



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

FOI UNIT
CAVAN

19 JAN 2009

DEPARTMENT OF COMMUNICATIONS,
ENERGY & NATURAL RESOURCES
ROINN CUMARSAÍDE, FUINNIMH
AGUS ACMHAINNÍ NADURTHA

Our Reference : 070102
16 January 2009

Ms. Mary Rabitte
Freedom of Information Unit
Department of Communications, Energy and Natural Resources
Elm House
Earlsvale Road
Cavan

Dear Ms. Rabitte

Re: Case numbers 070102 and 080189

I refer to the applications by Mr. Seamus McConnell, solicitor and Mr. Thomas Newman, both of which were on behalf of Newman Biodiesel Limited, under the Freedom of Information (FOI) Acts, 1997 and 2003, for a review of the decision of the Department of Communications, Energy and Natural Resources in relation to their request for access to records.

Having carried out a review under section 34(2) of the Freedom of Information Act, [as amended by the Freedom of Information (Amendment) Act, 2003], the Office of the Information Commissioner's authorised officer has decided to affirm the decision of the Department. I enclose for your information a copy of the decision, dated 16 January 2009.

A party to a review, or any other person affected by a decision of the Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date of the decision.

Yours sincerely

Ciaran O'Donohoe
Investigator



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

Review Application
under the Freedom of Information Acts 1997 & 2003 (the FOI Act)
to the Information Commissioner

Case Numbers: 070102 and 080189

Applicants: Requests from Mr. Seamus McConnell, solicitor, (case number 070102) and Mr. Thomas Newman (case number 080189). Both requests were on behalf of Newman Biodiesel Limited.

Public Body: Department of Communications, Energy and Natural Resources

Issue: Whether the Department is justified in its decision to rely on sections 26(1) and 27(1)(a), (b) and (c) to refuse access to records sought in a request under section 7 of the FOI Act.

Review: Conducted in accordance with section 34(2) of the FOI Act by Mr. Seán Garvey, Senior Investigator, Office of the Information Commissioner (authorised by the Information Commissioner to conduct this review).

Decision: The Senior Investigator found that the Department was justified in its refusal of access to records containing details of volumes of biofuels produced by specified individual companies, as he found section 27 of the FOI Act applies to them.

Right of Appeal: A party to a review, or any other person affected by a decision of the Information Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date of this decision.

Background

The Department of Communications, Energy and Natural Resources (the Department) informed this Office that it had secured an amendment to the Finance Act 1999, which provided for the introduction of a scheme granting excise tax relief for the production of biofuels. The Department further informed this Office that the purpose of the scheme was to allow qualified and conditional excise relief from excise of biofuel used in approved pilot projects for either the production of biofuel or the testing of the technical viability of biofuel for use as a motor fuel. In 2005, the Department introduced an excise relief scheme for Pilot biofuels projects (Scheme I) valued at EUR 6 million over two years. Eight projects were successful in a selection process undertaken by the Department.

The Department informed this Office that a second Biofuels Mineral Oil Tax (MOT) Relief Scheme (Scheme II) was launched in July 2006. It also said that a further targeted package of excise relief on biofuels valued at over EUR 200 million over a five year period was agreed with the Minister for Finance in Budget 2006. There were sixteen successful applicants for participation under the four categories provided for under Scheme II. The categories consisted of bioethanol, EN590, pure plant oil and captive fleets.

Case number 070102

On 19 January 2007, the applicant sought answers to a list of twelve questions concerning the Biofuels MOT Relief Licence Scheme I and Scheme II. The questions concerning scheme I concerned three named companies, whereas the questions concerning scheme II covered all applicants under the scheme. The Department issued a decision on the request on 23 February 2007. On 7 March 2007, the applicant applied to the Department for an internal review of the Department's decision. In its internal review decision, dated 30 March 2007, the Department affirmed the original decision. In a letter dated 18 April 2007, the applicant applied to this Office for a review of the decision of the Department, which was assigned case reference number 070102.

Case number 080189

The applicant, on 27 May 2008 made a fresh FOI request seeking answers to a further four questions concerning "biofuels scheme II". On 24 June 2008 the Department issued a decision in relation to this FOI request. The applicant then applied to for an internal review of the Department's decision on 30 June 2008. In its internal review decision of 24 July 2008, the Department affirmed its original decision. On 29 July 2008, the applicant appealed the decision of the Department to this Office, which was assigned case reference number 080189.

As the two cases referred to this Office (070102 and 080189) concern the same applicant and subject matter, this Office decided to deal with both cases together and, therefore, I have dealt with the cases by way of a composite decision.

Scope of Review

It had been agreed with the applicant, as outlined in a letter by Mr. O'Donohoe, Investigator with this Office, dated 1 September 2008, to narrow the scope of both requests so as to confine the request to seeking the up-to-date figures of biofuel produced relative to each company selected for participation in both schemes I and II. Participating companies under scheme I were required to make six monthly (bi-annual) returns, covering the periods from

February to July and August to January of each year. Under scheme II the bi-annual returns are required for the periods from June to November and December to May of each year. These returns are generally supplied in the month after the end of the six month period to which they relate. It is noted that case number 070102 refers to both schemes I and II, whereas case number 080189 concerns scheme II only. This means that this review covers the production figures for the period up to and including end-November 2007 in the case of scheme II as the relevant FOI request was dated 27 May 2008, and for the period up to and including end-July 2006 for scheme I, as the relevant FOI request in that case was dated 19 January 2007.

This review solely concerns whether or not the Department, in its original and internal review decisions, is justified in relying on sections 26(1) [information given in confidence] and 27(1)(a), (b) and (c) [commercially sensitive information] of the FOI Act to exempt release of the production figures for each individual company which are contained in the bi-annual reports referred to above.

In reviewing this case, I have had regard to the following:

- The decisions of the Department on the matter;
- The communications between the Department and this Office;
- The communications between the applicant and the Department on the matter;
- The applicant's communications with this Office;
- The communications between this Office and the sixteen companies involved
- Mr. O'Donohoe's preliminary views letter of 3 December 2008 to the applicant and the applicant's reply dated 10 December 2008; and
- The provisions of the FOI Act as amended by the FOI Amendment Act 2003.

Analysis and Findings

Section 27

The Department claimed that access to these records should be refused on the basis of section 27(1)(a), (b) and (c) of the FOI Act. I will now examine whether the Department is justified in claiming exemption under section 27 insofar as it applies to the records. I have set out the provisions of the relevant sections below for information.

Section 27(1) of the Act states:

27(1) Subject to subsection (2), a head shall refuse to grant a request under section 7 if the record concerned contains -

(a) trade secrets of a person other than the requester concerned,

(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or

(c) information whose disclosure could prejudice the conduct or outcome of

contractual or other negotiations of the person to whom the information relates.

In order for exemption from release of records to be claimed under section 27(1), any one of the subsections (a), (b) or (c) must be met. In particular, section 27(1)(b) protects information whose disclosure:

- could reasonably be expected to result in material financial loss or gain to the person whom the information relates, or
- could prejudice the competitive position of the person in the conduct of his or her profession or business or otherwise in his or her occupation.

The word "*could*" in the provision allows for more generous latitude in refusing to grant access on the ground of perceived harm than the word "*would*". In relation to the second bullet point above, it should be noted that this part of section 27(1)(b) can apply even where such harm is not *certain* to materialise but *might* do so. However, in invoking the phrase "*prejudice*", the damage likely to occur as a result of disclosure of the information sought must be specified with a reasonable degree of clarity.

With regard to possible harm caused by the release of the figures, the point has been made by the Department and some of the companies in submissions made to this Office that the release of this information must be considered in the context of the biofuel industry in Ireland being small and players being sharply focused on what is going on in the industry. It was further outlined to this Office that the number of potential suppliers of raw materials required for biofuel production was also small and that the release of these records could result in those suppliers increasing the price which they charge to the companies for such raw materials. It was put to Mr. O'Donohoe that releasing information which highlighted a company's low production volume had the potential to cause considerable commercial harm, without reflecting on the underlying reasons behind such low production volumes.

Having considered the submissions, I must decide whether the records meet the criteria for them to be exempt under section 27(1)(b) of the FOI Act. In the first instance, I am satisfied that the records containing production volumes clearly contain commercial information within the meaning of section 27 of the FOI Act. In addition, in order for section 27(1)(b) to apply, the public body would have to be of the opinion that disclosure "*could reasonably be expected to*" give rise to a harm specified in the exemption. In this regard, it is noted that the disclosure of data on quantities produced by individual companies would allow for relative comparisons of the individual companies involved. It is noted that the overall allocation figures for each individual company under scheme II have been published on the Department's website. It is further noted that for companies successful under scheme II, any surplus amounts under scheme I were carried over to scheme II. I believe that the release of the production figures for individual companies would therefore disclose that some companies are proportionately a considerable way behind other companies in terms of the percentage of their allocated amount which they have actually produced under the schemes. Therefore, I find it plausible that the disclosure of the production figures could damage the reputation of some companies and, therefore, "*could reasonably be expected to*" result in a material financial loss to some companies. I concur with the view expressed by Mr. O'Donohoe, in his preliminary views letter of 3 December 2008 that this could prejudice the competitive position of a company whose production levels are relatively lower than the other companies involved in the schemes. The harm that potentially could occur is a damage to the

reputation of a company and the effects that this could have on its business. Therefore, I find that a harm has been identified together with a reasonable expectation that it could occur through the release of data about an individual company and, therefore, that section 27(1) applies to production figures of individual companies. As I have found that section 27(1)(b) applies, there is no requirement for me to deal with subsections (a) or (c) of section 27(1) of the FOI Act.

Public interest

It can be seen from the analysis above, that I find that the Department is justified in claiming that the production figures are commercially sensitive and, therefore, section 27(1) of the FOI Act applies to them. However, section 27(3) provides for the release of commercially sensitive information if, in the opinion of the Commissioner, the public interest would be, on balance, better served by granting rather than refusing to grant access to the records. Therefore, it is necessary to consider the public interest arguments pertaining to these cases.

In coming to a decision, I have had regard to the submissions of the applicant, the Department and the companies concerning the public interest issue. The amount of excise relief available under biofuel schemes is considerable, amounting to EUR 6 million and EUR 200 million under schemes I and II respectively. Therefore, I concur with Mr. O'Donohoe's views, as expressed in his preliminary views letter of 3 December 2008 to the applicant, that there is a strong public interest in disclosing data that highlights the performance of a scheme in which a large amount of public money is forgone through the granting of excise relief. In addition, in view of the level of global debate on the production of biofuels, there is also a public interest in disclosure of data concerning levels produced in Ireland. However, it is clear that the information contained in these records is commercially important information. There is also a public interest in the protection of this type of information and in not disclosing information that could potentially impede a company in the effective pursuit of its business. This issue of potential commercial damage to companies through disclosure of these figures was articulated in submissions made by many of the interested parties.

Having had regard to the points which they made in their submissions, I believe it is reasonable to conclude that this damage could occur on release of this information. That said, it is clear to me that it is necessary for data on production levels to be disclosed in order to satisfy the public interest in the accountability of a body which operates schemes which involve the forgoing of a sizeable amount of public money.

The key question is whether it is necessary to release production values for individual companies, which could be potentially damaging to some companies if released, in order to satisfy the public interest requirement in these cases or whether the public interest concerns could be met by some other means. I believe that the disclosure of the aggregate totals of biofuel produced under each scheme would ensure that the public interest requirement in the accountability of the public body was met, while also protecting the rights of those companies to pursue their businesses in a fair and reasonable manner. This approach would also serve to address the public interest in the Department being accountable for how it was performing its functions. In view of this, I believe that it is not necessary to disclose commercially sensitive data for each company in order for the public interest requirements to be met in these cases.

With regard to the disclosure of aggregate totals referred to above, I note that, in a letter dated 3 October 2007, the Department already provided details of these totals for scheme I to the

applicant's solicitor for the period up to and including July 2006. With regard to scheme II, I note that the Department has indicated to this Office that it is agreeable to release, outside of freedom of information, details of the most up-to-date data on aggregate volumes of biofuel produced in each category under scheme II. I believe that the release of this information would be sufficient to satisfy the public interest factors in favour of the release of information concerning both schemes I and II.

Therefore, I find that the public interest would not be, on balance, better served by granting rather than refusing to grant access to the production figures of individual companies, in accordance with section 27(3), particularly where the Department has released or has undertaken to release aggregate production figures for both schemes I and II.

Section 26

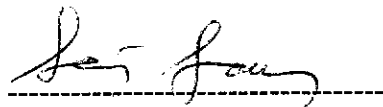
The Department has contended that supply of production volumes by the companies to it was "*in confidence on the basis that it would not be revealed to other parties*" and it referred to section 26(1)(a) as one of the reasons for refusal in the schedule to the decision. At no stage did the Department provide any justification for claiming exemption under section 26(1)(a). However, as I have found that section 27(1) of the FOI Act is applicable, I do not need to further consider the applicability of section 26(1)(a) as part of this review.

Decision

Having carried out a review under section 34(2) of the Freedom of Information Act 1997, as amended, I affirm the decision of the Department that records concerning the up-to-date figures of biofuel produced relative to each company selected for participation in both schemes I and II are properly exempted under section 27(1)(b) of the FOI Act.

Appeal

A party to a review, or any other person affected by a decision of the Information Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date of this decision.



Seán Garvey
Senior Investigator

16 January 2009

Carmel Cosgrove

From: FOI UNIT
Sent: 19 January 2009 15:19
To: Geraldine Luddy
Cc: Martin Finucane
Attachments: OIC correspondence 16 jan 09.pdf

Hi Geraldine,

Attached please find correspondence from the OIC advising that they have affirmed the decision of the Department in relation to FOI request numbers 12/2007 & 39/2008 (FOI requests for records concerning Mineral Oil Tax Relief Scheme for Biofuels by Newman Biodiesel Ltd and others).

Regards
Carmel Cosgrove

Dept of Communications, Energy
& Natural Resources
Freedom of Information Unit
Elm House
Cavan

Tel: 01 6782902
Fax: 01 6783057
<mailto:carmel.cosgrove@dcenr.ie>



Our Ref: FOI/0012/2007

30 March 2007

Mr Seamus McConnell BCL Solicitor
Patrick Street
Tullamore
Co Offaly

Dear Mr McConnell

I refer to your request seeking an internal review under Section 14 of the Freedom of Information Act of the decision conveyed to you, on 23 February 2007 on your application for access to records in relation to the Biofuels MOT Relief Schemes I and II.

I am a more senior member of the staff of this Department than was the person making the first decision. I have reviewed your request for access to records relating to the Biofuels Mineral Oil Tax Relief Schemes I and II. I have decided to uphold the original decision made by Ms Geraldine Luddy.

You may appeal this decision by writing to the Information Commissioner at 18 Lower Leeson Street, Dublin 2.

If you wish to appeal, you must usually do so not later than 6 months after receiving this letter. Should you write to the Information Commissioner, making an appeal, please refer to this letter.

If you make an appeal, the Information Commissioner will fully investigate and consider the matter and issue a fresh decision.

Please note that an application fee must accompany all appeals made to the Office of the Information Commissioner regarding FOI requests for non-personal records, and your appeal to them cannot be processed until the fee has been submitted. The application fee is currently €150 and a reduced fee of €50 will apply if you are covered by a Medical Card.


If claiming a reduced application fee, the request must also be accompanied by

- The Medical Card registration number
- The name of the issuing Health Board
- Your consent to the verification of these details with that Health Board.

Payment should be made by way of bank draft, money postal order, or personal cheque made payable to "The Office of the Information Commissioner"

On receipt of the fee, an acknowledgement letter will be sent to you outlining details of when you can expect a decision on your request, and the contact details of the person handling the application.

Yours sincerely



Katherine Licken
Assistant Principal Officer



Department of Communications, Marine and Natural Resources
Roinn Cumarsáide, Mara agus Acmhainní Náúúrtha

17 March, 2007

Seamus McConnell BCL Solicitor,
Patrick Street,
Tullamore,
Co.Offaly.

FOI/0012/2007

Dear Mr. McConnell,

I refer to the appeal you have made on behalf of Newman Biodiesel Ltd., under the Freedom of Information Act on the decision taken regarding your recent FOI request concerning the Biofuels MOT Relief Licence Scheme I and Scheme II.

Your appeal was received in the FOI Unit on the 12/03/2007 along with the associated fee. A decision on your appeal will be made within three weeks of receipt of your request. This means that you can expect to receive the outcome of your appeal by the 03/04/2007.

A full and new examination of the matter will now be carried out by Ms Katherine Licken, Renewable & Sustainable Energy Division, Department of Communications, Marine & Natural Resources, 29 – 31 Adelaide Rd., Dublin 2. She can be contacted at 01 6783204.

If you are not satisfied with the outcome of the appeal, you are entitled to apply for a further review by the Office of the Information Commissioner, 18 Lr. Leeson Street, Dublin 2, within six months of receiving notice of decision on the appeal. Please note the FOI charges will apply if you wish to bring your case to the Office of the Information Commissioner.

Please note that an application fee for an appeal to the Commissioner is currently €150.00 and a reduced fee of €50.00 applies if you are covered by a Medical Card.

If claiming a reduced application fee, the request must also be accompanied by

- The Medical Card registration number
- The name of the issuing Health Board
- Your consent to the verification of these details with that Health Board.

Payment should be made by way of bank draft, money postal order, or personal cheque made payable to "The Office of the Information Commissioner".

Yours sincerely,

Mary Rabbitte
FOI Unit
PH: 01 6782903