

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

Date: 24 January 2024

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a specific farm. The Environment Agency (“the public authority”) refused to confirm or deny whether the information is held, citing regulation 13(5)(a) (personal information) of the EIR.
2. The Commissioner’s decision is that regulation 13(5)(a) has been applied correctly.
3. The Commissioner does not require further steps.

Request and response

4. On 27 July 2023, the complainant wrote to the public authority and requested:

“Please could you give me all the details possible under the freedom of information act 2000 regarding (Name and address of farm). Reports were made about a huge heap of inert waste which was brought in on large lorries. The owner had know (sic) exemption at the time how ever applied for one after photos were taken by a member of your team (Redacted) and she spoke to him regarding the site. The farmer that owns the field (sic) reported the rise in field levels after the waste

was spread over the land. He was granted an exemption after this in 2021 July. As we are taking legal action against [Redacted] and would appreciate any information you can provide.”

5. The public authority responded on 18 August 2023. It withheld the requested information, citing regulation 12(5)(b) (the course of justice and inquiries).
6. The complainant requested an internal review on 22 August 2023. They noted they had been informed that no action was being taken against the farm in question.
7. The public authority provided the outcome to its internal review on 20 October 2023. It revoked its reliance on regulation 12(5)(b), explaining:
“upon review, there are no ongoing legal investigations at the site of interest. We applied the exemption due to there being a history of investigation at the site. As our decision was based on historical events and not current, this was the incorrect use of EIR regulation 12(5)(b).”
8. The public authority changed its response and confirmed it was relying on regulation 13(5)(a) to neither confirm nor deny whether any relevant information was held.

Reasons for decision

Regulation 13(5)(a) – personal information

9. The Commissioner notes the request relates to the state of the land, and any waste that might affect it. He’s satisfied that the requested information, if held, would be environmental information in line with regulation 2(1) (interpretation) of the EIR.
10. Regulation 5 of the EIR states that a public authority must confirm whether or not it holds information that’s been requested. This is what’s known as ‘the duty to confirm or deny.’
11. However, there are exceptions from the duty to confirm or deny. When applying one of these exceptions, a public authority must consider the consequences of providing both responses, regardless of whether or not the information is actually held.
12. For example, if a public authority doesn’t hold the requested information, it should consider what would be revealed by denying it held the information but also by confirming it held the information. Neither confirm nor deny responses should be used consistently,

regardless of whether the requested information is held, to avoid any inferences being made.

13. Under regulation 13(5)(a) of the EIR, a public authority is not obliged to comply with regulation 5 if simply confirming whether or not it holds the requested information would contravene any of the principles relating to the processing of personal data that are set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
14. In order for the public authority to correctly rely on regulation 13(5)(a) the following criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would confirming or denying whether the requested information is held constitute the disclosure of a third party's personal data?

15. Section 3(2) of the Data Protection Act 2018 ('DPA18') defines personal data as:

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

16. 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.
17. The address of the farm is outlined in the request. Bearing in mind the role of the Environment Agency (enforcing laws to protect the environment), the phrasing of the request and the explanation the public authority gave in paragraph 7, the Commissioner believes that if the public authority were to comply with regulation 5, this would reveal something about the farm and by extension its residents. It would reveal whether or not the farm is under investigation, being considered for investigation, or at least engaging with the public authority. Any of these outcomes would result in the disclosure of the personal data of the residents of the farm.
18. Even though complying with the duty to confirm or deny would result in the disclosure of personal data, this doesn't mean that the public authority automatically shouldn't do so. The Commissioner must consider whether such a confirmation or denial would contravene any of the data protection principles referred to in paragraph 13.

Would confirming or denying whether the requested information is held contravene one of the data protection principles?

19. The most relevant principle is Article 5(1)(a). This states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”¹

20. 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 – or as in this case, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) of the UK GDPR), be fair and be transparent.

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

21. 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.”

22. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made 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, or in the case, confirmation or denial that the requested information is held, 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.

¹ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](https://legislation.gov.uk/eur/2016/679)

The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

23. The Commissioner must first consider the legitimate interest in confirming or denying the information is held, and essentially disclosing personal data, to the public and what purpose this serves. In considering any legitimate interest(s) under the EIR, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin the EIR, or may represent the private concerns of the requestor.
24. It's important to remember that disclosure under the EIR is effectively disclosure to the world at large. The Commissioner is of the opinion that, if the requester is pursuing a purely private concern which is unrelated to any broader public interest, then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).
25. The complainant clearly has concerns about the farm in question and wants to know whether the public authority is engaging with the residents. The Commissioner is satisfied there is a valid, private, legitimate interest being pursued here.
26. There's also a legitimate interest in the public authority being transparent about its work and whether it's addressing such concerns from the public, especially since it appears the regulator has considered the matter in the past.

Necessity test

27. The Commissioner must also consider if confirmation or denial that the requested information is held is necessary for the purpose that this legitimate interest represents or if there is an alternative method of doing so.
28. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure, or in this case confirmation or denial, under the EIR is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.
29. When raising their complaint, the complainant described the concerns they have about the farm which the Commissioner doesn't intend to

replicate here. However, it's clear the complainant has a complaint about the farm and they believe it's relevant to the work the Environment Agency does.

30. The Commissioner isn't convinced that confirming or denying that this information is held, under the EIR, is necessary in order for the complainant to raise any complaint with the public authority. Anyone can raise a complaint with the public authority² or escalate³ a decision they think is incorrect.
31. The Commissioner acknowledges the circumstances behind the request and that the complainant's concerns will likely be shared with others who live near the farm. However, the information being requested here is intrusive. Whilst there is a legitimate interest in understanding the work the Environment Agency does, the Commissioner must consider the extent to which this will be met by the proper channels, or legal challenge, rather than providing confirmation or denial in this instance.
32. However, the Commissioner does acknowledge the need for the public authority to be transparent and accountable for complaints that are in its remit. Since the Commissioner is satisfied that disclosure is necessary to demonstrate this accountability and transparency, he'll go onto consider whether the identified interests in confirmation or denial outweigh the interests or fundamental rights and freedoms of those who live at, or operate, the farm, who represent the data subjects.

Balancing test

33. If the data subjects would not reasonably expect that their personal data would be disclosed to the public under the EIR, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
34. In performing this balancing test, the Commissioner has considered the following:
 - the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern to the disclosure; and

² [Report an environmental incident - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

³ [Complaints procedure - Environment Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

- the reasonable expectations of the individual.
35. In the Commissioner's view, the balancing test should take into account whether the data subjects concerned have a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose which this personal information serves.
 36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 37. The Commissioner has no doubt that confirmation or denial in this instance (which, either way, would result in the disclosure of personal data) would cause distress to the data subjects. If the public authority confirms it holds the requested information, speculation will follow as to why the farm is engaging with the environmental regulator and what activities the farmers were carrying, or allowing, to be carried out.
 38. Furthermore, confirmation that the requested information is held wouldn't provide any context as to why it's held and could be misinterpreted. Information could be held because the regulator has made enquiries but deemed that no action has been taken.
 39. Disclosure under the EIR is disclosure to the world at large. The Commissioner is satisfied that the information the complainant is requesting is not in the public domain. Some of the issues surrounding the farm might be known to the complainant, and others, but this isn't the same as confirming to the world at large that the regulator holds information relevant to the farm.
 40. The Commissioner isn't diminishing the legitimate interest behind this request; the requested information is important to the complainant for valid reasons. However, the complainant, or any other individual, can bring a complaint to the public authority for investigation at any stage. Confirmation of denial isn't required for the regulatory body to look at any allegations about the farm. Bearing in mind the nature of the information requested, and the harm and distress confirmation or denial would cause in this instance, the Commissioner believes the legitimate interest in this case doesn't outweigh the rights and freedoms of the data subjects.
 41. The Commissioner therefore considers that there is no Article 6 basis for processing and disclosure of personal information in this instance through confirmation or denial in this case would be unlawful.

Other matters

42. The Commissioner's guidance states that a public authority should provide its internal review within twenty days of the internal review request. This can be extended by a further twenty days if the review is particularly complex. The public authority exceeded this timeframe.

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

44. 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.
45. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF