

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

Date: 23 August 2018

Public Authority: Environment Agency
Address: Horizon House
Deanery Road
Bristol
BS1 5AH

Decision (including any steps ordered)

1. The complainant has requested information relating to the Environment Agency's (EA) investigation into allegations made about a particular member of staff. The EA refused to disclose the information, citing regulations 13, 12(4)(e) and 12(5)(b) of the EIR.
2. The Commissioner's decision is that the EA is entitled to refuse to disclose the requested information under regulation 13 of the EIR. The Commissioner therefore does not require any further action to be taken.

Request and response

3. On 17 July 2018, the complainant wrote to the EA and requested information in the following terms:
 - "1. Provide a full copy of the investigation report.
 2. Confirm in writing on behalf of the Environment Agency that the Environment Agency takes the view that it is appropriate and acceptable for a senior waste officer to kick material into a sampling area at an operator's site with the clear intention of affecting the sampling results and saying *'it's nothing you wouldn't do'* to the client and then being removed from site by another officer.

3. Confirm whether [name redacted] is still on active duty at the Environment Agency.
 4. Explain why [name redacted] did move the 'contaminated material' if it was not to 'unfairly or inappropriately influence the sampling exercise'. Please explain exactly what [name redacted] was doing then, when he was observed kicking materials into the sampling area, and why his explanation of this when caught by the operator was *'it's nothing you wouldn't do'*.
 5. Explain why the Environment Agency felt the need to conduct another sampling exercise one month after this one.
 6. Confirm why the other Environment Agency officer removed [name redacted] from site if his actions were not inappropriate. Please provide a copy of that officer's notebook from that date."
 7. Provide an update on your colleague's investigation of [name redacted] conduct in relation to the telephone call which he had with our client where we understand he suggested he would drop the investigation if our client dropped his complaint against [name redacted]. This was raised during the investigation with [name redacted] on [date redacted]."
4. The EA responded on 10 August 2017. In relation to question 1, the EA applied regulations 13, 12(4)(e) and 12(5)(b) of the EIR. In relation to question 2 it confirmed that the information is not held. In respect of question 3 it applied regulation 13 of the EIR. For questions 4, 5, 6 and 7 it applied regulations 13 and 12(5)(b) of the EIR.
 5. The complainant requested an internal review on 4 October 2017.
 6. The EA carried out an internal review and notified the complainant of its findings on 29 November 2017. It confirmed that it remained of the opinion that the requested information is exempt from disclosure under the exceptions cited.

Scope of the case

7. The complainant contacted the Commissioner on 13 February 2018 to complain about the way her request for information had been handled. She provided a four page letter to the Commissioner detailing the background to the request and explaining why she remains dissatisfied with the EA's decision not to disclose the investigation report.

8. The Commissioner asked the complainant to confirm the scope of her complaint. She advised that she remains dissatisfied with the EA's handling of all questions except question 2.
9. The Commissioner has therefore considered the EA's handling of questions 1, 3, 4, 5, 6 and 7. Many of these questions are requests for specific explanations to be provided or for an update to be given in relation to ongoing investigations. There is no requirement under the EIR to answer questions or provide explanations unless the answers to these questions or explanations is already held in recorded form.
10. The EA has confirmed that the recorded information it holds falling within the scope of these questions is the investigation report and it considers this report to be exempt from disclosure under regulations 13, 12(4)(e) and 12(5)(b) of the EIR.
11. During the Commissioner's investigation the EA disclosed appendix 8, 9 and 17 to the complainant. Appendix 8 is the EA's Code of Conduct and appendix 9 is its Disciplinary Policy applicable to all staff. Appendix 17 is the EA's Customer Service Commitment statement.
12. The Commissioner will consider the application of regulation 13 of the EIR first to the remaining elements of the investigation report. She will only go on to consider the application of regulations 12(4)(e) or 12(5)(b) if it is found that regulation 13 of the EIR does not apply to some or all the remaining withheld information.

Reasons for decision

13. It first must be highlighted that the Data Protection Act 1998 has been superseded by the Data Protection Act 2018. However, as this request was made and considered by the EA under the 1998 Act (as this was the legislation in force and applicable at this time) the Commissioner must consider the application of regulation 13 of the EIR in conjunction with the 1998 Act and not the 2018 Act. The Data Protection Act 1998 will be referred to as the 'DPA' for the remainder of this notice.
14. Regulation 13 of the EIR states that a public authority shall not disclose information if it constitutes the personal data of a third party and the disclosure of that information would breach any of the data protection principles outlined in the DPA.

Personal data is defined as:

..."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 that individual and any indication of the intentions of the data controller or any other person in respect of the individual..."

15. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle 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, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

16. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of regulation 13 of the EIR ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

Is the remaining withheld information personal data?

17. The EA has argued that the remaining withheld information in its entirety constitutes the personal data of the officer named in the request. This is because the information was recorded as part of an investigation following a specific complaint against that individual. It stated that the remaining withheld information is an investigation report and appendices commissioned by the EA to establish the facts and to allow a determination to be made as to whether there is a disciplinary case to answer with regards to its disciplinary procedures. It also argued that the withheld information includes the personal data of a second named individual against whom a complaint was made and other EA staff that were interviewed as part of the investigation.

18. The Commissioner has reviewed the withheld information. She is satisfied that in its entirety it constitutes the personal data of the officer that was being investigated. This person is the focus of the withheld

information, the reason the investigation was undertaken and the remaining withheld information discusses the specific allegations made against them and their conduct. It is information from which this person can be identified. In relation to question 3, the withheld information also constitutes this individual's personal data. They are the focus of the withheld information and providing an answer to this question one way or another releases personal information about the status of their employment.

19. She is also satisfied that the withheld information contains the personal data of a number of third parties. It contains the personal data of various members of staff who were interviewed as part of this enquiry and provided their account of the events described and allegations made against the staff member. It also contains the personal data of another member of staff against whom a connected but separate complaint was made. The Commissioner is satisfied that all third parties can be identified from the contents of the withheld information.
20. The complainant has questioned why the EA has not redacted the withheld information to prevent identification and to enable disclosure. The Commissioner is of the opinion that in some cases it is possible to redact information in order to sufficiently anonymise it for public disclosure. In cases where it is possible to render the requested information anonymous by the process of redaction, what remains does not constitute personal data, as the data subjects can no longer be identified from it. The Commissioner has considered the contents of the withheld information and she is of the opinion that it is not possible to sufficiently redact the investigation report to anonymise the various data subjects involved. One data subject's personal data is intrinsically linked to another and she considers it would be possible to identify the individuals from the accounts they have provided – the description of the events that occurred, what they considered happened and their opinion on that/version of events.
21. For the above reasons, the Commissioner is satisfied that the withheld information is the personal data of a number of third parties and it is not possible to anonymise it sufficiently in order to allow disclosure. She will therefore now go on to consider whether disclosure would be unfair in accordance with the first data protection principle.

Would disclosure be unfair?

22. Firstly it is important to highlight what disclosure under FOIA/EIR actually means. Disclosure under FOIA/EIR is to the world at large. The relevant consideration is not whether the information can or should be disclosed to the complainant but whether the information should be

disclosed to the world at large i.e. is suitable for the public domain and for anyone to see.

23. The EA has argued that the officer that was under investigation would have no expectation that their personal data would be used for any other purpose other than investigating the allegations and any subsequent action that may or may not arise from the investigation. It considers the officer and all members of staff would have no legitimate expectation that personal data alleging serious misconduct would be disclosed into the public domain. To the contrary they would have the reasonable expectation that this information would remain private between them as employee and the EA as employer and would only be used for this specific purpose in line with its Disciplinary Policy.
24. The EA advised that it does not consider this position is changed by the fact that the officer works for a public body and has a public facing role. It acknowledged that the Commissioner draws a distinction between personal data relating to one's personal life and personal data that relates to one's public life. However, it considers disclosure in this case would cause serious reputational damage and personal upset to the named officer, including a risk to their emotional or mental wellbeing.
25. The EA considers the same arguments apply to the other member of staff against which a complaint was made.
26. In respect of question 3, the EA stated that a response to this question would release personal data relating to the named officer. It would say something about their employment status at that time and would allow inferences to be drawn from that response which would be unfair and distressing to the officer concerned.
27. Turning now to the third parties in the withheld information who assisted the investigation, the EA again refers to its Disciplinary Policy and states that these individuals would hold the reasonable expectation that the information they supplied together with their recollection of events and opinions would remain private and confidential. They would not have any expectation that their personal data could be disclosed to the world at large and would instead expect that it is only used for the purpose of the investigation and determining what action is required if any in a private setting.
28. If this information was disclosed it would cause these data subjects distress and upset and could lead to staff in the future refusing to cooperate with similar investigations or being selective with the assistance and information they are willing to provide.

29. It stated that it has considered whether there is an overriding legitimate public interest in the disclosure of this information and it has decided that there is not. In this case there is a strong expectation of confidentiality and privacy in relation to all the data subjects concerned and EA staff more generally which should not be overridden.
30. The Commissioner has reviewed the EA's Disciplinary Policy and notes at paragraph 1.5 that it states the following:

"Disciplinary matters are confidential. You will be given access to relevant information on a need to know basis, and you must treat the information as confidential. Any breach of confidentiality (including informal discussions with colleagues) may prejudice an investigation and may also itself constitute a disciplinary offence. Records must be kept confidential and retained in accordance with the policy, the Environment Agency's data management protocols and the Data Protection Act 1998, which requires the release of certain data to individuals on their request. In certain circumstances some information may be withheld, for example to protect a witness."
31. The Commissioner understands that this policy is applicable to all staff and it is evident from this that all disciplinary matters and investigations leading up to whether disciplinary action is required or not takes place in private and strictly on a confidential/need to know basis. It also stipulates how records about such matters will be treated i.e. confidentially and how such confidentiality may restrict any subject access requests that may be made by those involved under the Data Protection Act.
32. The Commissioner considers this clearly supports the EA's assertion that the named officer under investigation, the other officer which had a complaint made against them as well and those that assisted with the EA's investigation, will hold the reasonable expectation that their personal data will remain private and confidential. It suggests that their personal data will be used only to determine that investigation nothing further and will certainly not be disclosed into the public domain for anyone to see.
33. The Commissioner notes that a general distinction can be drawn between the personal data of a public sector employee acting in their professional capacity and the personal data of a public sector employee's private life. Generally speaking she accepts that some personal data relating to senior members of staff and those in public facing roles should be legitimately disclosed to aid transparency and accountability. However, she considers there is a difference between disclosing information relating to the duties they perform or in relation to specific decisions they have made on behalf of their employer in a

work related capacity to disclosing more personal information relating to their personal relationship with their employer, their performance at work, any complaints made about their conduct for example and any disciplinary matters.

34. Disciplinary matters should be carried out in private in accordance with the appropriate procedures a public authority has in place; not in public. Public disclosure of such matters would undoubtedly cause the officer involved and those that assisted with the public authority's investigation distress, upset and potential damage to their reputations and careers. The Commissioner considers the same can be said for the investigation of complaints about particular members of staff.
35. With regards to question 3, the Commissioner considers in these circumstances it would be unfair to disclose the employment status of the officer subject to the investigation report at the time of the request. Disclosure would have revealed whether or not they were still employed, in active duty and so on and would have allowed inferences to be drawn from this information about the status of whether any further action may or may not be taken against that individual, or whether disciplinary matters were ongoing or concluded.
36. The Commissioner accepts that there is a legitimate public interest in openness, transparency and in knowing that any allegations made about a public sector employee are taken seriously and investigated fully. She also accepts that the complainant has a legitimate interest in the disclosure of this information. It would allow her to know the 'in's' and 'out's' of the EA's investigation and use this information to determine whether her clients could, in her opinion, successfully instigate private proceedings. However, in this case, the Commissioner considers there are more appropriate mechanisms and routes for the complainant to follow rather than seeking public disclosure under the EIR and any legitimate public interest in disclosure of this information is not sufficient to outweigh the distress, upset and unwarranted intrusion disclosure would cause to all data subjects concerned.
37. For the above reasons, she is satisfied that disclosure would be unfair, in breach of the first data protection principle outlined in the DPA and therefore that regulation 13 of the EIR applies.

Right of appeal

38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

39. 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.
40. 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

Samantha Coward
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