

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2012

Public Authority: Department of Agriculture and Rural
Development for Northern Ireland

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

Decision (including any steps ordered)

1. The complainant requested information about communications (emails) between a member of staff at the Department of Agriculture and Rural Development (DARD) and a third party, relating to the installation of a Wind Turbine at the An Creagán Visitor Centre. DARD refused to disclose the information citing sections 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that DARD correctly cited section 40(2) of FOIA and so it was not necessary for him to consider section 41(1).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 6 July 2010, the complainant wrote to DARD and requested information in the following terms:

'Emails sent and received between [named member of DARD staff] and [named third party and Company] in relation to the wind turbine at AN Creagán between July 2007 and February 2010 using the email address [named DARD staff member email address]'.
5. DARD responded on 30 July 2010. It stated that it considered that the information was personal information and that to disclose the information would be a breach of the data protection principles. It did

not cite any exemptions under FOIA or provide any further explanation of its refusal.

6. Following an internal review DARD wrote to the complainant on 7 September 2010. It stated that, having reviewed the handling of the request, it was satisfied that the information had been correctly withheld under section 40 (personal data) and additionally section 41 (information provided in confidence). However, it also admitted that the original refusal was lacking detail of the application of the FOIA.
7. The Information Commissioner notes that following a period of 11 months An Creagán contacted DARD and stated that it had not received a copy of the internal review. No explanation was found for the delay but a copy was therefore re-sent by DARD to An Creagán on 18 August 2011.

Scope of the case

8. On 9 September 2011 the complainant contacted the Information Commissioner to complain about the way the request for information had been handled. It asked the Information Commissioner to consider its view that there was a legitimate public interest in the disclosure of the information. It said that it believed that the exchange of emails between a member of DARD staff and the named third party may have interfered with the accountability of a public body.
9. The complainant provided the Information Commissioner with some background information to its request and explained that there had been issues with the operation of a wind turbine on its site which had been installed by the third party.
10. The Information Commissioner requested, received and has inspected a copy of the withheld information and can best describe it as a series of emails between a member of DARD staff and a third party external to DARD.

Reasons for decision

11. The Information Commissioner initially considered whether the request should have been handled under EIR rather than FOIA given that the information requested was about the installation of a wind turbine.
12. Because of his concerns the Information Commissioner asked DARD to consider whether, given the facts of the case, the request could have

been handled under EIR. DARD subsequently provided an explanation of how it assessed the request, and having carefully inspected the withheld information and the detail of the handling of the request the Information Commissioner is satisfied that the request was correctly handled under FOIA.

13. DARD cited section 40(2) and additionally section 41(1) to the withheld information.

Section 40 – personal data

14. Section 40(2) of the Act states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998.

15. For section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

16. The information in question in this case is a series of emails between a named third party and DARD. Having inspected the information the Information Commissioner is satisfied that it constitutes the personal data of a living individual who can be identified from it. Accordingly, the Information Commissioner finds that section 40(2) is engaged.
17. DARD argued that disclosure of the withheld information would be unfair to a third party and would thus breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

18. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors, including the reasonable expectations of the individual in terms of what would happen to their personal data, the (detrimental) consequences of disclosing the information, and any legitimate interests in disclosure.
19. In relation to reasonable expectations, such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 ECHR;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
20. In terms of consequences, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain; and if so,
 - the source of such a disclosure; and
 - even if the information has previously been in the public domain, whether the passage of time means that disclosure now could still cause damage or distress.
21. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure.
22. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case-specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach – it may still be possible to meet the legitimate

interest by only disclosing some of the requested information rather than viewing the disclosure as an all-or-nothing matter.

23. DARD argued that the withheld information constituted the personal data of a third party and explained that there was a reasonable expectation of that third party that the information contained within those emails would not be disclosed. It argued that it had specifically been told by the third party that he had a reasonable expectation that his emails would not be disclosed and that he had refused to consent to disclosure.
24. Having inspected the information and carefully considered the context and circumstances of the background to the request the Information Commissioner is satisfied that the third party had a reasonable expectation that the emails would not be disclosed. In particular he has noted that the third party has made an explicit refusal to consent to their disclosure.
25. DARD argued that it had considered whether any legitimate interest existed in disclosing the information and it had balanced that against the personal interests of the third party. It said that it had been unable to identify any such legitimate interest that would be served by the disclosure. It concluded that disclosure of the requested information would breach the first data protection principle as it would amount to unfair processing.
26. The complainant argued that it believed that there was a legitimate public interest in the information being disclosed. It told the Information Commissioner that the member of DARD staff involved in the exchange of emails with the third party was a public servant and it believed that through these emails both parties had interfered with the accountability of a public body. It provided additional arguments to support this view which, because of the specific detail, are not specifically referred to here, but which the Information Commissioner has noted.
27. The Information Commissioner has taken into account the general principles of transparency and accountability in considering the legitimate interests in disclosure in this case. He has also taken into account the specific details of the information and the arguments put forward by both parties. Without detailing the exact detail and nature of the context of the request or content of the emails, the Information Commissioner is satisfied that, on balance, the legitimate interests in disclosure do not outweigh the personal interests of the third party.
28. The Information Commissioner has considered the arguments put forward by DARD and has carefully considered them alongside the withheld information. Having taken into account the nature and context

of the information together with the refusal to consent to the disclosure he is minded to agree that disclosure of the information would be unfair.

29. Accordingly, the Information Commissioner has determined that DARD was correct that the disclosure of the information would be unfair and therefore would breach section 40(2).
30. DARD additionally relied on section 41(1) (information provided in confidence). Having found that section 40(2) is engaged and that disclosure of the information would be unfair, the Information Commissioner has not gone on to consider section 41(1).

Right of appeal

31. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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

Jon Manners
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