation and potential prosecution has not been tested in court and no opportunity given to challenge its accuracy or validity by either the Public Prosecution lawyers or the defendant's legal representation in court. As such, the DAERA explained that the withheld information still has the status of allegations rather than proven fact. Consequently, the release of such material could create a situation where it is difficult or impossible for prejudice not to exist against a defendant.
12. Finally, the DAERA argued that its ability to conduct an investigation of a criminal nature would be compromised by the release of material that would enable any offenders to know what aspects of their activities had aroused suspicion, what evidence the authority hoped to find and what detection methods and techniques had been used. The DAERA emphasised that disclosure of the information under the EIR risked jeopardising not only this investigation but also other investigations in the future if the withheld information was disclosed.
13. In its submissions to the Commissioner the DAERA explained that the withheld information contained details of the techniques and approaches used in its investigation to date, details of the evidence gathered and analysis of this, and details of potential future strategies for the investigation. The DAERA argued that given the content of this information it was clear that its disclosure would undermine the investigation and any future legal proceedings for the reasons set out in the internal review response.

### The complainant's response

14. The complainant disputed the DAERA's reliance on the exception because he argued that no criminal proceedings had been instigated in respect of the pollution and he did not believe that any would be issued in the near future. In support of this he argued that the DAERA had had ample opportunity to gather evidence and issue proceedings over the previous years and had failed to do so.

### The Commissioner's position

15. The Commissioner appreciates the complainant's position that despite the work undertaken by the DAERA to date, at the point that his request was submitted, no proceedings had been issued. However, in light of the DAERA's submissions to her, the Commissioner is satisfied that the case may still be referred to the Public Prosecution Service in the future and thus legal proceedings could follow. Furthermore, the Commissioner is satisfied that disclosure of such information would undermine any such legal proceedings by adversely affecting the ability of a person to receive a fair trial for the reasons set out in the internal review response. The Commissioner is also satisfied that having considered the contents of the investigation file, its disclosure would clearly risk undermining the DAERA's ability to conduct an effective investigation into the cause of the pollution given that it would reveal details of the evidence collected to date, the techniques and methods previously used and strategies for taking the investigation forward.
16. Regulation 12(5)(b) is therefore engaged.

### **The public interest test**

17. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

### *Public interest in favour of disclosing the withheld information*

18. The complainant explained that the pollution was causing significant damage to his hatchery business. He argued that he needed to access the information so that he could be informed about, and understand, the action that the DAERA had taken in order to investigate the pollution. In particular, he argued that disclosure of the information was necessary so

that he could understand why the DAERA had not started any legal proceedings as a result of its investigation.

*Public interest in favour of maintaining the exception*

19. The DAERA emphasised that its investigation into the pollution remained ongoing and it considered there to be a significant public interest in ensuring that this investigation was not prejudiced and that any subsequent legal proceedings are not undermined.

*Balance of the public interest test*

20. Given the effect the pollution is having on the complainant's business the Commissioner accepts that he has direct and personal interest in understanding the actions that the DAERA has taken in respect of this pollution. More broadly, the Commissioner accepts that there is a public interest in the DAERA being open and transparent about the actions it has taken as a result of this pollution so that the public can have confidence in the authorities tasked with dealing with such pollution. Disclosure of the withheld information would provide the complainant, and the broader public, with a direct insight into the investigatory actions taken by the DAERA including its potential future steps. Therefore, in the Commissioner's view, the public interest in disclosing the information should not be dismissed lightly.
21. However, the Commissioner considers that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice. In the particular circumstances of this case given that at the time of the request the DAERA's investigation remained ongoing, allied to the sensitivity of the withheld information, the Commissioner considers there to be a particularly strong public interest in withholding the information in order to ensure that the DAERA's investigation is not undermined. Furthermore, she considers that there is also a very clear public interest in protecting the course of justice, and in the circumstances of this case ensuring that any defendants in legal proceedings which may follow as a result of the DAERA's investigation receive a fair trial.
22. The Commissioner has therefore concluded that the public interest favours maintaining the exception contained at regulation 12(5)(b) and withholding the information.

**Regulation 11 – internal review**

23. Regulation 11(4) of the EIR requires a public authority to complete an internal review *'no later than 40 working days after the date of receipt of the representations'*.
24. In the circumstances of this case the complainant contacted the DAERA on 21 December 2017 in order to request an internal review; the DAERA informed him of the outcome of the review on 20 June 2018. As part of its review the DAERA apologised for this delay and explained that:

*'First of all, may I apologise for the delay in dealing with your Internal Review request but two qualified staff from the old DARD left under the Voluntary Exit Scheme and another took early retirement. When the two Departments merged, all but two of the former DOE Information Management Branch staff either had left under Voluntary Exit or else transferred into Departments other than DAERA. As well as that, a colleague had to take a period of long term sick leave and then early retirement. As a consequence, I am currently the only member of DAERA staff currently qualified to conduct Internal Reviews in respect of the Freedom of Information and Environmental Information legislation. We have recruited two other members of staff and a recruitment competition for another is currently just in the closing stages. However, you will appreciate that conducting an Internal Review is not an entry level process and that the officers recruited need several months of training in the application and interpretation of information access legislation.'*

25. The Commissioner is not unsympathetic to the pressures that public authorities may occasionally face in complying with the statutory time limits within the EIR. Nevertheless, the DAERA's failure to complete the internal review within 40 working days represents a breach of regulation 11(4) of the EIR.

## Right of appeal

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26. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

27. 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.
28. 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 .....**

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