

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

Decision notice

Date: 12 September 2019

Public Authority: Homes & Communities Agency
(trading as Homes England)

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information regarding air monitoring relating to a large demolition and construction project.
2. Homes England redacted information on the basis of EIR regulations 12(3) and 13(1) - third party personal data; and 12(5)(e) – confidentiality of commercial information. During the course of the investigation Homes England withdrew its reliance on regulation 12(5)(e) in favour of regulation 12(5)(f) – interests of the information provider.
3. The Commissioner's decision is that Homes England has appropriately relied upon the cited exceptions to withhold the requested information. Furthermore she finds that, on the balance of probabilities, Homes England has located all the information held in scope of the request. However it breached Regulation 5(2) in failing to respond to the request within 20 working days.
4. The Commissioner does not require any steps.

Request and response

5. On 24 September 2018, the complainant wrote to the Homes and Communities Agency (trading as 'Homes England') and requested information in the following terms:

"DAEDALUS / WATERFRONT: Lee-on-Solent Phase 1: Independent Dust Monitoring

Referring to above site and HCA's [name redacted] email of 30 August 2017 timed 16.32, subject heading "Daedalus Dust & Rubble Management".

That email states:-

"In advance of our meeting on Friday I should let you know that the HCA has undertaken further independent air monitoring at the boundary of the Daedalus site in the same location as the Natta dust monitoring stations. This is as a direct result of [complainant's name] concerns and is for reassurance purposes. I have sought to avoid it being confused with the statutory dust monitoring that Natta are undertaking."

"These tests are generally carried out weekly and started end of July/beginning of August. They cover dust quantum, heavy metals, organics and asbestos. .."

Relating to above Project works (December 2016 to present) and immediately quoted above please supply all air monitoring information to the current date. Also please give the name of the firm undertaking the work. For avoidance of doubt including all reports, full test results, monitoring exact locations from commencement onwards giving full dates. Please include PM10 and PM25 tests, levels and frequency.

Please state if there is no such information beyond the site boundary supplying the information and why not. If there are additional air monitoring tests to those quoted immediately above please also supply that information with the exception of the Natta information immediately below described.

As the Natta EAC% benchmark frequently quoted as a dust benchmark is only an indicative tool of dust discolouration (Dust Management Plan) as well as only relating to road Natta building July 2017 onwards, not to demolition works (January 2017 – May 2017) I do not request that NATTA information as it appears irrelevant and misleading.

For information airborne dust from this highly contaminated site continues (22 months so far). It is extremely fine thus likely breathed deep into lungs. Continued at the Eastern side is absence of watering down of the churned up dusty site other than rain."

6. Homes England responded on 2 November 2018. It identified and provided a number of documents that fell in scope of the request. Some information was redacted, being withheld under regulations 12(3) and 13(1) - third party personal data); and 12(5)(e) – confidentiality of commercial information. In the response it also referred to a commercial fee structure, stating: "*Homes England considers that disclosure of the commercial fee structure would adversely affect the legitimate economic interests of the relevant third party organisations.*"
7. Following an internal review Homes England wrote to the complainant on 14 December 2018 stating that it upheld the original response, but found it had breached regulation 5(2) by failing to respond within 20 working days.
8. During the course of the investigation Homes England withdrew its reliance on regulation 12(5)(e) in favour of regulation 12(5)(f) – interests of the information provider.

Scope of the case

9. The complainant contacted the Commissioner on 25 January 2019 to complain about the way the request for information had been handled. Specifically disputing that the response should be made "only" under the EIR legislation; stating that the request did not ask for fee information; providing reasons why further information must be held other than the information identified; disputing Homes England's reliance on regulations 12(3) and 12(5)(e) to withhold information; and complaining about the timeliness of their response.
10. During the course of the Commissioner's investigation, Homes England agreed with the complainant's point regarding the fee information and confirmed that it had incorrectly stated that information relating to the fee structure had been withheld. Having considered the request again it found this was not in scope of the request.
11. The Commissioner considers that the scope of this case is to establish whether Homes England was correct to respond in terms of the EIR; if it has correctly engaged the exceptions at regulations 12(3) and 12(5)(e); and whether, on the balance of probabilities, it holds any further information in scope of the request. Any procedural breaches will also be considered.

Reasons for decision

Regulation 2(1) - Environmental Information

12. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
13. Regulation 2(1) of the EIR defines environmental information as information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste...emissions...and other releases into the environment, likely to affect the elements referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;..."
14. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The information in this case relates to the monitoring of deposits affecting air quality and the land due to a large demolition and construction project. This is clearly information regarding the state of the elements of the environment, and the monitoring of factors affecting it.
15. The Commissioner therefore finds that the information is environmental information and that Homes England is correct to have considered it under the EIR.

Regulation 13 personal data

16. 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.

17. 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').
18. The first step for the Commissioner is to determine 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.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

20. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. Homes England redacted a number of items of information in the disclosed reports. Homes England confirmed that the information comprised of the names, signatures, and contact details of individuals that carried out, or produced the summary reports of the air monitoring.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals that were involved in the air monitoring. She is satisfied that this information both relates to and identifies those individuals. This

¹ As amended by Schedule 19 Paragraph 307(3) DPA.

information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

26. The fact that information constitutes the personal data of an identifiable living individual 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.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. 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".

29. 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.
30. 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.

Lawful processing: Article 6(1)(f) of the GDPR

31. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
32. The Commissioner 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".

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

33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of 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.
36. 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.
37. The complainant's stated legitimate interest is in transparency and accountability. Specifically that "*Prompt disclosure and full transparency is very much in the public interest, to the public good, importantly in the interest of public health.*" She states that dust exposure has occurred over a long period to a high volume of residents and other members of the public, and "*...So full disclosure is sought, essential to inform*

"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".

implementation of proper practice: which knowledge hopefully will help ensure risks are reduced to the very minimum."

Is disclosure necessary?

38. '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.
39. Homes England states that it has met the general principles of accountability and transparency by disclosure of the air monitoring test results and reports and the names of the organisations that authored the reports. It states "*Providing the names of the individuals or their contacts details does not further the public debate on the issue or provide any additional information to the requestor to inform their specific concerns.*"
40. Having considered the withheld information with regard to the furthering of the stated legitimate interest in transparency and accountability, the Commissioner agrees that disclosure of the individuals' personal data is not necessary.
41. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

42. The Commissioner has therefore decided that Homes England was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 12(5)(f) – Interests of the information provider

43. Regulation 12(5)(f) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure...

44. The Commissioner's public guidance on this exception³ explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.
45. With regard to engaging the exception, as recognised by the Tribunal, a four stage test has to be considered, namely:
- (i) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - (ii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - (iii) Has the person supplying the information consented to its disclosure?
 - (iv) Would disclosure adversely affect the interests of the person who provided the information to the public authority?
46. The withheld information comprises a single entry within the document control information for one of the supplied reports. The disclosed title of the item of data is the "*file origin*". The data item itself is simply the network file address of the document on the third party's computer network. This information only describes how to locate the document on the third party's network.

³ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

47. Homes England considers that the exception is engaged as: (i) the third party was not legally obliged to provide the file path as part of the contract; (ii) the third party did not provide the file path with the expectation that it would be disclosed; and (iii) the third party has not provided consent to disclose the information.
48. Regarding (iv), Homes England stated "*Disclosing the information would adversely affect the interests of third party who supplied the information by posing a high risk to the security of their IT systems.*"
49. The Commissioner therefore finds that there is no legal obligation for the information to be supplied to Homes England, and conversely no circumstances under which Homes England would be required to disclose it. She concurs that all steps of the test are passed and that the exception at regulation 12(5)(f) is engaged.

Public Interest Test

50. There is always a general public interest in the disclosure of environmental information on the grounds of transparency and accountability.
51. However when considering the specific item of withheld information, being a network file address, the usefulness of that information, for the general interest in transparency, is highly questionable. Furthermore the information does not relate in any way to the core purpose of the information request.
52. Conversely, the argument for maintaining the exception is strong as disclosure could compromise the IT infrastructure of the third party. Homes England states "*This would lead to financial loss through securing their network as well as reputational damage should they suffer a breach.*"
53. Commissioner's view is that in this case, there is greater public interest in maintaining the regulation 12(5)(f) exception.

Regulation 5(1) – Duty to make information available on request

54. Regulation 5(1) of the EIR states that: "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
55. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainants' evidence and argument. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by

the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.

56. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.
57. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*" The Commissioner has therefore taken the above factors into account in determining whether or not further information is held on the balance of probabilities.
58. In response to the Commissioner's questions, Homes England:
- advised that "*The documents provided constitute all air monitoring information for the site as in scope of the request... all information held in scope of the request has been provided in a redacted form*";
 - stated in regard to the searches that were undertaken, and their likelihood to retrieve relevant information: "*Searches were conducted by the team leading on the project. They searched the project file specifically set up to store information related to the project. All air monitoring reports related to the site are stored in this network folder. As the dates of the reports corresponded with the dates of the scheduled air monitoring, no further searches were required.*" Furthermore that "*Due to the specific nature of the request no search terms were required as the project file is set up in a way that all information relating to air monitoring of the site is easily sourced*";

- Confirmed that no information is held locally on personal computers or in paper records: *"All information relating to air monitoring at the project site is held within the project file. This is an electronic file that is located on Homes England's network"*;
 - Confirmed that no information, relevant to the request, had ever been held but subsequently destroyed;
 - Advised that there are no specific statutory requirements to retain the requested information, however retention limits are set to align with the requirements set in the Limitations Act 1980⁴. *"Homes England's record retention schedule states that records of this type are held for seven years (six plus one) from the date of project closure"*;
 - Confirmed that it does not hold any information regarding monitoring beyond the site boundary;
 - Confirmed there is no further information held regarding dust information tests, levels and frequency as specified by the requestor. Stating *"No. There is not further information held that has not been disclosed. Homes England hold two earlier versions of a summary report produced before all of the monitoring had been complete. However the information contained in those versions was disclosed in the final report contained within annex A."*
59. The Commissioner asked specifically whether any further information is held in relation to the period of demolition work during January to May 2017 or February to March 2018. Homes England advised *"This time period refers to the NATTA information as quoted in the request. This information was not considered as part of the request as the requester specifically stated "I do not request that NATTA information as it appears irrelevant and misleading"... As stated the requester has previously been provided with a "Dust Management Plan" produced by Natta has been provided to the requester."*
60. The Commissioner asked specifically whether any information is held regarding asbestos, for example, relevant to samplings taken that are not covered by the 4 August 2017 report. Homes England advised *"No. There is no further information held regarding asbestos that are not covered by the 4 August 2017 report that is in scope of the request."*

Conclusions

⁴ <https://www.legislation.gov.uk/ukpga/1980/58/contents>

61. In coming to her conclusion, the Commissioner has considered the complainants view regarding why further information should be held by Homes England. The complainants stated concerns are that it is a large demolition site, that contaminants have been identified and that there are "*serious consequences eg health, homes values, daily life upon the thousands directly affected...*"
62. The Commissioner has also considered the responses provided Homes England during the course of her investigation.
63. The Commissioner considers that Homes England has carried out relevant searches, by the appropriate project team. It has explained that all files are electronic and organised in one centralised network area, that no information is held locally on personal computers. It confirmed that information is held in accordance with set retention periods and that no information, in scope of the request, had been destroyed. It has also responded to specific points made by the Commissioner which were related to the details of the complaint.
64. The Commissioner appreciates the seriousness of the concerns held by the complainant. However the Commissioner does not consider that there is any evidence which undermines Home England's position that it has provided all of the information relevant to this request.
65. Taking all of the above into account the Commissioner is satisfied that on the balance of probabilities, no further information in-scope of the request is held by Homes England.

Regulation 5(2)

66. Regulation 5(2) of the EIR provides that on response to information requests under the EIR, information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
67. The complainant made their request for information on 24 September 2018. Homes England responded on 2 November 2018 which is 30 working days after receipt of the request. As such this period falls outside of the time limit required by the EIR.
68. The Commissioner notes that Homes England acknowledged this breach of Regulation 5(2) in the internal review response.
69. The Commissioner has therefore decided that Homes England failed to comply with the requirements of Regulation 5(2) in its response to the complainants' request for information. As the response has been provided no further action is required.

Right of appeal

70. 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@justice.gov.uk

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

71. 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.
72. 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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