

## **Freedom of Information Act 2000 (Section 50) and the Environment Information Regulations 2004**

### **Decision Notice**

**Date: 10 June 2008**

**Public Authority:** Environment Agency  
**Address:** Millbank Tower  
25<sup>th</sup> Floor  
21-24 Millbank  
London  
SW1P 4XL

### **Summary**

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The complainant requested information about the individual who had complained to the Environment Agency about the complainant's septic tank and sought a copy of the letter of complaint. The Commissioner finds that much of the information is personal data relating to the complainant and was therefore exempt from disclosure by virtue of regulation 5(3) of the EIR, which was not cited by the Agency. He also found that the remaining information in the letter is personal data relating to third parties and that it is exempt by virtue of regulations 13(1) and (2)(a) as the disclosure of it would breach the first data protection principle, and the Agency had acted correctly in withholding that information.

### **The Commissioner's Role**

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1. The Environmental Information Regulations ("EIR") were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR. Provisions of the EIR that are relevant to this complaint are set out in the Legal Annex to this Decision Notice.

## The Request

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2. On 20 November 2006 the Environment Agency (the "Agency") visited the complainant's property in response to allegations it had received that sewage effluent had been entering controlled water, namely a ditch in a field at the front of his property. On 1 December 2006 the Agency wrote to the complainant, saying that this watercourse constituted controlled waters and that, under the Water Resources Act 1991, it was an offence to cause or knowingly permit any poisonous, noxious or polluting matter or any solid waste matter to enter any such controlled waters. The Agency said that, under that legislation, its consent was needed for a discharge of sewage effluent into controlled waters and that, without such consent, discharges from his septic tank would be illegal.
3. On 4 December 2006 the complainant asked the Agency for a copy of its files relating to his septic tank. He asked for a number of items of information, including details of complaints made about his septic tank, in respect of which he asked who had made the complaints, and when.
4. On 12 December 2006 the Agency replied. It said that, in the light of the complainant's comments, it believed that further investigation was needed to determine whether his septic tank drained into the ditch, and asked him to offer a suitable date for officials from the Agency to visit the site. On 18 December 2006 the complainant asked the Agency to respond, firstly, to his letter of 4 December. He also asked the Agency to disclose 'any information or documents or policy held by the Agency or partner agencies which relates to getting the residents of Flecknoe to join the main sewerage system'.
5. The Agency provided a substantive response on 9 January 2007, saying that it had investigated the discharge of effluent from the complainant's septic tank in response to a complaint received in a letter dated 18 October 2006. The Agency said that it was unable to provide the name of the person who had complained about the septic tank under the exception in regulation 13(2)(a) of the EIR. As to his additional request for information about getting the residents of Flecknoe to join the main sewerage system, the Agency said that it did not have any of the information sought, but suggested that the complainant might wish to request it from the Water Undertaker at Severn Trent Water.
6. On 18 January 2007 the complainant sought an internal review of the Agency's refusal to provide him with details of the individual who had complained about his septic tank, saying that he was prepared to have a redacted version of the complaint letter, his interest being in the content of the complaint. He repeated his request for that information or, failing that, he wanted 'an assurance from the Agency that no member of staff involved in the investigation of this complaint in any way knows directly or indirectly the complainant' (ie the author of the letter), 'his family members or agent or the owner of the land including those who have an interest in the event of development'. On 24 January 2007 he suggested to the Agency that it might seek the consent of the complainant which, if given, would remove the need for the review.

7. The Agency acknowledged the review request on 26 January 2007 and replied substantively on 2 February 2007, maintaining that the details of the individual had rightly been withheld under regulation 13(1) of the EIR. It said that it was under no obligation to ask the individual whether he or she objected to disclosure and, in any case, the public interest in withholding would still outweigh the public interest in disclosing on the basis that disclosure would be likely to discourage members of the public from reporting environmental incidents. The Agency said that the way the letter was written meant that it would have to 'remove most of the letter to protect the personal details'. However, it was able to reveal that the author referred to a 'nasty smell' coming from the complainant's septic tank and described 'very black and smelly water in the ditch'. The Agency said that the local officers involved with the investigation neither directly nor indirectly knew the author. It also said that it held no further information, other than what had already been provided, about the complainant's septic tank.

## The Investigation

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### Scope of the case

8. On 1 March 2007 the complainant contacted the Commissioner to complain about the Agency's refusal to release to him the letter of complaint of 18 October 2006 (expressing himself to be willing to have a redacted version of the letter as a last resort). He also asked the Commissioner to establish whether any member of the Agency's staff (not simply local officers concerned with the investigation) knew, either directly or indirectly, the author of the letter, his family member or agent or the owner of the land, including those who had an interest in the event of development of the land. It is not for the Commissioner to request information on behalf of a complainant, rather it is for him to determine whether public authorities have responded correctly under the Act and the EIR to requests for information made to them. However, since the Agency has commented on that issue in its answers to the Commissioner's enquiries, it is addressed as part of the present complaint (see paragraph 11 below).
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act, primarily the allegation that the Agency's investigation was undertaken because of bias on its part against the complainant. A complaint of bias on the part of a government department or agency would not fall within the remit of the Information Commissioner but might, as an administrative matter, fall within the remit of the Parliamentary and Health Service Ombudsman. The process for making a complaint to the Ombudsman is set out in her office's website, namely: [www.ombudsman.org.uk](http://www.ombudsman.org.uk).

## Chronology

10. On 31 October 2007 the Commissioner asked the Agency for its relevant papers including the withheld information. He also asked the Agency to contact the author of the letter of 18 October 2006 to establish whether he or she was prepared to consent to its release, unless the author had already requested that it remain confidential.
11. The Agency replied on 12 November 2007. It declined to contact the author of the letter, saying that 'there is no obligation under the EIR for a public authority to seek consent from a member of the public for the disclosure of their identity and/or their correspondence to a requester. It is our view that an individual who has either sent correspondence to, or received correspondence from, a public authority has a reasonable expectation that such correspondence will remain confidential. We therefore have no plans to seek consent from the author of the letter that is the subject of this complaint.' As to the question of whether or not the Agency's staff knew the author, it confirmed that no member of the Agency's staff involved in the investigation knew the author prior to the complaint being received. Although it could not categorically state that none of the 12,000 Agency staff knew the author, there were procedures and requirements in place to record staff's declarations of interest and no such declarations were on record in relation to any of the staff involved in the investigation. The definition of information that is covered by the EIR requires such information to be in a material form. Since there is no entry in its register of interests in relation to the author of the letter of 18 October 2006, the Commissioner is satisfied that the Agency has no material record of the information sought by the complainant, and the information requested is not, therefore, covered by the EIR.

## Analysis

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### Exception

#### Regulation 5(3)

12. Under regulation 5 (1), a public authority that holds environmental information is required to make it available on request. However, that requirement is subject to regulation 5(3) which provides that, to the extent that the information requested includes personal data of which the applicant is the data subject, the requirement to make that information available does not apply to those personal data. Under regulation 2(4) the expressions 'data subject' and 'personal data' are held to have the same meaning in the EIR as they have in the Data Protection Act 1998 ('the DPA').
13. Although the Agency has cited the exception in regulations 13(1) and (2)(a) as its basis for withholding the information in the letter of 18 October 2006, the Commissioner has examined the letter and its attachment, which is a map, and is

satisfied that part of the information it contains would constitute personal data relating to the complainant, and that regulation 5(3) is therefore engaged.

14. While some of the remaining information in the letter could be said to constitute the personal data of the author of the letter, that does not necessarily mean that this information is not also personal data relating to the complainant. For the purposes of regulation 5(3), however, it is not relevant if this information is also personal data relating to a third party; if it is personal data relating to the complainant that is all that matters; regulation 5(3) applies and the information is exempt (see, for example, the Decision Notice in case reference FS50098771).
15. The information in question comprises comments about the complainant's septic tank. The Commissioner finds that the complainant can be identified from some of the information in the letter and its attachment: even were the details of the author to be redacted as has been suggested by the complainant, he (the complainant) would still be identifiable from the information. Further, it is apparent from the Agency's response that that information could be said to have been used to inform or influence actions or decisions affecting him (see paragraph 2 above), which is one of the criteria for designating information as personal data. The Commissioner therefore concludes that the information identifying the complainant is personal data relating to the complainant and is exempt from disclosure under regulation 5(3). In reaching this conclusion the Commissioner has taken into account his guidance about what is personal data, in particular questions 1 to 5 of that guidance. This can be viewed on his website at the following link:  
[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf).  
Regulation 5(3) is not subject to the public interest test.

### **Regulations 13(1) and (2)(a)**

16. There remains, however, some information in the letter that relates to persons other than the complainant. The Agency has cited the exception in regulations 13(1) and (2)(a) as its grounds for withholding that information. So far as is relevant to this case, under that exception, where the information requested includes personal data of which the applicant is not the data subject and disclosure would contravene any of the data protection principles set out in the DPA, a public authority is entitled to withhold that information.
17. The first principle of the DPA requires that the processing of personal data is fair and lawful. The Commissioner has firstly considered whether the disclosure of this information would be fair. In order to reach a view on this he has considered what would have been the reasonable expectation of the author of the letter and other persons mentioned in the letter, i.e. would they have any knowledge of or expectation of their personal data being provided to a third party.
18. Having regard to the terms of the letter it is unlikely that the individuals mentioned would have had any expectation that their personal data would be released to a third party: indeed, it is doubtful whether some of the individuals mentioned were

even aware that their personal data were included in the letter. In these circumstances, it is clear that to release personal data about those individuals would contravene the first data protection principle on the basis that it would be unfair processing of their personal data. The Commissioner considers therefore that that information was properly withheld under regulations 13(1) and (2)(a)(i), which are not subject to the public interest test.

## The Decision

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19. The Commissioner's decision is that the public authority:
- correctly withheld some of the information in the letter of 18 October 2006 under regulations 13(1) and (2)(a) of the EIR;
  - misapplied regulations 13(1) and (2)(a) to information in the letter that was personal data relating to the complainant;
  - acted incorrectly in failing to apply regulation 5(3) to the information in the letter that was personal data relating to the complainant.

## Steps Required

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20. The Commissioner requires no steps to be taken.

## Other matters

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21. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters.

### Consultation

22. In correspondence with the Commissioner's staff, the Agency declined to consult the author of the letter of 18 October 2006 as to whether he was willing for the information in the letter to be released, on the grounds that that there was no obligation under EIR to seek consent from a member of the public for the disclosure of their identity and/or their correspondence to a requester. The Commissioner considers this to be understandable in the context of a case in which the terms of correspondence make confidentiality implicit (and having seen the letter in question, the Commissioner believes this to be such a case), or where the author has explicitly asked that information should not be revealed. However, the Commissioner would nevertheless remind the Agency of the presumption in the EIR that information should be released, and that it would therefore be advisable in most other circumstances to seek the consent of the authors of correspondence to the release of the information in question, unless the cost of seeking consent would be disproportionate.

Right of subject access

23. As regards the personal information to which regulation 5(3) has been held to apply, section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of subject access. Therefore, the Commissioner will go on to make an assessment under section 42 of the DPA as to whether the information in question in this case should have been disclosed to the complainant under this access right. However, this assessment will be dealt with separately and will not form part of this Decision Notice, as the Commissioner does not believe it would be appropriate to record an assessment under section 42 of the DPA within a Decision Notice under section 50 of the Act.

## Right of Appeal

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24. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 10<sup>th</sup> day of June 2008**

**Signed .....**

**Anne Jones  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Regulation 5 - Duty to make available environmental information on request

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 5(3)** To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

### Regulation 13 - Personal data

**Regulation 13(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.

**Regulation 13(2)** The first condition is –

- (a) in a case where the information falls within any 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 the 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(a) (which relates to manual data held by public authorities) were disregarded.

**Regulation 13(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 the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.