

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

Decision notice

Date: 30 April 2019

Public Authority: Environment Agency
Address: Horizon House
Deanery Road
Bristol
BS1 5AH

Decision (including any steps ordered)

1. The complainant has requested information associated with particular Environment Agency (EA) staff who responded to an issue at Clayton Hall Landfill Site in 2018. EA withheld the specific information requested under regulation 13(1) of the EIR as it considers it to be the personal data of third persons.
2. The Commissioner's decision is as follows:
 - EA is entitled to withhold the disputed information under regulation 13(1), by way of regulation 13(2A)(a).
3. The Commissioner does not require EA to take any remedial steps.

Request and response

4. On 17 July 2018 the complainant wrote to EA and requested information in the following terms:

"Please could you provide the following information for the ongoing issue relating to the landfill at:

*Quercia Ltd
Clayton Hall Sand Quarry
Dawson Lane
Whittle-le-Woods
Lancashire
PR6 7DT*

1. The total amount paid by the Environment Agency in overtime payments for staff responding to issues connected to this site between 1st October 2017 and 1st May 2018;

2. The total amount of overtime pay received for responding to issues connected to this site between 1st October 2017 and 1st May 2018 for each of the five members of staff in the Cumbria & Lancashire Area who received the most in overtime pay;

(iv) The total hours worked, both overtime and substantive, for the five members of staff listed above between 1st October 2017 and 1st May 2018.

I would like to reference Freedom of Information request 661-12 that was submitted to the British Transport Police and answered in full."

5. The EA responded on 5 September 2018. (In its submission EA says it responded on 7 August 2018 but from the information provided to the Commissioner the response was provided on 5 September 2018). It handled the request under the EIR. It refused to disclose a breakdown for the top five members of staff for overtime payments and hours worked as it said this was excepted information under regulation 13(1) of the EIR.
6. EA noted that it had provided a figure for the total hours of overtime worked in response to an earlier request. It now released a revised figure that included overtime and substantive hours. EA then released information on the total amount that it paid in overtime to staff responding to the issue connected to the site in question. It also released a figure for the total payments five members of staff received; the five staff members who were involved in the EA's response and who received the most in overtime pay.
7. The complainant requested an internal review on 7 September 2018. He said he had not requested the names of the top five members of staff, only the value of the payments made to each of them. He added that if EA could not provide the hours worked it could still provide the value of payments made.

8. EA provided an internal review on 17 October 2018. (In its submission EA says it provided a review on 7 October 2018 but from the information provided to the Commissioner the response was provided on 17 October 2018). It maintained its position that a breakdown of five individuals' substantive and overtime hours and payments, with regard to the site in question over the relevant time period, is exempted from release under regulation 13(1) as it is the personal data of third persons.

Scope of the case

9. The complainant contacted the Commissioner on 19 October 2018 to complain about the way his request for information had been handled. The complaint centres on EA withholding a breakdown of the overtime payments received, and hours worked, for the five members of EA staff who received the most overtime payment as a result of responding to the issue at Clayton Hall Landfill Site.
10. The complainant has also referred to the fact that the British Transport Police had released information he had requested from it; the suggestion being that EA should therefore release the information in this case. That point is dealt with under 'Other Matters'.
11. The Commissioner's investigation has first considered whether the requested information can be categorised as environmental information which should be handled under the EIR, or whether the FOIA would have been the appropriate access regime. The Commissioner has then considered whether the information associated with the five individuals in question is the personal data that can be withheld under regulation 13(1) of the EIR, or section 40(2) of the FOIA (the EIR equivalent).

Reasons for decision

Is the requested information environmental information?

12. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
13. Regulation 2(1)(a) defines environmental information as information that concerns the state of the elements of the environment, including: air and atmosphere, soil, landscape and natural sites and biological diversity. Regulation 2(1)(c) defines environmental information as information that concerns measures (including administrative measures) such as policies, legislation, plans, programmes and activities affecting

or likely to affect the elements referred to in (a) as well as measures or activities designed to protect those elements.

14. The background to the request concerns odours from Clayton Hall Landfill Site; EA was part of a multi-agency group set up to respond to those odours.
15. In its submission to the Commissioner, EA has confirmed that it considers that it was correct to deal with the request under the EIR because the matter of overtime hours and payments to employees who responded to the incident at Clayton Hall is closely related to the protection of the environment.
16. EA has told the Commissioner that regulating landfill is part of its remit to protect the environment, and to have regard to the health and safety of the public. It has noted the Commissioner's guidance which states that "*regulation 2(1)(e) ensures that the definition extends to information about the financial implications of environmental measures and activities*". EA considers that, in this case, this relates to how much it cost in overtime to provide a level of protection from environmental harm. It says that spending money on overtime to further this work also illustrates a cost/benefit approach to the protective actions; actions that are directly linked to the health and safety of the public and 'conditions of human life'. EA therefore considers that regulation 2(1)(f) is also engaged. Regulation 2(1)(f) defines environmental information as information on the state of human health and safety as they are or may be affected by the state of the elements referred to in regulation 2(1)(a) or by any of the matters referred to in (b) and (c).
17. The Commissioner has considered EA's position. Given the wider circumstances of the request she is persuaded that, in this case, the requested information can be categorised as environmental information and that EA was correct to handle the request under the EIR. She has gone on to consider whether EA can rely on regulation 13(1) to refuse to disclose particular information.

Regulation 13 – personal data

18. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.

19. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
20. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
21. Second, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosing that data would breach any of the DP principles.

Is the withheld information personal data?

22. Section 3(2) of the DPA defines personal data as: '*any information relating to an identified or identifiable living individual*'.
23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
25. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. The information in this case is the total value of overtime payments five EA staff members each received as a result of responding to the Clayton Hall Landfill Site issue during a particular period; and the total number of overtime hours each of the five members of staff worked.
27. In its initial submission, EA confirmed that it considers the information to be the personal data of five members of EA staff. EA said it considers the information relates to these five staff members as it concerns overtime hours and overtime payments made to these staff members. It went on to say that although the request did not ask for the names of

¹ As amended by Schedule 19 Paragraph 307(2) DPA.

the five employees, due to the small number of individuals involved, and the specificity of the request, it believes that individuals could be identified from the information, by the mosaic effect.

28. The term 'mosaic effect' is often used to refer to the argument that whilst it may not be prejudicial to disclose requested information in isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester, or indeed to others.
29. By way of examples in this case, EA said that if any of the employees worked part-time hours, or there was existing knowledge of the number of overtime hours one employee had submitted, this could lead to it being identified which individual received which payment. It said that individuals could also be identified by reverse calculating the overtime hours worked with the overtime paid, to work out the pay grade of employees, which again could identify them.
30. The Commissioner went back to EA to ask it to explain in more detail how any specific person could be identified from the withheld information; that is the process of re-identification. EA provided the Commissioner with additional information. This concerned the number of staff who worked on the Clayton Hall matter, the teams in which the five individuals concerned work, the overall number of staff in these teams and the grades of the individuals concerned. EA again argued that if the specific information requested was to be put in the public domain, the five employees with the largest overtime claims could be identified due to the small number of operational staff who worked on the matter. But in addition, it argued that it would not be difficult to extrapolate the grade/salary band of the five individuals by comparing the number of overtime hours worked with the amount of overtime paid. Once the grade has been calculated, EA says a simple phone call could elicit the identity of an employee. For example the caller could ask to speak to an individual with a job role at the calculated grade and who worked overtime at Clayton Hall, and the caller would be put through to that individual.
31. In its submissions EA has also indicated that it has reason to believe that the complainant may well have access to wider information about EA and payments made to its staff. It appears to EA that he has quite detailed knowledge about the regulation of the site and the specific dates between which overtime was worked and overtime payments were made.
32. But even if the complainant himself does not have access to related information, if it were to be disclosed to the public the information would be available to all EA staff. In the Commissioner's view at least some of

these individuals would be likely to know information about other EA staff, the Clayton Hall Landfill Site issue and EA's response to it – including the staffing response.

33. The Commissioner is satisfied that the disputed information relates to the five individuals because it concerns overtime they worked and payments they received. Second, the Commissioner is persuaded by the reasons the EA has given and because of the low number involved, that at least some of the five individuals could be identified from the information by someone – for example, someone from within EA – who was motivated to do so. The Commissioner therefore finds that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.
34. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The Commissioner considers that the most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. Article 5(1)(a) of the GDPR states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*".
36. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
37. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
38. EA considers that the lawful basis most applicable is basis 6(1)(f) which states:

"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

39. In considering the application of Article 6(1)(f) in the context of a request for information under EIR it is necessary to consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject (that is, the five staff members in this case).
40. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

41. In considering any legitimate interest(s) in disclosing the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
42. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
43. The personal data being considered in this case is that of EA employees who worked overtime responding to an issue at a particular landfill site. In correspondence to the Commissioner the complainant has claimed that EA is deliberately sending out false information and withholding information to cover up poor practice. He considers EA is sending out false information because he spoke to several EA officers during the course of the landfill issue who, he says, told him that they were

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

running a 24 hour rota of staff with a lot of people on it for a number of months. The complainant says they agreed it was costing a lot of money and he questioned why better monitoring equipment was not being used. The Commissioner accepts that this is a legitimate interest.

Is disclosure necessary to meet the legitimate interests?

44. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
45. The complainant has concerns about how EA responded to an issue at Clayton Hall Landfill Site, and its role as a regulator of this site. In its submission to the Commissioner, EA has conceded that there is a legitimate interest in the general public knowing how much time a public body has spent regulating a site, and how much this has cost.
46. EA has gone on to argue that it considers that it has satisfied this legitimate interest by providing the total amount of overtime payments made in relation to the site, and it has also provided the (cumulative) overtime hours, substantive hours and amount of overtime payments made to the subset of five individuals referenced in the request. As such EA considers that disclosure of a breakdown of this information for each of the five individuals is not necessary.
47. The legitimate interests in this case are the general interest in public authorities being accountable and transparent, and the complainant's specific interest in EA's role and performance as regulator of the Clayton Hall Landfill Site, and the veracity or otherwise of information it has sent out.
48. To a large degree the Commissioner considers that these interests have been satisfied through the information EA has released in response to this request. The complainant has not provided any compelling evidence to support his view that EA has provided false information and has engaged in poor practice. Nor has he explained why a breakdown of the hours worked by, and payments made to, five specific individuals would surface false information or poor practice. However, because it is not certain that all the legitimate interests in this case have been satisfied by the information EA has released so far, the Commissioner considers that disclosing the specific information requested is necessary to meet the legitimate interests in this case.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

49. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
50. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
51. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
52. EA maintains that disclosing the requested information to the world at large could be both damaging and distressing to the individual employees. In addition to the individuals' reasonable expectations as to what will happen to their personal data, discussed below, EA has indicated that there may be other EA staff whose interest in the information could be of detriment to those individuals. It has gone on to say that while there is no evidence to suggest that additional harm to the employees will result from a disclosure in this instance, it considers that a breach of privacy and loss of control over the use of their personal data is harm in itself.
53. In its submission EA has argued that, although the information relates to their employees' professional lives, those individuals would expect that details of their overtime hours and payments will be used within EA for HR purposes, payroll, internal management and resource allocation. In EA's view its employees would not have any expectation that information about their working hours or overtime payments that could identify them would be released to the world at large, in response to an information request.

54. EA says it has not consulted the individuals in question on whether they would be willing to consent to disclosure. It has noted that there is no legal obligation to seek consent when considering whether to make a disclosure under the freedom of information legislation, and it does not consult in such instances. EA also considers that if it was to ask the individuals if they would consent to details of overtime hours they worked and overtime payments they received being disclosed, they would refuse consent. Although EA has not addressed the following point in its submission, in the Commissioner's view the information is clearly not already in the public domain and there is no evidence to suggest that it is already known to some individuals (other than each of the five individuals concerned).

The Commissioner has considered all the circumstances of this case. She accepts that the complainant has a personal interest in the withheld information. While he has referred to concerns he has about EA's response to the Clayton Hall Landfill Site issue, and its dissemination of false information, he has not provided any compelling evidence to suggest these concerns are justified. Meanwhile, the wider public interest in EA being open and transparent about its operations has been met, in the Commissioner's view, through its release of cumulative information about overtime hours worked and payments made, and through information it has published on its website about Clayton Hall Landfill Site.

55. Based on the above factors, the Commissioner has therefore determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
56. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
57. The Commissioner has therefore decided that EA was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Other matters

58. In its internal review, EA had also addressed the complainant's point about his request to the British Transport Police – it considered that request was not analogous to the complainant's request to EA. The Commissioner also advises that Authority A is not obliged to release information simply because Authority B may have released it in response to the same or similar request. It is correct for each authority to handle a request for information submitted to it in the way it considers appropriate.

Right of appeal

59. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.
61. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF