



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2013/0248**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice dated 22 October 2013  
FS50494523**

**Appellant: Richard Green**

**First Respondent: Information Commissioner**

**Considered on the papers**

**Before**  
John Angel  
(Judge)  
and  
Roger Creedon and Nigel Watson

**Subject matter:** s.40(2) personal information

Date of Decision: 7<sup>th</sup> February 2014

Date of Promulgation: 10<sup>th</sup> February 2014

**DECISION**

The appeal is dismissed.

**REASONS FOR DECISION**

**Background**

1. The Green Deal framework enables private firms to offer consumers energy efficiency improvements to their homes, community spaces and businesses at no upfront cost, and recoup payments through a charge

in instalments on the energy bill. According to Department of Energy and Climate Change (“DECC”):

“The Green Deal framework is established by legislation and enables the creation of Green Deal Plans. A Green Deal Plan allows energy efficiency improvements to a property to be paid for in instalments, by the person who is for the time being liable to pay the energy bills for the property, through the energy bills for the property.

An agreement is only a Green Deal Plan if, amongst other things, the energy efficiency improvements are recommended in a qualifying assessment conducted by an authorised Green Deal Assessor, they are installed by an authorised Green Deal Installer and the green Deal Plan is entered into with an authorised Green Deal Provider.

The Green Deal legislation establishes a scheme to: (a) authorise Green Deal Assessors, Green Deal Installers and Green Deal Providers in the event that they meet certain standards; (b) place comprehensive requirements on these persons; and (c) allow for the monitoring and enforcement of these requirements. This regime is important for the proper functioning of Green Deal Plans and the protection of consumers. For example, a Green Deal Assessor must comply with the Green Deal Code of Practice and the Assessor Services Specification.

The concept of a Green Deal Advisor is not provided for in the Green Deal legislation. Green Deal Advisors would only be able to operate within the Green Deal market if contracted or employed to act on behalf of a Green Deal Assessor.”

2. Public registers of all Green Deal Providers and Green Deal Assessors exist to enable members of the public to contact or be contacted by an appropriately qualified and certified person. There is no public register of Green Deal Advisors. There are approximately 2256 such Advisors. This information is held by a contractor on behalf of DECC which includes their names, email addresses, dates of birth, Green Deal identification numbers, the date of commencement and date of revocation (if applicable) and whether active or not.
3. An Advisor is not recognised as such in the Green Deal legislation. However DECC has introduced a training qualification for Assessors to be able to undertake their task through individuals with the necessary qualification. Those who have obtained the qualification are called Advisors and they may also be Assessors, although Assessors are often organisations. Advisors are not necessarily Assessors but maybe employed by them or used on a contract basis. The Green Deal scheme is designed in such a way that the public are expected to contact Assessors and Providers to get the process going, not Advisors.

## The request and complaint to the Information Commissioner

4. On 21 January 2013 Mr Green wrote to DECC asking to be provided with “.. a full list of registered [Green Deal] Advisors”. DECC replied on 18 February 2013 refusing to disclose the information on the grounds that it was exempt under section 40(2) FOIA. This decision was maintained on internal review.
5. Mr Green complained to the Commissioner on 17 April 2013. The Commissioner issued his Decision Notice on 22 October 2013 (“DN”) and found that the withheld information was exempt from disclosure under section 40(2) FOIA.

## The legislative framework

6. In so far as relevant to this appeal, section 40 FOIA provides as follows:
  - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
  - (2) Any information to which a request for information relates is...exempt information if—
    - (a) it constitutes personal data which do not fall within subsection (1), and
    - (b) either the first or the second condition below is satisfied.
  - (3) The first condition is—
    - (a) in a case where the information falls within any of 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 this Act would contravene—
      - (i) any of the data protection principles ...
7. “Personal data” is defined in section 1(1) of the Data Protection Act 1998 (“DPA”) as follows -

“personal data” means data which relate to a living individual who can be identified—

  - (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

8. The data protection principles are set out in Schedule I DPA. Of relevance in the present appeal is the first data protection principle in paragraph 1 of Schedule I which provides:
- “Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.
9. This means that personal data can only be disclosed if to do so would, amongst other requirements, be fair. Key considerations in assessing fairness include:
- the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and
  - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
10. The application of section 40(2) FOIA therefore requires consideration of two issues; (i) is the disputed information “personal data” and (ii) would disclosure breach any of the data protection principles. It is an absolute exemption.

#### Mr Green’s case

11. Mr Green says that he does not ask for “extensive” information and “accordingly it would not be identifiable to a living individual”. The information held by DECC falling within the scope of Mr Green’s request is advisor’s name, telephone number, email address, date of birth, identification number, the date they became an advisor, the date the status was revoked (if applicable) and whether they are active or not. Mr Green does not consider the information he has requested to be an “extensive” -“list of qualified [Green Deal Advisors] ie name, accreditation number, not their personal information”.
12. Mr Green contends that the majority of Green Deal Advisors “would expect to be listed publicly as a result of their accreditation and for transparency purposes”. The Commissioner does not agree. For the reasons given in his DN, and summarised at §14 above, the Commissioner submits that the reasonable expectation of Green Deal Advisors would be that their details would not be disclosed.
13. Mr Green is clearly critical of the way in which the government has decided to operate the Green Deal framework. In particular, he obviously disagrees with the decision that members of the public should request a qualifying assessment through Green Deal Assessors / Green Deal Providers rather than through Green Deal Advisors direct. He also clearly considers that Green Deal Advisors should have a “greater influence” in how the scheme is operated.

14. However, we must consider the question of whether DECC has dealt with the Mr Green's request for information in accordance with Part I FOIA against the factual background and context of how the scheme is actually operated, not how Mr Green would prefer it to operate.
15. Mr Green does not accept DECC's explanation of how a list of Green Deal Advisors briefly appeared in the internet in error. However there is no evidence to doubt this position. Moreover such disclosure for a brief period in error does not set a "precedent" for any continuing intentional disclosure under FOIA.

Whether section 40(2) is engaged?

16. The Commissioner concluded that the disputed information was personal data about each of the Green Deal Advisors (§§22-25 DN). The information held by DECC that falls within the scope of the Mr Green's request is ".. a list of 2256 Green Deal Advisors [containing] each advisor's name, telephone number, email address, date of birth, identification number, the date they became an advisor, the date the status was revoked (if applicable) and whether they are active or not" (§9 DN). The Commissioner contends that the disputed information is information that relates to living individuals from which those individuals can be identified and that it is personal data.
17. We have considered the disputed information and agree with the Commissioner that this is personal data for the reasons he has given. Even if it was just the name and contact details alone of a particular Green Deal Advisor this would, in our view, amount to personal data: it is data from which a living individual can be identified.
18. We then need to consider whether disclosure of the disputed information would contravene the first data protection principle.
19. In his DN the Commissioner noted that:
  - i. For the reasons given at §§26-30 DN there was no legitimate public interest in disclosure of the disputed information. It is Green Deal Assessors or Green Deal Providers, rather than Green Deal Advisors, whom assumed responsibility and legal liability for a qualifying assessment.
  - ii. It is Assessors and Providers, not Advisors, whom the public were expected to make contact with if they wanted to request an assessment. The Green Deal framework was set up in such a way that Green Deal Advisors were not expected to be contacted by members of the public (§27 & 36 DN).
  - iii. The Green Deal Advisors had not consented to their details being made public and would have no expectation that that it would be (§31-32 & 35 DN).

- iv. Public registers are available of Green Deal Assessors, Green Deal Providers and Domestic Energy Assessors. Any individuals named on those registers would have a reasonable expectation that their details would be made publicly available: they were also provided with an option to opt out of appearing on said registers. This was not the case with Green Deal Advisors (§§33-34 DN).
  - v. Whilst there is a legitimate public interest in transparency, any interest there is in relation to the operation of the Green Deal framework is met by the availability of details of Green Deal Assessors and Green Deal Providers (§37 DN).
20. There is no evidence that Advisors have consented to their personal data being disclosed and there is no evidence that they have a reasonable expectation of this happening even if Mr Green considers this preferable. The Green Deal scheme operates in a way which does not require the public to deal directly with Advisors at the preliminary stage, only when the actual assessment is being carried out. The Advisor is not subject to regulation only the Assessors, Providers and Installers. Mr Green is looking for a role for Advisors which is not envisaged by the scheme. We accept that the scheme may appear somewhat confusing but this does not make it fair to disclose the list of Advisors.
21. Mr Green and other Advisors may have a legitimate interest in the scheme being revised so that it is easier for them to get work bearing in mind they have invested in training. However they can always apply to be Assessors so that they can be included in the public register but then they would be subject to regulation and the responsibilities and the further investment which come with it. However there is no evidence before us that Advisors generally would want their personal data disclosed on a public registry and certainly they have not specifically consented to this. In fact if it was disclosed the public may be uncertain as to whom to contact as the responsibilities and obligations of the various players in the scheme could become more confusing.
22. We find that the first data protection principle is not satisfied and it would not be fair to disclose the disputed information.

Our conclusion

23. We find that section 40(2) FOIA is engaged and therefore dismiss the appeal and uphold the Commissioner's DN.
24. Our decision is unanimous.

Signed

John Angel

Judge

Date: 7<sup>th</sup> February 2014