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19 February 2013

Jonathan Pryce
Director for Agriculture, Food and Rural Communities
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Dear Mr Pryce,

Evidence submitted to the Land Reform Review Group
Environmental Information (Scotland) Regulations 2004
FoI/13/00041

I request a review of the decision by Scottish Ministers to refuse my request for information about evidence to the Land Reform Review Group (ref FoI/13/00041). I attach the refusal email together with the original request.

The request has been refused under regulation 10(4)(b) of the Environmental Information (Scotland) Regulations 2004 (EIR) as being “manifestly unreasonable” on four grounds. I quote these grounds and respond to them in italics as follows.

1. Submitting this request so soon after the original deadline of 11 January 2013, means that to release the information to you within the timescales required by the Regulations, would mean that the review group would not have had time to study the responses themselves, nor have the benefit of having undertaken any formal analysis. This is especially so, given that the deadline for responses was subsequently extended to the 18 January 2013.

I am unaware of any provision under the EIR regulations that allow for the withholding of information on the grounds that “the review group would not have had time to study the responses themselves” or that such a group had not had “the benefit of having undertaken any formal analysis” I do not doubt the veracity of both of these claims - I merely reject the notion that they are in any way relevant to my request.

2. In the group’s Call for Evidence issued on 4 October 2012, the group said that “If you ask for your response not to be published, we will regard it as confidential.”.

Therefore, I would not consider any submission that had asked to be kept confidential, be released as part of this request.

I do not expect confidential responses to be released in response to my request. Confidentiality is an exemption under Freedom of Information. This reason for refusal is irrelevant.

3. In addition, it stated that, “At the end of the review process, and after the final report is published, we will publish your responses on the review web page, subject to any requests for anonymity “. Respondents would reasonably expect that, even if they do not wish their submission to remain anonymous, that we would not be publishing the information contained until after the final report.

I am aware of the statement made in the Call for Evidence and agree that respondents may well not expect the Scottish Government or the Land Reform Review Group to publish them until after the final report. But I am not asking the Scottish Government to publish them before that date - that it a decision for the Scottish Government and/or Review Group to take. I am making a request under FoI for the information - a possibility that is made clear to respondents in the Call for Evidence. I thus reject this as a grounds for refusal.

4. Finally, the work involved in collating the information to respond to your request, even should the deadline be extended to 40 days as allowed within the regulations, would place an unreasonable burden on the very small team dealing with the review group, at the same time as they are trying to collate the evidence for the group themselves.

I do not understand this as a grounds for refusal. I am not, of course, aware of the exact process adopted within the Scottish government for processing this information but I cannot see how releasing this information is in any way time-consuming. Submissions have been made and presumably the majority are electronic (pdf or Word or such like). To release the information, you place these files in a folder after filtering out the confidential responses. You then burn this folder to a CD, place it in an envelope along with photocopies of any hard copy submissions and pop it in the post. Or am I missing something?

As the Information Commissioner’s Guidance makes clear “The EIRs do not define the term ‘manifestly unreasonable’, and neither does the Directive. However, the Aarhus Convention Implementation Guide makes it clear that volume and complexity alone do not make a request ‘manifestly unreasonable’”. (1)

As the Information Commissioner’s Guidance also states, “Public authorities should not use these provisions lightly - applicants cannot be unjustly denied the opportunity to make a genuine information request. Requests may be inconvenient, and meeting them may at times stretch an authority's resources, but these factors are not on their own sufficient to deem a request vexatious or manifestly unreasonable.” (2)

The Scottish Government then proceed to apply the public interest test and conclude that the public interest is is “outweighed by the public interest in ensuring the efficient and effective use of public resources by not incurring excessive costs when complying with information requests. In addition, should we change the publication

schedule from that already announced, I feel that it would have a negative impact on the willingness of some respondents to give further evidence to the group.”

On the first point (excessive costs), as I argue above I do not accept this argument. On the second point (negative impact), the Section 60 Code of Practice issued by Scottish Ministers themselves notes that “possible loss of confidence in government or other public authority” should not be taken into account in deciding whether a disclosure is in the public interest. (3) Even if the request is “manifestly unreasonable, I would still maintain that there is a public interest in releasing the information in order to inform a proper debate about the future direction of land reform in Scotland.

Finally, Section 10(2)(b) of the EIR regulations makes clear that the Scottish Government is obliged to “apply a presumption in favour” of disclosure.

I do not consider that in this case that obligation has been properly applied.

All considered I do not believe that the Scottish Government has properly applied the provisions of the EIR to my request for information and ask that you review the decision.

Thank you.

Yours etc.

Andy Wightman
mail@andywightman.com

(1) page 10 at <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>

(2) www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.asp

(3) Scottish Ministers’ Coe of Practice on Discharge of Functions under FoISA. Section 73-75 at <http://www.scotland.gov.uk/Publications/2004/09/19894/42619#73>