



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

EA/2015/0049

BRYAN WELLS

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held on 6 September 2016 at Field House.¹
Before Jean Nelson, David Wilkinson and Judge Taylor.

Decision

The appeal succeeds in part. The reasons for this decision are out below and in the Closed Appendix². This decision is to be treated as a substituted Decision Notice.

Steps to be taken

Within twenty working days of the date of promulgation of this decision, the Environment Agency is required to disclose the information set out in the Appendix to this Decision.

¹ The matter was heard by consideration of the papers without an oral hearing.

² Part of the Appendix to this decision has been redacted because it discloses the contents of the requested information. It is therefore categorized as a 'Closed Appendix'.

Reasons

Background³

1. On 17 November 1997, the Appellant's sole water supply was contaminated following the spraying of slurry by a neighbouring farm. The Appellant complained that this caused serious problems for him and his family and the operation of his farm.
2. Prior to this event, the EA had been involved in approving the neighbour's farm waste management plan to which the slurry distribution system related.
3. On 18 November 1997, the Environment Agency ('EA') started its investigation relating to the complaint of pollution. The Appellant made two further complaints of contamination on 18 January and 6 March 1998 where the EA found no discharge occurring at the time of investigation. The EA decided not to prosecute anyone and ensured a review of the plan.
4. For some time, the Appellant has wanted to see information on the dealings between the EA and the individual who then owned the neighbouring farm. From 2006 to 2012, he made a number of 'subject access requests' under the Data Protection Act 1998 (the 'DPA'). Not satisfied with the response, he subsequently complained to the Information Commissioner ('Commissioner'). The subject access requests are not a matter for this appeal.

The Request

5. On the 7 October 2013, the Appellant requested from the EA:
 - *"all documents held by the EA relating to the groundwater pollution incident caused by low pressure irrigation of effluents and slurry occurring in late 1997"*. □
6. On 17 October 2013, the EA refused to disclose the information relying on the exception set out in regulation 13(1) EIR (*personal data*). Matters progressed with the Commissioner investigating the Appellant's complaint. In his Decision Notice (Ref. FER0539292), the Commissioner found that the EA had correctly relied on regulation 13(1) so as to withhold the information where it considered the requested material to be personal data of a sole trader.
7. The Appellant now appeals this decision.

The Task of the Tribunal

8. The Tribunal's remit is governed by s.58 Freedom of Information Act 2000 ('FOIA'). This applies to environmental information appeals as a result of regulation 18 of The Environmental Information Regulations 2004 ('EIR'). This requires the Tribunal to consider whether the decision made by the

³ See pages 234 to 239 of the Open Bundle.

Commissioner is in accordance with the law, or, where the decision involved exercising discretion, whether it should have been exercised differently.

9. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and make different findings of fact.
10. In this case, our remit is limited to considering whether the EA complied with requirements as a public authority under EIR in responding to his request. Any other matters raised by the Appellant - such as the regulatory powers of the EA and questions he has raised as to the lawfulness of their actions; what material the Commissioner considered - are beyond our remit. We make our decision on the basis of the material and submissions presented to us.
11. We have received an 'open' bundle of documents and a set of 'additional open documents' containing submissions and evidence as well as the 'closed' bundle containing the requested information. We have considered all of these even if not specifically referred to below.

The Law

12. Broadly speaking, the EIR is legislation governing an individual's right to access information from a public authority where it is 'environmental information'. Environmental information is defined in regulation 2(1) to include:

“any information in written, visual, aural, electronic or any other material form 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, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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”.

13. The parties agree that the relevant legislation to consider in this appeal is the EIR because the request relates to a groundwater pollution incident and the measures and activities affecting or likely to affect the elements as well as measures or activities designed to protect those elements.
14. Public authorities are under a general duty under the EIR to disclose information where it is requested under regulation 5. However, regulations 12 and 13 provide exceptions to that duty, including in relation to information that is personal data.
15. Personal data is defined in s.1(1) DPA as:

“data which relate to a living individual who can be identified - 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..”□

16. So far is relevant here, Regulation 13 states:

“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.

(2) 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 these Regulations would contravene— □(i) any of the data protection principles...” □

17. The first ‘data protection principle’ has been identified in this appeal as of relevance. This provides that:

“1. 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...” (See para. 1 of Schedule 1 of the Data Protection Act 1998 (‘DPA’)

(Emphasis added)

18. The only condition in Schedule 2 DPA that may be of relevance in these circumstances is where the disclosure 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.’ (See para 6, Sch. 2 DPA).

Issues

19. The Appellant has submitted extensive grounds of appeal. In short, the questions for the Tribunal relate to whether the EA has correctly relied on regulation 13(1) so as to withhold the information, namely:

A. *Is the Requested Information Personal Data?*

B. *Would disclosing it contravene the first data protection principle?*

A. Is the Requested Information Personal Data?

20. If the information is not personal data, then the EA cannot rely on the exception set out in regulation 13(1) EIR so as to withhold the information.

21. The Commissioner's submissions on the point include the following:
 - A. The disputed information comprises records of conversations between an identifiable individual and the Environment Agency, and correspondence between the Agency and that individual.
 - B. Personal data is defined under section 1(1) DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller. Therefore, even if the person's name were redacted, the remaining information would still constitute the individual's personal data. □
 - C. Information may relate to an individual in a business capacity and not just to their private life. As such, information about the business of a sole trader will amount to personal data as information about the business will be about the sole trader. □
 - D. The Appellant is aware of the identity of the person involved in the incident and confirms that his interest concerns the actions of the EA in relation to the investigation and subsequent findings of the pollution incident.
22. The Appellant's only argument on this point relates to whether the individual concerned in the incident was a sole trader or partner of a partnership. The point is not relevant for our purposes. This is because when considering whether the Appellant's request for information concerned 'personal data', we must consider whether the information is about or relates to an identifiable individual.⁴ On the facts, regardless of whether the relevant person was a sole trader or partner, he is an identifiable individual for the purpose of the DPA. In other words, whilst the Commissioner may or may not have incorrectly described the relevant individual as a sole trader makes no material difference to our decision, and we do not need to make a finding as to whether he was a sole trader or partner. In either case, he is an individual and we must determine whether the requested information is his personal data. We do not consider the argument further.

Our Findings

23. We have reviewed the requested information, and consider that it is personal data. This is because the redacted material contains information about individuals, principally but not exclusively the individual involved in the incident.
24. To the extent that the individuals' names and identifying details are redacted, the material will still remain the personal data of the person involved in the incident. This is because the Appellant will still be able to identify him from the requested information as he is already 'in possession of' his name. (See *para. 15 above*.)
25. The Commissioner argues that even if the material relates to an individual's business rather than personal activities it can still be personal in nature. We

⁴ See paragraph 15 above.

accept this. We consider that given the nature of the incident, the complaint made by the Appellant and subsequent investigation by the EA (exercising its regulatory powers in relation to the individual's activities), the requested material is personal in nature and personal data within the meaning of the DPA.

B. Would disclosing it contravene the first data protection principle?

26. The Commissioner's submissions on the point include the following:

Legitimate expectations

- A. There is a greater expectation of disclosure in relation to information about an individual's business as opposed to his private life, particularly where a regulator is involved.
- B. However, on the facts of this case, the individual had a reasonable expectation that their correspondence and dealings with the EA would not be disclosed:
 - a. The EA had explained that individuals whose activities fell within its regulatory powers had a reasonable expectation that information they provided in relation to those matters would be kept confidential. As a result any such disclosure of the information requested is likely to have distressing consequences to the individual concerned.
 - b. The EA had not pursued a prosecution.
 - c. The matter settled from the point of view of the regulator and the individual concerned.
 - d. The individual involved would not reasonably expect the EA to disclose such dealings more than fifteen years later.

Public Interest

- C. The public interest in disclosure did not outweigh the rights of the individual because
 - a. The information was purely of historical interest. The incident occurred more than 15 years ago, and did not warrant significant action by the regulator at the time.
 - b. There was a general public interest in disclosure of information relating to serious pollution incidents that resulted in criminal prosecutions, but not here. The Appellant's claim that the information remains relevant to existing and future water supplies in the local area was not supported by evidence.
 - c. There was no evidence presented to suggest that information about the 1997 pollution incident was pertinent to current issues or that a present danger was posed by the land in question or likely to recur.

- d. Disclosure under the EIR is disclosure to the world at large.
 - e. The Appellant's interest in the disputed information appears to be personal, given the focus on issues relating to an insurance claim and other potential legal action in his submissions. The personal interest did not translate into a wider public interest in disclosure to the world at large.
27. The Appellant's submissions are lengthy and not repeated here. They include:
- a. *"The information asked for is plainly about a matter that is now seen as rotten to the core with secrecy and clandestine dealings that covered up the truth. From the full history of correspondence it can also be seen that the EA was involved in the approval of a waste disposal plan at the concept and planning stage of affairs with the business."*
 - b. *"The EA investigator suggested the Farm Waste Management Plan as a means to control what was going on the day after the pollution incident. Significantly the investigator knew of the plan's existence and by then obviously aware of its limitations and failure."*
 - c. *"The approval of the Farm Waste Management Plan ['FWMP'] was at the root cause of failure and the fundamental error that lead to a cascade of further errors leading to disaster and deceit. I was of course barred from seeing the original FWMP and despite three formal FOI Information requests specifically related to the FWMP I am obliged to accept the position in relation to access of a plan formulated before the disaster."*
 - d. *"My level of trust in the intentions of the EA and the EA Corporate Security to provide the true records and full truth was destroyed the day I found out that the true cause of the pollution incident had been improperly denied and covered up for four years. The refusals to supply further detail and confirmation at that point was inexcusable and a despicable action. It was flagrant abuse and breach of trust. Trust was further demolished when the IC made clear that the EA had engaged in private dealings with the offenders to the obvious detriment of the victims in the disaster. It was a clandestine and discriminatory action covered up until recently exposed as private dealings and described as such by the IC."*
 - e. *"The EA action by letter to my MP and the Solicitor that listed reasons for not prosecuting the offenders and plainly deliberately omitted to reveal the true cause is the contemptable part of the whole affair. It was an inexcusable failure to tell the truth. The letters, however, make clear that the EA had approved the farm waste management plan at concept stage and the omission of the true cause of the pollution incident is conspicuously absent. They should be compelled to provide all the files under caution for complete disclosure."*

- f. *“No government body should have the power to make decisions and undertake clandestine actions and thereafter use the information regulations in an inappropriate way to cover up actions taken to the detriment of victims in a pollution disaster. Decisions and actions of a public body should be without discrimination and accountable. It follows that the results of any EA incident investigations as to cause of a pollution incident with life changing effects should be made available to the victims without the necessity of formal FOI requests, legal costs and years of disruption and delay.”*
- g. *“I question the right of the EA to make a decision in favour of removing prosecution at the expense of the victims in the disaster, and then place a restraint on information as to cause.”*
- h. *“Under no circumstances should the irrigation of effluent and slurry have been in operation during winter months over saturated ground and in a spring collection area. No consideration had been given to the existence and location of the spring collection area nor the spring egression point and the supply of water for human consumption that had been in use for perhaps a hundred years or more. The EA approved the plan and they failed in a duty of care to members of the public. Overall it was a bad error of judgement that failed to consider the consequences of their actions. The attempts to pass responsibility back to the business is overridden by the fact that the EA approved a plan that was flawed. The EA negligently gave approval and failed to give essential guidance and correction to the business at the time of plan conception. They failed to make reasonable and proper investigation of the circumstances on site. Pollution was inevitably going to occur when the ground became saturated from winter rainfall and effluent then passed to a spring outfall. The document had been submitted to the EA for approval and approval had been given. Within the event in question it has become clear that during the irrigation of effluent and slurry in the spring collection area the equipment suffered a mechanical breakdown which caused saturation and the inevitable pollution to the groundwater. This was the information buried by the EA following private dealings with the offenders and remained secret for four years until that part of the truth emerged. Seen and considered now of course, prosecution for the offence would inescapably have been complicated with the involvement of the EA in the approval of the waste disposal scheme at conception...”*
- i. *“...the blatant denial of information as to cause and required for recovery of damages and insurance cover is something that should never be repeated. Both information as to cause and actions of the EA should be available, on request, to the victims of pollution disaster immediately following the regulators decision not to prosecute. Nobody should be subjected to the demands and delays of having to seek this information via FOI or EIR channels.”*

- j. *“In my view the victims in a man-made disaster should not be placed at disadvantage through denial of information by the regulator – the EA... The denial of information described was obviously a block on recovery of damages through court and insurance proceedings and is plainly wrongful and unacceptable.”*
- k. *“When the inevitable disaster struck, the EA affiliated with the business representatives and engaged in private dealings and in so doing placed those suffering damage at further disadvantage by not disclosing the actual cause of the pollution. Obviously the private dealings and remedial measures that the IC has referred to in his decision included a revision to the FWMP. This was no doubt the principle part of the offer in exchange for no prosecution. By engaging in secret dealings they demonstrated a callous disregard for the wellbeing of those already at disadvantage and suffering the loss of water supply. It was a calculated insensitive decision with immediate and long term damaging influence.”*
- l. *“It is my intention that the history of all the information enquiries (together with the associated correspondence) will demonstrate that the response from the regulators was confined to the default use of rights of the individual representing the business and throughout with complete avoidance of dealing with the demands for information about the actions of the EA... Significantly the IC has condoned these actions by accepting and ruling that the regulators have done nothing wrong”*
- m. *“I do feel that the argument put up by the IC using the rights and freedoms of the individual representing the business is unbalanced because the rights and freedoms of the victims are totally overlooked and not considered. The temerity of the situation is plain to see.”*

Our Findings

- 28. Having found that the requested material is personal data, we must consider whether its disclosure would breach any of the data protection principles. In particular, the Commissioner has been concerned with the first data protection principle, which states that personal data shall be processed fairly and lawfully and not disclosed unless one of the conditions is met.
- 29. The condition cited as of relevance here states that disclosure must be *‘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.’* (See para 6, Sch. 2 DPA).
- 30. Accordingly, we must first consider if the disclosure is ‘necessary’ for the purpose of the interests pursued by those to whom the information would be disclosed.

(i) What are the legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed?

31. The Commissioner argues that the interest must be a public rather than private interest for the purpose of this condition because disclosure under EIR is presumed to be a disclosure to the world at large. On a reading of the legislation, this is not necessarily so, given that the world at large cannot be said to be pursuing that the material be disclosed. However, regardless of whether the Commissioner's position is correct the strongest interests identified in the Appellant's case for disclosure and the only ones to which we would give weight seem to us to be both his private and the public's interests. The first is a general interest in transparency and accountability of a public authority. In particular, there would be value in knowing how effective, efficient and fair the EA were in dealing with an incident of contaminated water supply, including in deciding whether or not to prosecute the individual or individuals concerned. It is accepted that the incident was some time ago such that the interest may be weaker than it was, however the Appellant's focus at the time of this appeal is with the EA's discharge of its responsibilities as a public authority following the incident. Notwithstanding the nature of his interest, we have no reason to accept, and certainly do not accept, the Appellant's strong assumption of wrongdoing by the EA, as evidenced in the quotations at paragraph 27 above. The second interest is in the Appellant and other farmers being able to find out the details and causes of incidents affecting their property. There is a strong interest in this being known speedily after the event. Over time, this interest may also diminish, and we think it has done so here. We consider that whilst both interests have diminished with time, they nonetheless still carry some weight.
32. We accept that the incident did not result in a criminal prosecution, that it is plausible that the requested information is not relevant to existing and future water supplies in the local area or pertinent to current issues. We do not accept the Appellant's interest in the disputed information is focused on an insurance claim and other potential legal action, as the Appellant denies this and stating that it is too late to make such a claim. However, this does not detract from the interests we have identified in paragraph 31 above.

(ii) Is disclosure necessary?

33. The case of *Farrand v the Information Commissioner and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)* instructs us at para. 27 that the word necessary "*connotes a degree of importance or urgency that is lower than absolute necessity but greater than a mere desire or wish.*"
34. We have noted that the requested material includes both the personal data of the individual involved in the incident ('category A') as well as of other individuals ('category B'). The personal data that is category B consists of certain identifiers such as a person's name, which it is not necessary to disclose for the interests identified in paragraph 31 above. Accordingly, we find that the category B information should be withheld (*as described in the Closed Appendix*) and do not consider it further below.

35. Once the category B information is redacted, the remaining material is all category A, namely the personal data of the individual involved in the incident. We consider that disclosure of this information is necessary for the interests identified in the paragraph above, notwithstanding that the information is historic in nature.

(iii) What are the rights and freedoms or legitimate interests of the data subject? Would disclosure be unwarranted by reason of prejudice to these rights, freedoms and interests?

36. We then consider whether disclosure of the category A information is unwarranted because of it would prejudice to the rights and freedoms or legitimate interests of the data subject. In assessing this, we take into account that the disclosure under EIR is considered to be a disclosure to the world at large and not only to the Appellant. We consider whether there are rights and freedoms or legitimate interests of the individual concerned in the incident and whether disclosure would be unwarranted because of the prejudice to such rights and freedoms or legitimate interests.⁵

37. We accept that the relevant individual was running a business and that there is a greater expectation of disclosure in relation to information about an individual's business as opposed to his private life. Having reviewed the material in detail, we consider that the individual would have had a reasonable expectation to privacy of some of the material but not other parts by virtue of the nature of that information, as explained in the Closed Appendix to this decision.

38. As regards Category A, some of the requested information should be redacted in accordance with the Closed Appendix. This is because disclosure of this material is unwarranted where the relevant individual had a reasonable expectation that it would be kept confidential. We consider this reason to be sufficient in itself, but also accept the further factors would additionally indicate withholding the information:

- a. The EA had not pursued a prosecution.
- b. The matter had been settled from the point of view of the regulator and the individual concerned.
- c. The individual involved would not reasonably expect the EA to disclose such dealings more than fifteen years later.
(‘the further factors’).

39. We find that certain of the information identified in the Closed Appendix should be disclosed. This is because we do not consider it to be of sufficient a personal nature for the relevant individual to have such an expectation of keeping the information confidential as to make the disclosure unwarranted, having taken into account both the further factors and also the interests identified in paragraph 31 above.

⁵ See para. 29 of the Upper Tribunal decision of *Information Commissioner v (1) CF and (2) Nursing and Midwifery Council (Information rights : Data protection)* [2015] UKUT 449 (AAC) (10 August 2015).

40. Our decision is unanimous.

Judge Taylor

29 September 2016