



Department
for Environment
Food & Rural Affairs

Seacole Building
4th Floor
2 Marsham Street
London
SW1P 4DF

T: 03459 33 55 77
helpline@defra.gov.uk
www.gov.uk/defra

Owen Boswarva
By email: owen.boswarva@gmail.com

Our ref: IR2024/00835
6 March 2024

Dear Owen,

INTERNAL REVIEW: LandIS Agreement between Cranfield University and Defra

Thank you for your email which we received on 10 January 2024 appealing against our response. Your original request was dealt with under the Freedom of Information Act 2000 (FOIA), and I have handled your request for an internal review under the same legislation.

Summary

In accordance with Defra's internal review procedures, I have reviewed your complaint in discussion with policy colleagues who handled your original request.

I have considered your appeal and reviewed the public interest arguments for and against disclosure. I have concluded that some of the information can now be released to you, but some has been properly withheld under section 41(1) and 43(2) of the FOIA. I also find that some of the information should be withheld under sections 40(2) and 40(3A) of the FOIA. The revised version of the redacted document attached at Annex A shows which parts are withheld under which exemptions.

I have not gone on to look at the application of section 21 or whether some of the information is not held as this has not been challenged.

I set out in the annex below a fuller explanation of our decision.

Yours sincerely,

Damian Lynch

Information Rights Team Casework Manager
Email: InformationRequests@defra.gov.uk

Annex

Chronology

6 December 2023	<p>You submitted the following request:</p> <p><i>Cranfield University holds digital soil data for England and Wales in a soil and land information system called LandIS. Arrangements for access to this data have been established as part of a legal agreement, between the University and Defra acting on behalf of the Crown, called the "LandIS Agreement":</i></p> <p><i>I would like to request the following information, if held by Defra. Please treat this as an information request in accordance with the Freedom of Information Act. (This request is substantially a repeat of a request that Defra responded to on 29 May 2019, your reference FOI2019/09209.)</i></p> <ol style="list-style-type: none"><i>1. A copy of the version of the LandIS Agreement currently in effect, including any schedules or annexes to the Agreement.</i><i>2. The total amount received by Defra or the Government, in fees or other revenue, under the arrangements covered by the LandIS Agreement, in each of the past three years (either calendar year or financial year).</i><i>3. The total income received by Cranfield University, in fees or other revenue, under the arrangements covered by the LandIS Agreement, in each of the past three years (either calendar year or financial year).</i> <p><i>In addition, I would like to request the following information, to the extent that it may not be covered by point 1 above:</i></p> <ol style="list-style-type: none"><i>1. A copy of any other agreement made by Defra with Cranfield University, under which Defra and/or other UK government bodies have rights or permissions to access and/or reuse data held in the LandIS system.</i>
3 January 2024	<p>We responded to your request providing you with some information, confirming that some of the information is not held by Defra, and the rest was withheld under sections 21, 41(1) and 43(2) of the FOIA</p>
10 January 2024	<p>You then requested an internal review as follows:</p> <p><i>I would like to request an internal review of Defra's response to the access to information request that I submitted on 6 December 2023 (your reference FOI2023/24515).</i></p> <p><i>In carrying out your internal review of Defra's response, please consider</i></p>

in particular the following points:

1. *The version of the current LandIS agreement published on Contracts Finder is a 47-page document, the majority of which has been redacted. In its response to my FOI request, Defra has relied on exemptions under section 41(1) (information provided in confidence) and section 43(2) (commercial interests) as the basis of those redactions.*

It is unclear in Defra's response which exemptions have been applied to redact which parts of the agreement, and whether any parts have been redacted based on both exemptions. I believe this broad approach to explanation of the redactions is unhelpful and that Defra should have been more specific in its response about the basis for redaction of each relevant part of the agreement.

2. *The previous version of the 'Agreement for Maintenance and Licensing of LANDIS', dated 4th April 2018 and then in effect, was disclosed to me by Defra on 29 May 2019 (your reference FOI2019/9209) with relatively few redactions and no redactions that relied on the exemption under section 41(1) of the FOIA. This inconsistency in approach raises doubts about the validity of most of the redactions applied to the current version of the LandIS agreement.*

To the extent that any of the redacted material in the current version of the agreement duplicates or is substantially the same as material in the previous version that has already been disclosed to me, that information has already been legally disclosed to the world at large and cannot reasonably be withheld based on either of the exemptions applied by Defra.

3. *The LandIS information system and the data products derived from it, to which the LandIS agreement relates, are described in some detail on a public website maintained by Cranfield University at <https://www.landis.org.uk/>. To the extent that redacted material in the current version of the LandIS agreement duplicates or is substantially the same as material made public by Cranfield University, it cannot reasonably be considered "confidential information" for purposes of the exemption under section 41(1) of the FOIA.*
4. *In some parts of the agreement, Defra has even redacted titles or headings (for example, sections 6, 15, and 26, and Schedule 1). It seems unlikely that redaction of these titles or headings is sustainable within the scope of the exemptions under section 41(1) or section 43(2) of the FOIA.*
5. *I am surprised that Defra has not withheld any information based on the exemption under section 40 of the FOIA, but I note that redactions made based on the exemption under section 43(2)*

	<i>include "personal information". It would be in Defra's interest to specify which redacted parts of the LANDIS agreement it considers to be personal data, as I am unlikely to challenge those redactions.</i>
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Exemption at sections 40(2) and 40(3A) of the FOIA

Sections 40(2) and 40(3A) of FOIA provide an exemption from the right to information if it is personal data of a third party and release would be a contravention of the principles as set in Article 5(1) of the UK General Data Protection Regulations (GDPR). This means in applying this exemption I do not need to apply a public interest test.

I consider that disclosure of this information is likely to breach the first data protection principle, which provides that personal data must be processed lawfully, fairly, and in a transparent manner. Disclosure would not constitute 'fair' processing of the personal data because they would not reasonably have expected their signature to be made public in relation to a release under this legislation.

I therefore find that this exemption applies in relation to withholding the names and signatures in the disclosed information, which is marked up accordingly in Annex A.

Exemption at section 41(1) of the FOIA

Section 41(1)(a) of FOIA relates to exempt information if it was obtained by the public authority from any other person (including another public authority). The information was received from Cranfield University and contains details of historical mechanical arrangements between Cranfield University and Defra.

Section 41(1)(b) of FOIA relates to exempt information if disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person. Both section 41(1)(a) and (b) are conditional. With regard to whether disclosure would constitute an actionable breach of confidence Defra followed the test set out by *Judge Megarry in Coco v A N Clark (Engineers) Limited* [1968] FSR 415, specifically the three elements:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider

The information from Cranfield University was imparted in circumstances giving rise to an obligation of confidence. In this instance the information in question was provided to Defra confidentiality in line with the agreed contract. Section 41(1) an exemption designed to give those who provide confidential information to public authorities a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of an FOIA request.

Under these circumstances, I consider that disclosure would constitute an actionable breach of confidence as it has been agreed in a clause in the contract. Section 41(1) is an absolute exemption so there is no need to carry out a public interest test. However, I do have to decide whether there is a public interest defence to a breach of confidence in these circumstances. In considering the public interest in favour of maintaining the confidence I find that these circumstances have created an expressed expectation of confidentiality which, combined with the necessary quality of confidence of the information, means that Defra has a duty of confidence in relation to the content of the information held. I consider that such a breach of confidence would be actionable and therefore find that section 41(1) applies. Section 41(1) is applied in Annex A and marked up accordingly.

Exemption at section 43(2) of the FOIA

Section 43(2) of the FOIA relates to commercial interests and is engaged where disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). In this instance the information relates to commercially sensitive information and section 43(2) is engaged because the information, if released, would prejudice the commercial interests of third parties.

Public interest considerations

Section 43(2) is a qualified exemption and subject to a public interest test to determine if the balance of the public interest favours releasing or withholding the information.

I recognise that there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is also a public interest in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy.

However, I find that the application and arguments lie in favour of withholding information under this exemption because it contains commercially sensitive information for both parties. In other words this information, if released, would prejudice the commercial interests of both Defra and the third party.

Following careful consideration, the information is being withheld as it falls under the exemption at section 43(2) of the FOIA, which relates to information which if disclosed would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding the information).

In applying this exemption, we have had to balance the public interest in withholding the information against the public interest in disclosure. We recognise that there is a public interest in disclosure of information concerning the conduct of internal affairs relating to the competitive tendering process to facilitate accountability, transparency, and fairness in the procurement of public contracts. However, there are considerable factors in favour of withholding this information, in particular, that release would adversely affect Defra's ability to achieve the most economical and advantageous tender bids in relation to the use of public funds when negotiating future contracts. Publishing the full breakdown of budget information requested would identify specific amounts involved and would thereby prejudice Defra's commercial interests in future tendering bids.

As a Government department it is vital that Defra is able to obtain value for money when it comes to the public purse. It would therefore not be in the public's interest if there was not

a competitive tendering process to enable Defra to seek the best agreements.

Therefore, I have concluded that, in all the circumstances of the case, the information should be withheld, and the exemption is marked up accordingly in Annex A.

In addition, in the second paragraph of your internal review complaint you state that “it is unclear in Defra’s response which exemptions have been applied to redact which parts of the agreement, and whether any parts have been redacted based on both exemptions. I believe this broad approach to explanation of the redactions is unhelpful and that Defra should have been more specific in its response about the basis for redaction of each relevant part of the agreement.”. I have addressed this point in the table attached at Annex B, which specifies how the redactions were applied.

Rights of appeal

We hope that the above answers your complaint satisfactorily. However, if you remain dissatisfied, you have the right to apply directly to the Information Commissioner for a decision. <http://www.ico.org.uk/complaints.aspx>