



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0054**  
**Information Commissioner's Ref: FER0152885**

**Heard at Procession House, London, EC4**  
**On 20 November 2008**

**Decision Promulgated**  
**11 December 2008**

**BEFORE**

**CHAIRMAN**

**ROBIN CALLENDER SMITH**

**and**

**LAY MEMBERS**

**ANNE CHAFER**

**MICHAEL HAKE**

**Between**

**DE MELLO**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**THE ENVIRONMENT AGENCY**

**Additional Party**

**Subject matter:**

Environmental Information Regulations 2004

Request for information, Reg 5  
Personal Data, Reg 13

**Cases:**

*Common Services Agency v Scottish Information Commissioner [2008] UKHL 47;*  
*Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP*

**Representation: this appeal was decided on the papers and written submissions to the Tribunal - at the request of the parties - and did not involve an oral hearing.**

For the Appellant: Mr R de Mello  
For the Respondent: Mark Thorogood (Solicitor, Information Commissioner's Office)  
For the Additional Party: Ms Helen Thirsk (Solicitor, Environment Agency)

**Decision**

The Tribunal upholds the decision notice dated 10 June 2008 and dismisses the appeal.

## **Reasons for Decision**

### **Introduction**

1. Mr Rambert de Mello (the Appellant) has property in Northamptonshire which is served by a septic tank which is situated on land opposite his own which is owned by another individual. On 20 November 2006 the Environment Agency (EA) visited the Appellant's property in response to a complaint the Agency had received that sewage effluent had been entering controlled water.

### **The request for information**

2. On 4 December 2006 the Appellant asked the EA for, among other things, details of complaints made about his septic tank including the identity of the complainant. On 12 December 2006 the EA replied stating that it believed that further investigation was needed to determine whether the Appellant's septic tank drained into a particular ditch.
3. On 18 December 2006 the Appellant asked the EA to provide him with the information he had already requested in his letter of 4 December 2006. On 9 January 2007 the EA confirmed it had received a letter of complaint dated 18 October 2006 relating to the Appellant's septic tank. This letter forms the core of the disputed information.
4. The EA stated that it was unable to provide details of the person who had complained about the Appellant's septic tank by virtue of Regulation 13 (2) (a) EIR. The Appellant then requested an internal review and made it clear he was prepared to accept a redacted version of the disputed information as his interest was in the content of the complaint. He did repeat his request for the identity of the complainant but, failing that, wanted an assurance "that no member of staff involved in the investigation of this complaint in any way knows directly or indirectly the complainant, his family members or agent or the owner of the land including those who have an interest in the event of development".

5. On 24 January 2007 the Appellant suggested to the EA that it might seek the consent of the complainant to the disclosure of the information requested.
6. The EA acknowledged the Appellant's request for an internal review on 26 January 2007. On 2 February 2007 the EA replied to the Appellant maintaining that the details on the individual who had made a complaint had been correctly withheld under Regulation 13 (1) EIR and that it would not be possible to provide a redacted copy of the letter as that would require the removal of most of the letter in order to protect the identity of the complainant. The EA did confirm that the complainant had referred to a "nasty smell" coming from the Appellants septic tank and described "very black and smelly water in the ditch". The EA confirmed that the local officers involved with the investigation had no knowledge of the complainant either directly or indirectly.

#### The complaint to the Information Commissioner

7. On 1 March 2007 the Appellant complained to the IC about the EA's refusal to provide him with a copy of the disputed information and repeated, again, that he would be willing to accept a redacted copy of the disputed information.
8. The IC's decision notice dated 10 June 2008 concluded that the EA had correctly withheld some of the information in the letter of 18 October 2006 under Regulation 13 (1) and (2) (a) EIR, misapplied regulations 13 (1) and (2) (a) to information in the letter that was personal data relating to the complainant and acted incorrectly in failing to apply Regulation 5 (3) to the information in the letter that was personal data relating to the complainant. The IC required no steps to be taken.

#### The appeal to the Tribunal

9. It is common ground that the disputed information amounts to "environmental information" within the meaning of the Environmental Information Regulations 2004 (EIR). Regulation 5 (1) EIR imposes a duty on public authorities to make available on request environmental information which they hold. That duty is subject to Regulation 5 (3) EIR, which states:

“5. -- (3) to the extent that the information requested include personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.”

10. The duty to disclose environmental information is subject to a number of exceptions as provided for in Part 3 EIR. The exception which is relevant in this appeal is provided for in Regulation 13 EIR (set out below).

"13. -- (1) to the extent that the information requested include personal data of which the applicant is not the data subject and as respect which either the first or second condition below satisfied, a public authority shall not disclose personal data.

13. -- (2) The first condition is –

(a) in a case where the information falls within any paragraph (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...”

11. The relevant data protection principle that operates in this appeal is the first data protection principle which states:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met...”

12. The relevant condition in Schedule 2 is set out that paragraph 6 (1) –

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

13. The exceptions at Regulations 5 (3) and 13 (1) are "absolute exemptions" that are not subject to the public interest balancing test set out at Regulation 12 (1) (b) EIR.

14. The IC concluded that part of the disputed information was personal data relating to the Appellant and therefore fell within the exception provided by Regulation 5 (3) EIR and that the remainder of the information was found to be personal data relating to third parties, disclosure of which would contravene the first data protection principle.
15. The Appellant contended that the IC's decision was materially flawed in holding that the EA correctly withheld some of the information in a letter of 18 October 2006 under Regulation 13 (1) and (2) (a) EIR, in imputing to the letter of complaint (the correspondence) implicit confidentiality and that no steps were required to be taken.
16. The Appellant also contended that the IC's decision was also materially flawed in holding that the information received by the EA about the Appellant's property (septic tank) had been received on the basis that there was a duty of confidence to people who make complaints to the EA *and* that disclosing the details of complainants could discourage people from complaining to the EA *and* that disclosure of complainants' identities could potentially contravene the First Data Protection Principle *and* that the complainant's right to privacy (under Article 8 ECHR) was outweighed - in this particular case - by the Appellant's rights of access under the Data Protection Act 1998.
17. The broad grounds of the appeal can be summarised as follows:
  - (a) the reasonable expectations of the complainant should be assessed subjectively rather than objectively;
  - (b) the IC was wrong to accept the premise that those who make complaints to the EA do so in the expectation that those complaints will be treated in confidence;
  - (c) the IC should have taken into account the motives of the complainant and whether the letter of complaint was made in good faith or for personal gain;
  - (d) the IC should have considered whether there was any evidence to substantiate the complaint about the Appellant's septic tank;
  - (e) the IC should have considered the seriousness of the allegations made against the Appellant, and

- (f) the IC failed to act in accordance with the Appellant's rights under Article 8 and 10 ECHR [the Article 10 point was not pursued by the Appellant in his final submissions].

### The questions for the Tribunal

18. Is the letter of complaint to the EA of 18 October 2006 – containing personal data of the author and/or third parties – capable of being redacted or the information made anonymous so that disclosure of a redacted or edited version would not reveal personal data protected under Regulation 13 (1) EIR and s 1 (1) DPA?
19. Are there public interest considerations which over-ride the confidentiality implicit in a letter of complaint – and the personal data it contains- to a public authority like the EA?
20. Is there a breach of the Appellant's Article 8 ECHR rights relating to respect for private and family life?
21. For completeness Article 8 states that this qualified right to respect for private and family life is set out in the ECHR as follows:
1. Everyone has the right to respect for his family and private life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### Evidence

22. Both the IC and the Tribunal had been provided – in confidence - with a copy of the disputed evidence and copies of correspondence between the Appellant and the EA in relation to the inspection of the septic tank.

### Legal submissions and analysis

23. The Appellant accepts that while there is no presumption in favour of the release of personal data there is a presumption in favour of the release of non-personal data. He argues that this means, in practice, that the EA has to decide whether the personal data can be excised from the information sought and, if that is possible, then the information must be released. He argues that the burden is on the public authority to show that the data is personal data and that the exceptions apply.
24. He refers to The European Community Data Protection Directive 95/46/EC and, in particular, Article 1 which states that: "In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."
25. He contends that while this Article requires consideration of protecting the privacy and identity of the author of the letter of complaint, it also requires consideration of the privacy and interests of the "victim of the letter" in circumstances where the Appellant's own private rights have been infringed. In deciding whether there should be either disclosure or no disclosure the Tribunal had to conduct a balancing exercise to take into account the private rights of both the individual who wrote the letter and the "victim of the letter". In essence, if the rights are engaged then the judgement boils down to a balancing exercise in terms of proportionality.
26. The Appellant accepts this view is not accepted by the EA or IC who say in effect that the regime created in terms of personal information by the EIR bring the provisions of the DPA without an additional public interest test other than the balancing tests required by the DPA itself.
27. The Appellant contends that the EA is wrong in taking the view that, when an individual corresponds with a public authority, it is legitimate for that individual to expect that his/her identity will not be revealed, nor the content of the correspondence in a manner that is not rendered anonymous and that there is a general presumption that when an individual makes a complaint to a public authority, the source of the complaint and the identity of the complainant will be treated in confidence.



28. He says that the legislation does not state this proposition and that a judgement has to be made by the public authority whether the cloak of confidentiality applies to the letter of complaint on a case-by-case basis. In any case where someone like him requests the disclosure of information contained in a letter of complaint then the public authority should be obliged to write to ask the complainant whether he/she consents to the disclosure of the information. A course like this -- if adopted at the start of the enquiry like his -- could avoid the entire apparatus of the appeal procedure coming into play. There was no good reason why this practical step could not be undertaken by the public authority right from the outset and it was wholly unreasonable for the EA to adopt a blanket approach that it will not seek to obtain the consent of the writer of a letter of complaint to some kind of disclosure.
29. He points out that public authorities responsible for administering breaches of the law may, indeed, preserve the anonymity of members of the public who make genuine complaints about breaches of the law, as to disclose their identity would deter members of the public making complaints. Against that, he states, there is another public law principle that those who make spurious or malicious complaints motivated by self gain should be deterred from doing so. A public authority cannot be seen to assist wrongdoers and there was no confidence in issues created by a trickster.
30. He did not see why it should be open to the EA to plead a lack of resources as an excuse from undertaking an investigation to ascertain the motives and intentions of the writer of the letter.
31. In relation to Article 8 ECHR private life issues he contends that the letter of complaint was directed at his home (because the septic tank was part of those premises) and his conduct (the discharge of effluent). It contains information about him, his home and his private life (his conduct). On that basis the information held by the EA fell within Article 8 (1). That gave him the right to examine the contents of the letter stored by the EA so that he could dispute its veracity and set the record straight and consider what legal redress he might have against those who made malicious or ill founded complaints. The letter of complaint had resulted in the EA intruding into the Appellant's home and private life by undertaking an investigation and that intrusion was improper. All of that was sufficient to engage Article 8 (1).

32. He also contends that under Article 8 (2) the Tribunal should consider whether the refusal of the EA to disclose the letter of complaint -- even in a redacted version -- constituted interference by the EA with the Appellant's right to respect for his private life and home. If that refusal created such interference, whether the consequences were of such gravity as to engage the operation of Article 8? If that was so, whether the interference was in accordance with the law? If that was so, whether the interference was necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? Finally, if this were so, whether such interference was proportionate to the legitimate public interest to be achieved.

33. The EA - as the Additional Party -- effectively adopted and expanded on the Decision Notice and supporting legal submissions made on behalf of the IC. For that reason the EA's submissions are set out here as representative replies to the submissions made by the Appellant.

34. The EA drew the Tribunal's attention to the recent House of Lords decision *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*. Although the case is related to the relationship between the DPA and the Freedom of Information (Scotland) Act 2002 (FOISA), the Lords of Appeal found that the wording of the "personal data" exemptions in FOISA were analogous to those in FOIA and, as such, had a bearing across the United Kingdom.

Lord Hope (at Paragraph 7 of that judgement) stated: "In my opinion there is no presumption in favour of the release of personal data under the general obligations that FOISA lays down. The references which that Act makes to the provisions of the DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data."

35. The EA contended that this case in effect removed consideration of the disclosure of personal data from FOIA and moved it directly into the DPA (supporting the conclusion of an earlier Tribunal decision *The Corporate Officer of the House of*

*Commons v Norman Baker EA/2006/0015 and 0016*). It therefore followed that when considering disclosure of personal information under EIR, the provisions of the DPA were the operative ones and there was no additional public interest test other than any balancing test required by the DPA itself.

36. In terms of the "fairness" criterion under the DPA - a complaint letter such as the subject of this appeal would not get from the EA information about "fair processing". When considering whether such personal data should be disclosed, then the legitimate expectations of the person to whom the personal data related had to be assessed.. In some cases an individual might have explicitly requested that information provided be treated in confidence but, in the absence of an explicit statement to this effect (as in the current appeal), the EA had to make a judgement on what the expectations of the individual would be.

37. The EA took the view that individuals corresponding with a public authority might legitimately expect that their identities would not be revealed nor the content of the correspondence save so far as everything could be made anonymous.

38. In addition to the EA's own consideration of the first data protection principle it had considered and applied the IC's guidance on how to assess the confidentiality of third-party personal information in relation to requests under freedom of information legislation. The IC's guidance suggested a number of considerations about whether it was "fair" to release third-party personal information in response to a request for information. These are:

- Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
- Would the third-party expect that his or her information might be disclosed to others? Is disclosure incompatible with the purposes for which it was obtained?
- Had the person been led to believe that his or her information would be kept secret?

- Has the third-party expressly refused to consent to disclosure of the information?
- Did the legitimate interest of a member of the public seeking information about a public authority, including personal information, outweigh the rights, freedoms and legitimate interests of the data subject?

39. Although the EA had not explicitly sought the consent of the complainant (as it considered in this particular instance it was not necessary and there was no legal obligation to seek consent) the EA considered that application of the tests above confirmed that it was correct in not disclosing personal data of the complainant.

40. The EA pointed out that it investigated all reports of environmental incidents in accordance with its National Investigations Manual. It did not investigate the background or motives of complainants but focused on the environmental incident or alleged incident, investigated that in accordance with its internal procedures and assessed whether any enforcement action was appropriate. The EA did not automatically consult with local authorities when it received a direct complaint about an alleged discharge of effluent. Its powers were different from those of local authorities.

41. In terms of the alleged breach of Article 8 ECHR the EA submitted the Appellant's arguments were without merit. The "right to respect for private and family life, home and correspondence" was not a right to privacy or a right to be free from interaction with public authorities but only a right to respect for the protected interests. No aspect of the IC's decision in the case demonstrated any lack of respect for those interests and, as a result, Article 8 ECHR was not engaged.

42. There was no arbitrary interference with the Appellant's right to privacy or his right to respect for his home. The EA was required by law to investigate complaints about pollution and to ensure that the environment and human health was protected. In this case the complaint was received about the Appellant's septic tank and the EA investigated it. That necessarily involved the EA visiting the site of the septic tank and speaking to the Appellant. The investigation was not "arbitrary" and was not a dawn raid.

43. Even if Article 8 (1) had been engaged, the actions of the EA in refusing to disclose the name of the complainant were in accordance with the law, necessary and proportionate. The protection of health and morals (the need to ensure the pollution was reported without complainants fearing that their identity might be disclosed to the polluter" and the protection of the rights and freedoms of others (particularly the rights of the complainant under the DPA) emphasised the proportionality of the response.

### Conclusion

44. The Tribunal had no difficulty in deciding that the data requested in the letter of complaint was personal data and therefore subject to the regime set up under the DPA for all the reasons set out by the IC and the EA in the submissions and legal analysis set out above (which will not be repeated again here).

45. There were no public interest considerations in this appeal which could override the confidentiality implicit in the original letter of complaint

46. Each of the members of the Tribunal, in advance of meeting for the paper hearing of this appeal, had attempted their own redaction of the letter of 18 October 2006 in an attempt to see whether there was a core text which might still be disclosed to the Appellant (after redaction) within the terms of the existing statutory provisions and case law.

47. It became clear to the Tribunal at the paper hearing of the appeal that in carrying out its own redaction exercise, the content of the letter would be reduced to a point where little or nothing remained. What was left was not meaningful and would add nothing to the information already given in anonymised and summary form by the EA in response to the information request. The Tribunal was satisfied that no further disclosure of information could be made without contravening the first data protection principle..

48. The Tribunal regards it as important that the Appellant knows that proper and significant consideration was given to this point and that if the document could have been disclosed without breaching Data Protection principles -- even in some

vestigial form that would have had some meaning— the Tribunal would have required such redaction and directed disclosure in redacted form.

49. The Article 8 ECHR points in respect of private and family life are not ones which gain any traction in this appeal. Everything done by the EA (and considered by the IC) related to lawfulness and proportionality. It is the Tribunal's view that Article 8 is not even engaged and, because the rights within this Article are qualified rather than absolute, that lack of engagement is fatal to the Appellant's argument. If the Tribunal was wrong on the issue of whether Article 8 is engaged at all then, even if the Article was engaged, the actions of the EA were completely lawful (both in terms of enquiries about and entry on to the Appellant's land and in withholding the name of the writer of the letter of complaint). The EA's actions have been not only lawful but also proportionate. There has been no suggestion that inspections have taken place an unreasonable hours or in oppressive circumstances. The EA performs a valuable and delicate public function and, in terms of its actions in respect of this letter of complaint, it has done nothing inappropriate or untoward.

50. The Tribunal has, however, some sympathy with the Appellant's point that -- in this kind of situation -- a check by the EA with the original complainant, to see whether there was any objection to releasing the letter, might have resolved the situation and saved a significant cost to the public (even in the limited circumstances of a paper hearing of the appeal). It may be that the EA and other such public bodies wish to review their initial procedures in situations such as this -- not because it is a matter of law but simply because it is a matter of common sense -- but that is a matter for them. There may well be cost implications that make such procedures difficult to introduce but, if the writer of a letter of complaint is happy for it and the personal data within it to be disclosed in the end, anything that saves public bodies and Appellant's such as Mr de Mello from having to spend time and effort debating the disclosure of such information should be encouraged.

51. Our decision is unanimous.

Signed:

Robin Callender Smith

Deputy Chairman

Date: 11 December 2008