

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

Decision notice

Date: 31 January 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 activity at a particular site. The Environment Agency (EA) released some information and relied on regulation 13(1) of the EIR (third party personal data) to withhold other information.
2. The Commissioner's decision is as follows:
 - The EA is not obliged to confirm or deny it holds any information falling within the scope of the request under regulation 13(5)(a) of the EIR, as to do so would release the personal data of a third party.
3. The Commissioner does not require the EA to take any remedial steps.

Request and response

4. On 7 March 2018 the complainant wrote to the EA and requested information in the following terms:

"Could you please supply correspondence/information in respect of the above [Named Site] investigation by yourselves under the Freedom of Information Act."

5. In the period between 7 March 2018 and 12 March 2018, the complainant clarified her request as follows:

"What I would like is all what you can let me have on your investigation in respect of the [Named Company] lorries and the dumping of top soil from the Persimmon housing development please through the freedom of information act."

"...all correspondence between yourselves, [Named Individual] and [Named Company] and anything else that is assessable through the FOI from Aug/Sept 2016 when it was first reported and relevant to your investigation."

6. The EA responded on 30 April 2018. It released some information and confirmed that it neither confirmed nor denied that it held further information, under regulation 13(5)(a) of the EIR.
7. The complainant requested an internal review on 2 May 2018, confirming that her request also included particular communications between EA and a limited company trading from the site in question. The EA provided an internal review on 13 July 2018. At this point, it withdrew its reliance on regulation 13(5)(a). The EA confirmed that it held relevant information, some of which it considered to be personal data which is excepted from release under regulation 13(1) of the EIR. The EA provided a list of information that it had identified could be released.

Scope of the case

8. The complainant contacted the Commissioner on 9 July 2018 to complain about the way her request for information had been handled.
9. The Commissioner's investigation has focussed on whether EA has applied the correct subsection of regulation 13 to the request. As the authority set up to protect individuals' data privacy, the Commissioner has been prepared to retrospectively apply the appropriate EIR exception, if this is necessary.

Reasons for decision

Background

10. The EA has provided a background to the request which the Commissioner has noted but has not detailed in this notice.

Regulation 13 – personal data

11. In its original response to the complainant the EA had applied regulation 13(5)(a) to the request. It withdrew its reliance on this exception at internal review when the complainant's correspondence to EA indicated that the site owner in question operated a particular business from the site as a limited company. However, the Commissioner has first considered whether EA should have maintained its reliance on regulation 13(5)(a).
12. Regulation 13(5) of the EIR says that a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that—
 - (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or
 - (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act.
13. This means that a public authority may refuse to confirm or deny it holds information falling within the scope of a request if simply confirming or denying information is held would release the personal data of a third person.
14. In this case, the complainant has requested information relating to any investigation the EA may have carried out on activities a particular site owner was carrying out. If EA was to confirm or deny it held information relevant to the request it would, in effect, be confirming whether or not it had investigated the site in question. The Commissioner has first considered whether this information – whether or not the site owner had been under investigation – is the personal data of the site owner.

Would the information be a third party's personal data?

15. Although now superseded by the General Data Protection Regulation 2018, the Data Protection Act 1998 ('the DPA') was still in force at the point that EA provided its response to the complainant.
16. The DPA says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
17. Information will 'relate to' a person if it is about them, 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.
18. The Commissioner notes that information about limited companies is not personal data. However in the unusual circumstances of this specific case, the site in question also appears to be the home address on an individual, who is the director of the limited company to which the complainant referred.
19. Having considered the particular circumstances of this case, the Commissioner is satisfied that confirming or denying the requested information is held can be categorised as the site owner's personal data. This is because confirmation or denial would indicate whether or not the site owner had been under investigation by the EA. The site is referred to in the request, and whether or not it had been investigated would relate to the owner and have biographical significance for them. The Commissioner has gone on to consider whether releasing information about whether or not the site owner had been investigated - by confirming or denying the requested information is held - would contravene any of the data protection principles.

Would confirming or denying the information is held contravene one of the data protection principles?

20. The Commissioner has considered whether confirming or denying the requested information is held would breach the first data protection principle: that personal data '*shall be processed fairly and lawfully...*'
21. When assessing whether confirming or denying information is held would be unfair, and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to their public or private life, whether it is sensitive personal data, whether the individual has consented to the authority confirming or denying the information is held, and their reasonable expectations about what will happen to their personal data.

22. The Commissioner notes that the issue of confirming or denying concerns the site owner's professional life. Irrespective of this, given that it would also concern the issue of an EA investigation into the site owner's activities, the Commissioner considers such information would have a degree of sensitivity. She assumes the site owner has not given his or her consent for the EA to confirm or deny it holds the information. And the Commissioner considers it likely that the site owner concerned would have the reasonable expectation that their personal data would not be placed into the public domain through confirming or denying particular information is held as the result of an EIR request. Further, she considers it likely that confirming or denying the information is held would be likely to cause the site owner a degree of distress.
23. Despite the above, the EA might still confirm or deny it holds the requested information if there is a compelling public interest in doing so that outweighs the legitimate interests of the data subject; that is, the site owner in this case.
24. The Commissioner has considered all the circumstances of this case and the information EA has provided in its submission. She is satisfied that, although the information she has requested may be of interest to the complainant, confirming whether or not it is held does not have a degree of wider public interest such that it would override the site owner's rights and interests. The Commissioner is therefore satisfied that it would not be fair to confirm or deny the requested information is held and would breach the first data protection principle.
25. The Commissioner has decided that the EA was wrong to rely on regulation 13(1) to confirm that it held particular information that it was withholding. She finds that EA should have relied on regulation 13(5)(a) and neither confirmed nor denied it holds any information falling within the scope of the request. Confirmation in this case has released information into the public domain that is the personal data of a third person. This was not fair and the Commissioner has noted that the EA has therefore contravened the first data protection principle in its handling of this request.

Right of appeal

26. 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

27. 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.
28. 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
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