IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0058**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FER0531132
Dated: 2 February 2015

Appellant: **DAVID BARTRAM**

Respondent: **THE INFORMATION COMMISSIONER**

On the papers

Date of decision:

Before
CHRIS RYAN
(Judge)
and
ROSALIND TATAM
DAVID WILKINSON

Subject matter: Environmental Information Regulations 2004 –
Exceptions - Personal data, Reg 13

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0058**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 2 February 2015 is substituted by the following notice:

Public Authority: **The Coal Authority**

Complainant: **David Bartram**

Decision: For the reasons given in the Reasons for Decision below the Decision Notice should stand, save that the steps the public authority was required to take under paragraph 3 of the Decision Notice should be amended by deleting the words "and property postcode".

REASONS FOR DECISION

Background

1. On 2nd February 2015 the Information Commissioner issued Decision Notice FER0531132 under which he ordered The Coal Authority ("the Authority") to disclose to the Appellant certain information he had requested about hazards associated with coal mining and compensation claims for subsidence arising from them. In reaching his decision the Information Commissioner rejected a number of arguments which the Authority had relied on in refusing disclosure. However, he did accept that when responding to a part of the information request that had sought information about all subsidence claims made since 1 June 2013 the Authority could redact the property address and property postcode.

2. The basis of that part of the Decision Notice was regulation 13(1) of the Environmental Information Regulations 2004 ("EIR"). This provides that the obligation imposed on a public authority to make information it holds available on request may be avoided if the requested information includes third party personal data and disclosure would contravene any of the data protection principles set out in the Data Protection Act 1998 ("DPA").

3. The Information Commissioner considered that the address and postcode of any property affected by a subsidence claim was the personal data of the individual who made the claim and that its disclosure would be unfair and therefore in breach of the data protection principles. The individuals affected had not consented to disclosure and had a reasonable expectation that information about their claim would not be made public. There was no compelling public interest that the Information Commissioner could identify that would justify overriding the individuals' right to privacy.

4. In reaching his conclusions the Information Commissioner expressly addressed the fact that, although the Authority's records are not made available for general searching, information about any subsidence claim affecting a particular property may be made available to those seeking information. That usually occurs as part of the due diligence undertaken by a potential purchaser of property or his/her legal representative. For this purpose a standard enquiry form, with terms and conditions of use, has been adopted by the Authority following consultation with the Law Society, Royal Institution of Chartered Surveyors and other interested parties. The form is designated "Con 29M (2006) Coal Mining and Brine Subsistence Claim Search" ("CON29M"). It requires the enquirer to identify an individual property or area of land and contains a number of questions relating to existing or planned mining activities and hazards capable of arising from them. Question 9 is headed "Coal mining subsidence claims" and ask:

> *"(a) Has any damage notice or claim for alleged coal mining subsidence damage to the property been given, made or pursued since 1 January 1984? If yes, supply the date of such notice or claim.*
>
> *(b) In respect of any such notice or claim has the responsible person given notice agreeing that there is a remedial obligation or otherwise accepted that a claim would lie against him?*
>
> *(c) In respect of any such notice or acceptance has the remedial obligation or claim been discharged? If yes, state whether such remedial obligation or claim by repair or repayment, or a combination thereof.*
>
> *(d) Does any current "Stop Notice" delaying the start of remedial works or repairs affect the property? If yes, supply the date of the notice.*
>
> *(e) Has any request been made under section 33 of the* [Coal Mining Subsidence Act 1991] *to execute preventive works before coal is worked, which would prevent the occurrence or reduce the extent of subsidence damage to any buildings, structures or works? If yes, has any person withheld consent or*

failed to comply with any such request to execute preventive works?"

CON29M states that the enquiries are made, and replies prepared, in accordance with the Coal Authority's and the Cheshire Brine Subsidence Compensation Board's Terms and Conditions 2006. The form includes guidance on how to access them.

5. The Information Commissioner accepted in his Decision Notice that property address and property postcode would both be available in a CON29M but added:

> *"However, in such situations, the Commissioner does not hesitate to recognise that the said property owners give their expressed or implied consent that this personal date is available via a CON29M report. This being de facto necessary for the sale and purchase of property in areas that are or could be affected by coal mining."*

By inference, he did not consider that the individual's consent extended to the comprehensive disclosure sought in the Appellant's original information request.

6. On 19th March 2015 the Appellant lodged a Notice of Appeal with this Tribunal. This was accompanied by Grounds of Appeal which were responded to by the Information Commissioner in a written Response filed on 16 April 2015. On 30 April 2015 the Appellant filed a written Reply which included new arguments in favour of the Appeal. The Information Commissioner did not either object to this new material or seek to respond to it. We deal with each Ground of Appeal in paragraphs 15 to 34 below.

7. The parties agreed that the Appeal should be determined on the papers, without a hearing, and we agree that this was an appropriate procedure to follow. We have therefore reached our decision on the basis of the documents identified in the immediately preceding paragraph together with a bundle of relevant materials provided by the parties and the additional information which the Information Commissioner obtained from the Authority in the circumstances described in paragraph 27 below.

<u>The relevant law.</u>

TCA and the information held by it.

8. TCA was established under the Coal Industry Act 1994 ("CIA") for the purpose of holding, managing and disposing of land and other property which, before privatisation, had been owned and operated as part of the nationalised coal mining industry. One of its functions is the handling of claims from landowners affected by subsidence

caused by mining operations. As part of that function it is required to retain information about any claims for subsidence damage and to make such information available to those having a legitimate interest to access it.

9. The relevant provision is CIA section 57. The relevant parts of it read:

"*57 Public access to information held by the Authority.*

(1)This section applies to … any of the following information which is for the time being in the possession of the Authority, that is to say—

(a)…

(e) information about any subsidence or subsidence damage or about claims made under the [Coal Mining Subsidence Act 1991]*; and*

(f)…

(2)Subject to subsections (3) and (4) below, it shall be the duty of the Authority to establish and maintain arrangements under which every person is entitled, in such cases, on payment to the Authority of such fee and subject to such other conditions as the Authority may consider appropriate—

(a) to be furnished with any information to which this section applies;

(b)to have the contents of so much of the records maintained by the Authority as contains any information to which this section applies made available to him, at such office of the Authority as it may determine, for inspection at such times as may be reasonable; and

(c) to make or be supplied with copies of, or of extracts from, so much of the records maintained by the Authority as contains any information to which this section applies.

(3)Subject to subsection (5) below, nothing in this section shall require or authorise the disclosure by the Authority of any information which—

(a) relates to the affairs of an individual or specifically to the affairs of any body of persons (whether corporate or unincorporate), including the Authority itself, and

(b) is not contained in a register maintained under section 35 or 56 above,

if the disclosure of that information would or might, in the opinion of the Authority, seriously and prejudicially affect the interests of that individual or, as the case may be, of that body.

(4)…

(5)The information that is to be excluded by virtue of subsections (3) and (4) above from the information which is to be made available to any person in pursuance of arrangements under this section shall not include any information of a description that appears to the Authority to comprise information relating to matters which are or may be relevant to the safety of members of the public or of any particular individual or individuals other than the person whose consent is required for its disclosure.

(6)For the purposes of this section it shall be the duty of the Authority to maintain such records as it considers appropriate of any information which comes into its possession and is information to which this section applies.

…

(8)In this section "records" includes registers, maps, plans and accounts, as well as computer records and other records kept otherwise than in documentary form"

10. CIA section 59 is also relevant. The relevant parts of it read:

"59 Information to be kept confidential by the Authority.

(1)Subject to the following provisions of this section, it shall be the duty of the Authority to establish and maintain such arrangements as it considers best calculated to secure that information which—

(a) is in the Authority's possession in consequence of … the carrying out of any of its functions …, and

(b) relates to the affairs of any individual …,

is not, during the lifetime of that individual … disclosed to any person without the consent of that individual ….

(2)Nothing in subsection (1) above shall authorise or require the making of arrangements which prevent the disclosure of information—

(a) for the purpose of facilitating the carrying out by the Secretary of State, the Treasury or the Authority of any of his, their or, as the case may be, its functions under this Act;

(b) in pursuance of arrangements made under section 57 above;

(c) for the purpose of facilitating the carrying out by any relevant authority of any of the functions in relation to which it is such an authority;

…"

Freedom of Information Regime

11. The relevant part of EIR regulation 5(1) reads:

> *"… a public authority that holds environmental information shall make it available on request."*

12. The relevant part of EIR regulation 13 reads:

> *(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.*
>
> *(2) The first condition is—*
>
> *(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—*
>
> *(i) any of the data protection principles; or*
>
> *(ii)section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and*
>
> *(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*
>
> *(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.*

13. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

> *"'personal data' means data which relate to a living individual who can be identified-*
> *(a) from those data, or*

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller"

14. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

"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 …"

Schedule 2 then sets out a number of conditions. They include:

"1. The data subject has given his consent to the processing.

…

6. The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

The term "processing" has a wide meaning (DPA section 1(1)) and includes disclosure.

<u>The arguments presented by the parties and our conclusions on each</u>

First Ground of Appeal – neither property address nor property postcode constitute personal data.

15. Although it is logical to take this ground of appeal first it was not raised by the Appellant until he filed his Reply. Up to that stage he had not challenged the Information Commissioner's decision that both property address and property postcode constituted personal data because they both constituted biographically significant information that related to living individuals who could be identified from them. However, the Reply included arguments to the effect that:

a. the withheld information was not biographical, in that it referred to a claim and/or damage affecting particular properties and the individual who made the claim was not the focus of the information;

b. it was not inevitable that the relevant individual could be identified from the withheld information given that, even if that information was used to conduct a Land Registry search, it was quite likely that the original claimant for compensation would have subsequently sold the property to a third party;

c. it was inherently unlikely that anyone would go to the expense and trouble of carrying out a Land Registry search against the property address when a Con29M enquiry form could be used to obtain full details of the compensation claim..

16. We reject the Appellant's arguments. Complying with the relevant part of the information request would have disclosed personal data regarding each person who had made a claim for compensation in the specified period of time. The fact that, in respect of some properties, the information may have become inaccurate by the time the search was made does not alter the nature of the information, viewed overall. Similarly, the fact that an individual searcher might have different avenues of enquiry open to him or her does not prevent either an address or a postcode from being regarded as personal data.

Second Ground of Appeal –CIA section 57 created a public record which may be accessed regardless of any resulting impact on any individual's rights under DPA.

17. The Appellant argued that section 57 imposed on the Authority a duty to maintain records and that this, and the availability of information in a CON29M report, had the effect of limiting the application of the DPA. Effectively, the Appellant's case was that the fact that the withheld information had been accessible, in response to a conveyancing enquiry identifying a specific property, made all relevant records part of a public register, to which the public had a right of access. This he argued had the effect of removing the protection of any personal data for all purposes, particularly because the CIA had been enacted some years before a freedom of information regime had been introduced into English law.

18. In fact, as the Information Commissioner argued, the obligation on the Authority to make subsidence claim information available to the public is by no means as extensive as the Appellant argued. It is subject to a number of qualifications. First, it only arises when a person tenders the relevant fee and complies with any other conditions the Authority considers appropriate (section 57(2)). It is not therefore required to be made generally available for public inspection. Secondly, the information disclosed should not include any that relates to the affairs of an individual if its disclosure would, in the Authority's opinion, "*seriously and prejudicially affect the interests of that individual" (sub-section (3)(a))*[1] although the individual's right to privacy may be overridden if the requested information affects public safety (sub-section (5)). Thirdly, the access arrangements provided for by section

[1] Section 35 requires the Authority to maintain a register of mining licences and certain transactions and events relating to such licences. Section 56 requires the Authority to maintain a register of certain information about the withdrawal of support and actions taken in respect of such withdrawals. Neither of those provisions apply to subsidence claim information and accordingly the qualification in sub-section (3)(b) does not apply.

57 require to be construed restrictively as they constitute an exception to the general obligation, under section 59, to maintain confidentiality.

19. Section 57 of the CIA therefore created a balanced protection for information affecting individuals which, while expressed in different language, is largely consistent with the protection created by EIR regulation 13(1). In both cases the privacy rights of the individual are to be protected unless there is a public interest in disclosure (general under EIR but safety-specific under section 57) which overrides them. We therefore agree with the Information Commissioner's submission that the Authority's duty under CIA section 57 cannot be read as in any way abridging the rights of data subjects under the DPA, as it is applied in the context of a request for information under the EIR.

20. The Appellant also ran an argument that CIA s57(8) brought the Authority's records within the scope of the Public Records Act 1958. The language of the sub-section does not have that effect and, even if it did, the right to access would be no greater as the 1958 Act contained a much more restrictive access regime which has now been superseded by FOIA.

Third Ground of Appeal – individuals could have had no reasonable expectation of privacy so that disclosure to the Appellant would not breach data protection principles

21. The Appellant pointed to a number of circumstances which he said would have made it clear to property owners that subsidence claim information would be made available on a public register. First, he pointed out that the Authority's own privacy statement included a warning that personal information might be released upon request. However, it seems to us that this amounted to no more than a reminder that the Authority, as a public authority for the purposes of freedom of information legislation, might be required to disclose information if the circumstances are found to justify it. It is entirely consistent with the point, made by the Information Commissioner in his Decision Notice, that any individual making a subsidence claim must be treated as having consented to details of the claim (including his or her own personal data) being available to those making a CON29M enquiry in respect of the relevant property.

22. The Appellant's second point was that a CON29M report may result in the disclosure of other information about the same property, as well as subsidence claim information about the area around the particular property to which the enquiry was directed. It may also disclose a claim that had not succeeded. The Information Commissioner again relied upon the consent to limited disclosure that an individual making a subsidence claim must be deemed to have given, and argued that it did not follow that consent extended to the release of personal data in the manner envisaged by the Appellant. We have concluded that the Information Commissioner is correct in respect of the particular property being searched against. The other category of information

referred to by the Appellant does not appear to us to fall within the meaning of personal data and, accordingly, nothing turns on the point which the Appellant has made.

23. The Appellant also argued, as his third point, that the individual who made a subsidence claim may have sold the relevant property to a third party by the time a CON29M enquiry was lodged in respect of it. The new owner could not be said to have consented to any disclosure. The argument does not help the Appellant and is in fact inconsistent with the case he seeks to make. The Information Commissioner did not expressly address the point in his submissions but it seems clear to us that a purchaser who has made his own pre-contract enquiries will be aware of the extent to which information about the claim will be available to those making a CON29M enquiry in the future. Such a person would, however, be entitled to assume that the information would not be made more widely available.

24. In his Reply the Appellant raised new arguments in support of this point. He argued, as his fourth point, that the very existence of CIA section 57, even if it did not override the freedom of information regime, had the effect of further undermining any expectation of privacy. The answer to that is that no such conclusion could reasonably be reached by anyone correctly interpreting the scope and meaning of the statutory language of the CIA.

25. The Appellant's fifth point was that what he described as the "*common practice across other public authorities with similar functions as regards property related information*". He argued that this would undermine any reasonable expectation of privacy in the circumstances of this case. However, he provided scant evidence in support of his argument and certainly nothing that persuades us that the relevant individuals would have been likely to even know about other areas of law and practice, let alone allow it to affect their expectations of the degree of privacy likely to be applied to subsidence claim information.

26. The Appellant's sixth, and final, point was that the Authority already makes a great deal of location specific information available to the public. He said that this occurred as a result of:

    a. The publication on the Authority's website of interactive maps (http://mapapps2.bgs.ac.uk/coalauthority/home.html) from which address details and the identity of property owners could be identified.
    b. The fact that a CON29M report may be obtained, in respect of a specific property, whether or not the enquiry was made by or on behalf of a potential purchaser of that property.
    c. The Authority routinely publishes parts of the withheld information in response to enquiries made in respect of areas of land extending beyond a single property.

d. Commercial organisations may access the withheld information through a commercial service operated by an independent operator (David Bellis Consultancy Surveyors) through its website at http://www.coalsearch.plus.com .

27. Because these points were raised at a late stage and had only been referred to the Authority by the Information Commissioner, for the first time, at the time when the appeal bundle was being prepared, we did not feel we could decide the issues at our first determination meeting. Accordingly, we adjourned and invited the Information Commissioner to obtain further information from the Authority in response to a number of questions we posed. The responses provided by the Authority were subsequently passed to the Appellant, who added his own comments. The Information Commissioner also raised a number of questions with the Authority seeking further clarification of the answers given to our questions. In the following paragraphs we deal with each of the points raised, in light of the additional information and comments we received.

28. Interactive map. We found from our own searches on the map that it was not possible to "zoom in" further than to a scale of 1:25,000. The Authority confirmed that this was the most detail available, that it did not enable individual properties to be identified and that no other mapping service was provided that would enable this to be done. It also pointed out that although certain categories of information could be obtained by selecting particular data layers to view, the layers did not include one covering subsidence claims. The Appellant commented that, while what the Authority had said was true, it would still be possible to use the Authority's mapping service as the first step towards identifying individual properties. However, the complexity and sophistication of the sequence of searches required to do this seemed to us to extend beyond what a lay person might be expected to perform in order, by linking the requested information to other information publicly available, to identify a relevant individual. We conclude, therefore, that personal data could not be accessed from interrogating the map. The fact that this might have been possible had the data layers been structured differently does not alter that decision because it is not relevant to our determination to know what information might (or even should) have been available. The reasonable expectations of relevant individuals would be based on what information was actually in the public domain already, not what might have been if the Authority had organised its data differently.

29. General availability of CON29M reports. The Information Commissioner did not respond to this point specifically, but we think it is clear that, although a property owner would be aware that a CON29M report might be obtained by a third party having no interest in any conveyancing transaction, he or she would be aware of the restricted nature of the resulting disclosure and would still be entitled

to assume that personal data in respect of past subsidence claims would not be made generally available to the public.

30. Multi-residential and wide-area CON29M reports. The questions we asked the Information Commissioner to put to the Authority included a request to see the result of the searches which the Authority had indicated could be carried out, in return for an additional fee, covering a wider area than a single property. It is understandable that this should be the case because, for example, a developer would have a legitimate interest in knowing what subsidence claims had been made in an area which was under consideration for development. The pricing information for reports indicated that an area of up to 150 hectares could be searched (for a fee of £650). We asked to be provided with such a report. Unhelpfully, (given that the clear purpose of the request was to assist us in considering the general availability of subsidence claim information) the Authority provided us with a search centred on an area that was not within a coalfield area. Not surprisingly, therefore, it disclosed no subsidence claim information. However, the Appellant ordered his own search from the Authority for an "on coalfield" area. He explained that, owing to financial constraints, the area covered was less than 120 hectares but it nevertheless contained a considerable amount of information about subsidence claims made in respect of 21 properties identified by both address and postcode and included, in some cases, the amount of compensation which had been paid. Reference was also made to a further 20 properties affected by claims within 50 metres of the boundary of the area searched. The location of each property was shown on an accompanying map in sufficient detail for address details to be obtained from either the map itself or a larger scale map covering the same area. The fact that this quantity of information was freely available to anyone lodging a search form with the Authority and paying the requisite fee has a very significant impact on the extent of disclosure which a property owner may reasonably expect. It seems to us that his or her expectations would still not extend to the address of the individual property in respect of which a subsidence claim had been made but that he or she must countenance a degree of disclosure in respect of the immediate neighbourhood, which may enable the property to be identified.

31. Coalsearch.plus commercial service. The Appellant stated that an organisation called David Bellis Consulting Surveyors Ltd ("Bellis") was able to offer a commercial information service as the result of arrangements between it and the Authority, under which it gained wider access to subsidence claim information, including personal data, than would normally be available in a CON29M report. We found the information provided by the Authority on this issue confusing and unhelpful but, for the purpose of this decision, accept its assurance that Bellis did not have access to information beyond that available to anyone who either applied for a report in CON29M form or visited the Mine Heritage Centre at the Authorities headquarters in Mansfield,

Nottinghamshire. Accordingly, this issue has not influenced our decision.

32. As we have indicated, we do not accept most of the Appellant's arguments supporting his claim that property owners would not retain a reasonable expectation that their personal data in relation to subsidence claims would be withheld from the Authority's publicly searchable records. However, such owners would be aware that the information is highly relevant to property purchasers and would expect any potential purchaser in a coal mining area to commission a property-specific search. The level of expectation will be affected by that knowledge, but also the fact (see under paragraph 30 above), that data relating to subsidence claim may be accessed more widely by lodging a CON29M form identifying a wide search area. This leads us to conclude that a property owner would have a reasonable expectation of more extensive disclosure of such data than the Authority has suggested.

Fourth Ground of Appeal – public interest in disclosure should override the privacy rights of individuals

33. The Appellant challenged the Information Commissioner's conclusion in the Decision Notice that there was no compelling public interest in disclosing the withheld information to set against the protection of individual privacy. First, he pointed to the expenditure of money from the public purse and argued that there was a public interest in the public being able to identify the location of coal mining related subsidence, at least down to postcode level of detail, not least because this might help to identify the likely location of future subsidence. Secondly, disclosure would inform public debate on future underground activities, such as fracking. The Appellant also made the point, in responding to the additional information we sought from the Authority in respect of the Third Ground of Appeal, that the Authority was motivated, not by any wish to protect personal data, but its own interest in preserving the revenue stream derived from providing CON29M reports, which would be reduced if the data it held became freely available.

34. The Information Commissioner's response to these arguments was simply that he agreed that each of those considerations favoured the disclosure of the withheld information, but did not accept that they were capable of outweighing, either separately or collectively, the considerable weight to be accorded to the rights of data subjects to protect both their address and postcode data. We agree with that conclusion as it affects property addresses. However, we consider that, while the property postcode may be capable of constituting personal data, the reasonable expectations of relevant property owners would not extend, in the circumstances that exist in the property conveyancing field, to its absolute protection. We believe that an owner would reasonably expect that this level of detailed

information would be generally available to the public, even though it might be possible to identify individual properties (and, hence, property owners) from it. Against that, reduced, level of expected protection we set the public interest factors identified above. In particular, we consider that disclosure of subsidence claims at postcode level provides the public with a valuable impression of the degree of risk existing in a particular area and the likelihood of future subsidence damage being incurred by properties located there.

Conclusion

35. In light of the conclusions we have reached, we have decided that the Information Commissioner was right to require information about individual properties affected by subsidence claims to be withheld but that the balance between privacy rights and public awareness tips in favour of disclosure when considering property postcodes. Property address details may therefore be redacted before disclosure but property postcode data should be disclosed when the Authority complies with the Information Commissioner's direction to that effect. The disclosure should be made within 35 days of the date of our decision.

36. Our decision is unanimous

……..

Judge
2016