

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 18 June 2012

Public Authority: Environment Agency
Address: Millbank Tower
25th Floor
21/24 Millbank
London
SW1P 4XL

Decision (including any steps ordered)

1. The complainant requested information from the Environment Agency (the Agency) about the prosecution of an individual who was found guilty of causing a pollution incident which resulted in the deaths of hundreds of fish at a nearby fishery.
2. The Commissioner's decision is that the Agency has correctly applied regulations 12(3) and 13(1) of the EIR. He does however find that the Agency failed to comply with regulation 14 of the EIR. The complainant also asked the Commissioner to consider whether the Agency breached regulations 6(1)(a), 9(1) and 12(11) of the EIR. The Commissioner has not upheld these aspects of the complaint.
3. The Commissioner does not require the Agency to take any steps.

Request and response

4. On 4 April 2011, the complainant wrote to the Agency and requested the prosecution case file held on an individual in relation to a pollution incident that resulted in the death of hundreds of fish. The request referred back to earlier correspondence the complainant had had with the Agency of 25 November 2010, which the complainant regarded as being a request under the EIR. The text of the request of 4 April 2011 and the previous correspondence of 25 November are attached in the annex to this decision notice.

5. The Agency responded on 19 April 2011. It provided some of the information requested outside of the EIR.
6. However, it refused to disclose a copy of a cautioned interview transcript because of its reliance on the exception contained within regulation 12(5)(b) EIR (ability to conduct an inquiry). The Agency explained that the transcript was being withheld because it considered that to release it would adversely affect the Agency's ability to conduct criminal investigations and prosecutions. The Agency carried out a public interest test and concluded that the public interest in maintaining the exception outweighed that in disclosing the information.
7. Following an internal review on 20 June 2011, the Agency accepted that it was not clear in its response of 19 April 2011 that it was withholding information that was personal information, disclosure of which would contravene the first data protection principle in Schedule 1 of the Data Protection Act 1998 (the DPA). It explained that this information was therefore being withheld under regulations 12(3) and 13(1) of the EIR (third party personal data). The Agency did however disclose some information to the complainant which it considered not to be personal information.
8. It also explained that the complainant's letter to the Agency of 25 November 2010 asked for the information to be provided *'once the matter is concluded (whether by prosecution or a decision not to prosecute).'* The Agency stated that the EIR does not allow for requests to be made in advance. However, it had put the letter on file with the intention to respond to it once the case was concluded. It stated that, when the request was made on 4 April 2011 with no reference to the conclusion of the case, the Agency treated that as a request for information from the date of receipt as the case had been concluded.
9. On 4 August 2011 the Agency wrote to the complainant and upheld its reliance on regulations 12(3), 13(1) and 12(5)(b) to withhold information. It informed the complainant that its view was a prosecution file contained sensitive personal data. It stated that this view was supported by the Information Commissioner's decisions with the reference numbers FS50352663 and FS50361398. The Agency finally confirmed that the transcript was put in front of the court in the criminal proceedings. The Agency informed the complainant that it had passed the matter to its 'specialist information law team' to provide a further review.
10. In that further review on 24 August 2011 the Agency again upheld its previous position.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he complained that the Agency had not complied with regulations 6(1)(a) (making information available in another format), 9(1) (advice and assistance) and 12(11)(separation of information) of the EIR. He also maintained that the Agency had incorrectly applied regulations 12(3), 13(1) and 12(5)(b) of the EIR to his request for information.
12. The complainant confirmed to the Commissioner that his complaint was focused on the information that had not been disclosed to him. The Commissioner's investigation has therefore focused on that information which has been withheld from the complainant.

Reasons for decision

13. The Agency has relied upon regulations 12(3) and 13(1) of the EIR with regard to all of the withheld information and regulations 12(4)(e), 12(5)(b) and 12(5)(f) of the EIR to parts of the withheld information. The Commissioner has therefore firstly examined whether regulations 12(3) and 13(1) of the EIR were correctly applied to the request.
14. Regulation 12(3) of the EIR states that to the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13 of the EIR.
15. Regulation 13(1) of the EIR provides an exception for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in regulation 13(2) or regulation 13(3) of the EIR is satisfied.
16. One of the conditions, listed in regulation 13(2)(a)(i) of the EIR, is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
17. In this case the Agency has stated that it is relying upon regulations 12(3) and 13(1) of the EIR on the basis that the disclosure of this information would breach the first principle of the DPA as release to the world at large would not constitute fair processing. The Commissioner therefore considers that the Agency is relying upon the condition listed in regulation 13(2)(a)(i) of the EIR to withhold the information.

Personal data

18. Personal data is defined in section 1(1) of the DPA as:

“data which relate 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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

19. The Commissioner's approach to personal data and the EIR is similar to his approach under the FOIA.

20. His guidance on the exemption for personal data¹ contained within the FOIA expands on what constitutes personal data:

“The two main elements of personal data are that information must ‘relate to’ a living person, and that person must be identifiable. Information will ‘relate to’ a person if it is:

- *about them;*
- *is linked to them;*
- *has some biographical significance for them;*
- *is used to inform decisions affecting them;*
- *has them as its main focus; or*
- *impacts on them in any way.”*

21. The Commissioner considers that a file relating to an individual may contain information which is not that person's personal data, as he has detailed in his guidance on access to information held in complaints files.² For instance where a generic policy is held within that file it may not be personal data even where that was used to make decisions about an individual.

¹http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx

²http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Practical_application/access_to_information_held_in_complaint_files.ashx

22. The Commissioner has therefore closely examined the withheld information to decide whether it is indeed all personal data as the Agency has stated.

Does the information relate to a living person?

23. The Commissioner has determined that all of the information relates to the prosecuted individual in that it is either about him, is linked to him, has some biographical significance for him, was used to inform decisions affecting him, has him as its main focus or impacts on him in some way. He has made this decision based on a consideration of whether and to what extent each piece of information meets any of the above criteria.

Does the information identify a living individual?

24. The request was made on 4 April 2011. On the same date an article appeared in the press via the internet, which reported on the data subject's conviction. That article stated the data subject's name and other information relating to the court hearing. The Commissioner considers the information in the article to have been in the public domain at the time of the request and the response from the Agency.
25. The Commissioner is of the view that, whilst the request did not name the individual prosecuted, the wording of the request, when linked with the information in the article, would lead to the identification of the individual prosecuted.
26. Where the withheld information does not itself specify the name of the individual or does not of itself obviously identify the individual, the Commissioner has considered whether that information would otherwise identify the living individual to which it relates when combined with information in the public domain.
27. He has determined that, in such instances within the withheld information, it would not be possible to provide it in response to the request without identifying the individual to whom it relates due to the nature of the information, the wording of the request and the information available in the public domain.

Sensitive personal data

28. The Commissioner has gone on to consider whether any of the information is sensitive personal data. Section 2 of the DPA defines sensitive personal data as personal data as to, amongst other things:

'(g) the commission or alleged commission by an individual of any offence; or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.'

29. In this instance the individual was investigated, prosecuted, found guilty in court and sentenced in relation to a pollution incident. As explained, the Commissioner has examined all of the withheld information. He has determined that it contains information as to the offences committed. It also contains information as to the Agency's proceedings and disposal of those proceedings in its prosecution of that offence. The Commissioner categorises these proceedings as the formal investigation, the decision to exercise powers and the prosecution process that resulted.
30. Further, the Commissioner considers that the information contains personal data as to the court proceedings that resulted from and ran parallel to the Agency proceedings in respect of the offences. Finally, the court sentence is included in the withheld information.
31. The Commissioner is of the view that all of the withheld information falls under either sections 2(g) or 2(h) of the DPA and is therefore not only personal data but sensitive personal data.

The first data protection principle and fairness

32. The first principle of the DPA states that personal data shall be processed fairly and lawfully and shall not be processed unless:
 - at least one of the conditions in Schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.
33. In considering whether disclosure of the information would be fair to the individual the Commissioner has taken the following factors into account:
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned (ie the consequences of disclosure);
 - the individual's reasonable expectations as to what would happen to their information; and
 - whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subject.

34. In the above reasoning, the Commissioner has explained that he considers the withheld information to constitute sensitive personal data in its entirety. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Due to the sensitivity of this information the Commissioner considers that it is generally unlikely that disclosure of such information would be fair.
35. However, in this case the Commissioner is of the view that it would be fair to disclose a small part of the information whereas it would be unfair to disclose the remainder. His reasons for coming to this decision are set out below.

Fair disclosure

36. The Commissioner has already referenced the existence of an article that was in the public domain at the time of the request and which details information in respect of the prosecution of the individual concerned. The data subject was reported in that article as having provided brief comments to the press. Where information contained in that article was also within the withheld information, the Commissioner considers, in this case, it to be fair for such information to be disclosed. This information consists of that which confirms the name, offences, sentences and total costs imposed in the court case.
37. In coming to this decision the Commissioner has taken into consideration the fact that the request was made on the same date as the article was published: a matter of days after the court hearing. He does not therefore consider that disclosure of that information would have caused any unnecessary or unjustified damage or distress to the individual concerned.
38. He also considers it would have been within the individual's reasonable expectations for that information to be disclosed. Again, the Commissioner has borne in mind the closeness in time of the request, the court hearing and the article. He is of the view that an individual should expect some information about a criminal prosecution to be disclosed to the public, where the time elapsed is very short. The Commissioner has not been made aware of any specific factors that would lead to particular detriment for the data subject.
39. The Commissioner has also considered the public's legitimate interests in having confirmation that an individual has been prosecuted for what was a serious pollution incident. He is of the view that the public has a legitimate interest in knowing that an individual has been brought to account for such an environmental offence. Indeed he is also of the view that it is in the public's interest to know the name of that individual and

to know the sentence imposed. He is of the view that this serves the interests of justice and the need for justice to be seen to be done.

40. However, the Commissioner considers that the public's legitimate interests have already been met by the article putting that information into the public domain and so he has given little weight to this factor in his decision as to whether disclosure of information would be fair.

Unfair disclosure

41. With regard to the rest of the withheld information, the Commissioner considers that its release would not be fair. He is of the view that it would not be within the data subject's reasonable expectations for such information to be disclosed.
42. In this regard the Commissioner has considered that an individual may expect to have the limited amount of information set out above disclosed but that there would not be any expectation that the specifics of an investigation or court hearing, such as those which occurred in this case, would be made publicly available.
43. The Commissioner takes the view that disclosure of information to a court is likely to be to a limited audience and that even if such information has entered the public domain its lifetime will be short. In this case the Commissioner has considered what information was in the public domain about the prosecution and court hearing through media reports and the internet at the time of the request.
44. The Commissioner considers that the amount of such information is limited. He therefore concludes that any detailed information which may have entered the public domain through the court proceedings did not remain so at the time of the request.
45. The Commissioner is of the view that whilst there are legitimate interests in transparency and accountability with regard to investigation and court proceedings, such interests have been met in this case by the normal workings of the justice system.
46. The complainant has argued that his interests as a legal advisor and those of his client should be taken into consideration. However, the Commissioner would draw a distinction between private and public interests. Whilst the interests of those who use the polluted fishery may be engaged, the Commissioner would suggest that this would represent a relatively small number of individuals compared with the public at large.

47. For this class of information the Commissioner does not need to consider the matter further, as he considers that to disclose it would be unfair to the data subject and so a breach of the first data protection principle.

Schedule 3 of the DPA

48. As the Commissioner has considered that all of the withheld information is sensitive personal data, he will now consider whether a schedule 3 DPA condition may be met, in order to justify the disclosure of the information which he has deemed to be fair to release.
49. The complainant has argued to the Commissioner that the disclosure of information meets the sixth condition in schedule 3 of the DPA (necessary for legal proceedings; obtaining legal advice; establishing, exercising or defending legal rights). He has argued that the disclosure of information is necessary in order for him to advise his client and in order for his client to exercise legal rights in the context of a future civil case against the data subject.
50. However, the Commissioner would again highlight that disclosure under the EIR is to the world at large and not just to the party making the request. He notes that whilst the legal action envisaged may be one taken on behalf of those using the fishery, that interest, although encompassing perhaps a number of members, is a private not a public one.
51. Further, the Commissioner does not consider that the complainant has demonstrated how obtaining the withheld information would be necessary for the purposes he has claimed rather than merely being desirable.
52. In the Commissioner's view, the only schedule 3 condition that may be engaged is the fifth (information contained in the personal data has been made public as a result of steps deliberately taken by the data subject).
53. Whilst the Commissioner has noted that the data subject is reported as having made brief comments to the press, he does not consider that those comments constituted 'steps deliberately taken' to put the information contained within the withheld information into the public domain. He also does not consider that evidence provided in court in order to mount a defence or mitigation may be said to meet this condition.
54. Therefore no schedule 3 condition is met and so the withheld information may not be disclosed without breaching the first data protection principle. Consequently the Commissioner does not need to go on to consider whether any schedule 2 condition is also met.

55. As all of the information may be withheld under regulations 12(3) and 13(1), the Commissioner has not gone on to consider whether regulations 12(4)(e), 12(5)(b) and 12(5)(f) also apply to the withheld information.

Regulation 6(1)(a) of the EIR

56. The complainant has argued to the Commissioner that the Agency failed to comply with regulation 6(1)(a) of the EIR as it could have provided a schedule or digest of the information requested.
57. Regulation 6(1)(a) of the EIR operates in a similar, but not identical manner to section 11 of the FOIA. It requires a public authority to provide information in a particular form or format if requested to do so, unless it is reasonable for it to provide it in another form or format.
58. The Commissioner notes that the complainant did not ask for a schedule or summary of the information to be provided and so he does not find that the Agency breached regulation 6(1)(a) of the EIR.

Regulation 9(1) of the EIR

59. The complainant has argued to the Commissioner that the Agency breached regulation 9(1) of the EIR. Whilst the Agency was required to provide advice and assistance so far as it was practicable to do so, the Commissioner does not consider that such advice and assistance was required in this case as it was clear what had been asked for in the request and because no further information can be provided without breaching the DPA.

Regulation 12(11) of the EIR

60. The complainant has argued to the Commissioner that the Agency breached regulation 12(11) of the EIR. The Commissioner considers that due to the factors he has discussed above, the information requested is not reasonably capable of being separated from other information as there is no other information to separate it from, the complainant having requested the full prosecution file.

Regulation 14 of the EIR

61. The Commissioner finds that the Agency failed to comply with regulation 14 of the EIR in that it failed to fully inform the complainant within 20 working days of the exceptions within the EIR upon which it was relying to withhold information.

Right of appeal

62. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

63. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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