



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref ATISN10825

12 September 2016

Dear ,

ATISN10825 – Freedom of Information Request with regards to identity of those under restriction

Thank you for your request dated 14 September 2016. In your request, you asked for

- “the names of those farms/land/businesses under ESA restrictions”; and
- “the names and farms of those under an EIA (Agriculture) (Wales) Reg 2007 Remediation Notice”.

The Environmentally Sensitive Areas (ESA) scheme was opened to farmers on a voluntary basis in 1987. This early agri-environment scheme operated within six environmentally sensitive areas, covering a total of 500,000 ha. It was superseded by newer schemes in the early 2000s, but ran in parallel with these for several years. While it existed, over 2,600 ESA agreements were signed.

Under the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2007 (the EIA Regulations) the Welsh Ministers have the power to issue statutory enforcement Notices such as Stop and Remediation Notices. Remediation Notices are only issued under exceptional circumstances for sites which are significant from an ecological or historical perspective and have the potential to remediate. Since the EIA Regulations were first

introduced in Wales in 2002, the Welsh Ministers issued 47 Remediation Notices in total. This represents 8% of all EIA enforcement cases investigated by the Welsh Government.

Previous participation in an ESA scheme does not automatically mean that all land in a holding will fall within the scope of the EIA Regulations. It may however indicate that the land or parts of the land in question fall within the remit of the EIA Regulations. The Welsh Government advises land owners and managers to refer to the EIA guidance when planning to commence agricultural improvement works on their land. Further advice is available from the Welsh Government's EIA team situated across Wales.

I have decided that the information you have requested in relation to the names of farms/land/businesses under ESA and names and farms of those under EIA Remediation Notices is exempt from disclosure under section 40(2) of the Freedom of Information Act 2000 (FOIA). If the information were deemed to be environmental information, it is also withheld under regulation 13(1) of the Environmental Information Regulations 2004 (EIRs). The reasons for applying these exemptions are set out in full at Annex A to this letter.

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit,
Welsh Government,
Cathays Park,
Cardiff,
CF10 3NQ

or Email: FreedomOfInformationOfficer@wales.gsi.gov.uk

Please remember to quote the ATISN reference number.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF.

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely

Annex A

I have decided to withhold the following information:

Information being withheld	Section number and exemption name
The names of those farms/land/businesses under ESA restrictions	Section 40(2) of the FOIA and Regulation 13(1) of the EIRs
The names and farms of those under an EIA (Agriculture) (Wales) Reg 2007 Remediation Notice	Section 40(2) of the FOIA and Regulation 13(1) of the EIRs

Section 40(2)

Section 40 of the Freedom of Information Act and Regulation 13(1) of the EIRs set out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as:

“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

We have concluded that, in this instance, the information requested contains third party personal data. Under Section 40(2) of the FOI Act, personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the principle being most relevant in this instance as being the first.

The first data protection principle.

This states:

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.

We consider that the names of farms/land/businesses would identify individual farmers who signed an ESA agreement with the Welsh Government which means that this information falls within the description of personal data as defined by the DPA. Similarly, the names and farms of those who have been served a statutory Remediation Notice under the EIA Regulations also falls within the description of personal data as defined by the DPA. Hence the disclosure of the requested information would breach the first data protection principle.

The first data protection principle has two components:

- 1 Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

Guidance from the Information Commissioner's Office (Personal information (section 40 and regulation 13) v 1.3) states (at p11):

- *The starting point is to consider whether it would be fair to the data subject to disclose their personal data. The key considerations in assessing this are set out in the section on Fairness below.*
- *If disclosure would not be fair, then the information is exempt from disclosure.*

This approach was endorsed by the Court of Appeal in the case of *Deborah Clark v the Information Commissioner and East Hertfordshire District Council* where it was held:

"The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA" (paragraph 63).

In this instance, we believe the individuals affected by this request would have no expectation that this information would be made public. If this information is released, it would not only be provided to you as the requestor but also published on the Welsh Government's website and available in the public domain. This would mean personal data of farmers who signed an ESA, and individuals who have been served a statutory enforcement notice under the EIA Regulations, would be available in the public domain. Thus, we believe the release of this information would be unfair and a breach of the first data protection principle. For that reason, the information is being withheld under section 40(2) of the Freedom of Information Act or Regulation 13(1) of the EIRs. This is an absolute exemption and not subject to the public interest tests.