IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0023

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Appellant: Alan Clayton

Respondent: Information Commissioner

Second Respondent: Natural England

Before:

Melanie Carter
(Judge)

and

Alison Lowton
Melanie Howard

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the appeal and ordered that the Decision Notice FER0499367 dated 6 January 2014 be replaced by the following:

Information Tribunal **Appeal Number: EA/2014/0023**

Dated 11th August 2014

Public authority:

Natural England

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Decision Notice FER0499367 is substituted by the following:

Regulations 12 and 13(2)(a)(i) of the Environmental Information Regulations do not apply to the disputed information in this appeal such that it is not exempt from disclosure. Thus, Natural England is to disclose this information within 28 days of this appeal decision.

Dated this 11th day of August 2014

Signed

Judge Carter

Reasons

Background

1. On 15 November 2012, the Appellant submitted a request for information under the Freedom of Information Act 2000 ("FOIA") to Natural England ("NE") in relation to an area of land which forms part of the River Avon flood plains. He asked the following specific questions:

   (a) *"I want to find out, what agreements have been reached with farmers and landowners in that locality?"*

   (b) *"Do we as taxpayers have the right to request the details of any of these agreements?"*

   (c) *"Where can find out my rights to access sites of special or scientific interest and information relating to why they have been declared SSS1s?"*

   (d) *"Where does Natural England get the funding from for any grants that are awarded?"*

2. NE is an executive non-departmental public body which is responsible to the Secretary of State for Environment, Food and Rural Affairs. NE responded to the above information request on 16 November 2012 and provided the Appellant with some relevant information. The Appellant replied on 11 January 2013 explaining that he wanted as much information as it was *"reasonable for a tax payer to have"* about a specific Environmental Stewardship Agreement. Under such agreements, European funds are granted to farmers and landowners. In the UK, Environmental Stewardship Agreements are administered, and the corresponding information held by, NE (which acts on the behalf of the Department for Environment, Food and Rural Affairs).

3. On 8 February 2013, NE provided the Appellant with a redacted version of the relevant agreement. NE relied on regulations 12(3) and 13 of the Environmental Information Regulations 2004 ("EIR") to withhold some of the information contained within the agreement, including, in particular, the name of the beneficiary and the payment details of the grant. The Appellant complained to the Commissioner who in turn upheld the decision of the NE in a Decision Notice dated 6 January 2014. This appeal considers whether the Decision Notice is in accordance with law.

Analysis

4. Regulations 12(3) and 13(2)(a)(i) provide for an exception to the general duty of disclosure of environmental information where: (a) the information is the personal

data of a third party; and (b) the publication of that information would be in breach of any of the data protection principles. It is common ground between the parties that this appeal is indeed governed by the EIR and that the withheld information is personal data. Thus, the sole question before the Tribunal was whether disclosure of this information would be a breach of a data protection principle. The data protection principles are set out in Part I of Schedule 1 to the Data Protection Act 1998 ("the DPA") and include the first principle, which provides that: *"Personal data shall be processed fairly and lawfully"*. If the disclosure of the information would be unfair or otherwise contrary to the first data protection principle, NE is exempt from disclosure under regulation 12 EIR, read together with regulation 13 (2)(a)(i).

5. The Commissioner, in the Decision Notice, first of all considered what reasonable expectations the individual agreement holders would have in relation to the disclosure of their personal data. In its communications with the Commissioner, NE had explained that:

   (a) When it collected personal information from agreement holders it informed them via a privacy notice in its handbook that information about them, including of the nature withheld in this case (ie: name and amount of the grant), may be made public. Moreover, applicants for an Environmental Stewardship Agreement had to sign a declaration accepting the requirements as laid out in the handbook;

   (b) Prior to a ruling of the European Court of Justice in 2010, discussed below, it considered that the acceptance of the handbook's requirements constituted consent for the purposes of the DPA. Accordingly, until 2010 NE published agreement holders' data as a matter of course in line with Council Regulation (EC) No 1290/2005, which required the publication of data on beneficiaries of agricultural funds;

   (c) However, in 2010, NE argued that the European Court of Justice had ruled that such a requirement for publication was incompatible with an individual's right for privacy where the agreement holder concerned was a private individual or sole trader, and therefore declared the relevant provisions of the EC Regulations to be void (cases C-92/09 and C-93/09 *Volker und Markus Scheke GbR* and *Hartmut Eifert,* "the ECJ Judgement");

   (d) After the ECJ Judgement was issued, NE ceased the automatic publication of the personal data of agreement holders that are private individuals or sole traders. It also removed the information on natural persons from its websites and stopped other types of publication. It had not written to applicants to this effect (there being more than 40,000 grant recipients)

   (e) Even though consent for disclosure had been obtained from applicants for Environmental Stewardship Agreements through the acceptance of the

handbook's requirements, as described above, NE considered that the reasonable expectations of individuals in relation to the disclosure of their personal data of the type withheld in this case i.e. the agreement holder's name and the amount of grant they have received, changed in light of the ECJ Judgement.

6. NE informed the Appellant that it could not make disclosure on account of the ECJ Judgement. The letter of internal review of the refusal to disclose (28 May 2013) stated that:

> *"This judgment says that certain information relating to 'natural persons' must be withheld and as such we have continued to do so".*

In fact, NE's own legal advice (as disclosed in the bundle) was not that it could not make the disclosure but rather the effect of the decision was to "partially invalidate[ ]" an EU Regulation which had created an obligation to publish the data.

7. From the Tribunal's own reading of the ECJ decision, it disagreed with the way in which NE had described the effect of this decision to the Appellant. The ECJ had declared that the regulation was partially invalid but not ruled that the particular type of information could not in any circumstances be disclosed without breaching human rights or data protection law. It had found that the data controller in that case should have applied a set of criteria in balancing the interests for and against disclosure.

8. It appeared that NE, having stopped automatic publication of the personal data in relation to the Agreements at the suggestion of the European Commission, rather than carry out the balancing exercise required in relation to any request for information, had taken the position that it could not make the disclosure.

9. Applicants for grants including named person in the redacted information, had signed a form indicating consent to the terms included with the Handbook. The relevant version included the following:

> *"To meet our obligations under the Data Protection Act 1998 we need to explain how we will handle the information you give us. Because Environmental Stewardship involves expenditure of public money, there is public interest in how the money is spent. Therefore Defra, may in certain circumstances, make information about your application and agreement publicly available for this purpose. We may also need to disclose details about your application and agreement to other organisations or individuals for administration, evaluation or monitoring purposes. Details disclosed may include your name, the name of your farm or business, grid references, the total area under agreement, the payment you receive, the location of fields and details of the environmental features and management options they contain. Such information may be released upon request under the Environmental Information Regulations 2004 or the Freedom of Information Act 2000."*

10. NE had, at least prior to the ECJ Judgement, treated the applicants' declaration that they would be bound by the Handbook's terms as express consent to disclosure. The Tribunal was of the view, as did the Commissioner, that consent continued given the express terms set out above.

11. The Tribunal accepted however that given that post the ECJ Judgement, NE had changed its practice and stopped routinely disclosing on its website names of individual or sole trader applicants, this expectation might have changed. It was possible, although this was a matter of speculation given that there was no direct evidence on this point, that the applicant no longer expected the relevant personal data to be disclosed.

12. The Tribunal then asked itself whether, in terms of the first data protection principle, this was a reasonable expectation for the applicant to hold. When one combined the facts that an express consent had been given, that there had been no publicity by NE or mention on its website of the ECJ decision and finally, that the effect of that decision had not, in the event been to prohibit disclosure, it concluded that such an expectation would not be reasonable. On this critical point therefore the Tribunal disagreed with NE and the Commissioner in turn.

13. There was no evidence before the Tribunal as to the likelihood or otherwise of any prejudice or distress to the grant applicant were disclosure to be made. It was asserted by NE and accepted by the Commissioner that this was likely simply on account of the nature of the grant and its possible impact on the harmony between local residents. Without any evidence to support this however, the Tribunal was not satisfied that this would be the case. Moreover this submission seemed somewhat contradictory given the disclosure that had already been made. Further to the request for information, NE had already disclosed a map of the land in relation to which the grant had been given. Given the ease of public access to Land Registry information, it was reasonable to assume that the public could ascertain the owner of the land and therefore in all likelihood the recipient of the grant. NE itself had written during the course of a planning inquiry (albeit prior to the ECJ decision) naming the particular individual and stating that she was in receipt of the grant.

14. The lack of evidence of potential prejudice to the grant recipient was relevant also to the Tribunal's view that paragraph 6 of Schedule 2 to the DPA would be satisfied were disclosure to be made. The Tribunal was of the view that there was a clear legitimate interest in these matters being made public (accountability in the spending of public monies) and disclosure was necessary to meet this legitimate interest (without a publicly disclosed sum, the Tribunal could not discern how the use of the funds could be rendered accountable). In this regard, the Tribunal did not accept NE's argument that the need for such transparency was largely served by the disclosure of the parts of the Environmental Stewardship Agreement which had already been made; the amount of the grant had not been disclosed and without this the accountability and transparency public interests were unlikely to be met. It further concluded that these

interests were not, for the reasons given above, outweighed by any prejudice to the data subject involved.

15. Given these findings, the Tribunal concluded that disclosure of the redacted information would not have been in breach of the first data protection principle.

Conclusion

16. Thus, the Tribunal concluded that NE had been wrong in law in concluding that the personal data exception in regulation 13 of EIR applied and in turn the Decision Notice had not been in accordance with law. The Tribunal substituted the Decision Notice at the beginning of this decision and ordered that the redacted information be disclosed to the Appellant within 28 days of this Decision.

17. The Tribunal's decision was unanimous.

Signed

Judge Carter

Date: 11th August 2014