

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 July 2012

Public Authority: Environment Agency
Address: Tyneside House
Skinnerburn Road
Newcastle Business Park
Newcastle Upon Tyne
NE4 7AR

Decision (including any steps ordered)

1. The complainant has requested transcripts of interviews conducted by the Environment Agency ("EA") with the Deputy Chief Executive of Heart of England NHS Trust ("the Trust") and a senior manager about waste management at the Trust. The complainant also asked for a letter sent by the EA to the Trust in February 2007.
2. The Environment Agency withheld some information under regulations 12(5)(b) and 12(5)(f). The Commissioner considered some information to be the personal data of third parties and therefore considered regulation 13(1). In addition to this the EA identified some information as being the personal data of the applicant and applied regulation 5(3). The EA has considered this latter information separately under section 7 of the Data Protection Act 1998.
3. The Commissioner's decision is that the EA has correctly applied regulation 12(5)(b) as a basis for withholding the requested information. He has therefore not gone on to consider the application of the other exceptions.

Request and response

4. On 10 November 2011 the complainant wrote to the EA and requested information in the following terms:

"I believe that on the 18th October, the Deputy Chief Executive of Heart of England NHS Foundation Trust, Mr Adrian Stokes, and a senior manager of the Trust, were interviewed under caution by the Environment Agency following audits carried out at the Trust into waste management in early 2010 (22nd and 23rd February, 31st March and 1st April 2010) ... I would

therefore like to have the opportunity to look at their statements given to the EA ... I had requested a copy of these transcripts from the Trust, but they advise that they would not be able to provide this information to me as it is confidential property of the EA. They suggested I make this request to the EA.

I would also like to request a copy of the letter sent by the Environment Agency on 29th June 2007 to the then Chief Executive Officer of the Heart of England NHS Foundation Trust, Mr M Goldman, following the EA audits carried out at the Trust in February 2007."

5. The EA responded on 13 December 2011. It stated that the information requested was environmental information and it had now provided a copy of the letter it understood the complainant to be referring to. With regards to the transcripts and statement of the Trust the EA explained it considered disclosure of this information would undermine the EA's investigation of offences and adversely affect the course of justice as the interviews were conducted on a voluntary basis.
6. Following an internal review the EA wrote to the complainant on 1 March 2012. It stated that it had reconsidered its application of regulations 12(5)(b) and 12(5)(f) and the public interest arguments associated with each and still maintained these exceptions favoured withholding the transcripts and statement of the Trust.
7. The EA also applied regulation 12(3) and 13(1) as it had identified that some of the opinions and views contained in the statements referred to third parties. The EA also identified information it considered to be the personal data of the complainant and explained that this would be considered under section 7 of the Data Protection Act 1998 ("DPA").

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, the complainant did not consider that disclosure of the requested information would have the prejudicial effect identified by the EA.
9. The Commissioner considers the scope of his investigation to be the application of regulations 12(5)(b), 12(5)(f) and 13(1) to withhold the interview transcripts and the statement of the Trust.

Reasons for decision

10. The EA has stated that some of the information within the transcripts is the personal data of the complainant.

11. The Commissioner has considered the information which is held by the EA and his decision is that a limited amount of the information is the personal data of the complainant. This information is third party comments and opinions on the actions of the complainant recorded within the interview transcripts.
12. Regulation 5(3) of the EIR overrides the general right of access to information under the EIR where the information is the personal data of the applicant. This information is therefore exempt from disclosure under the EIR. The Commissioner recognises that the complainant is therefore likely to have access rights to this information under section 7 of the DPA and notes that the EA has considered this information separately under section 7. He has therefore not considered this particular information any further in this decision notice.

Regulation 12(5)(b)

13. Regulation 12(5)(b) allows a public authority to withhold information if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
14. The EA has explained that the interview transcripts and statement were part of an investigation into breaches of the Environmental Protection Act 1990, the Environmental Permitting (England and Wales) Regulations 2007 and the Hazardous Waste Regulations (England and Wales) 2005. The inquiry related to the management of controlled industrial waste and hazardous waste at hospitals in the West Midlands. The EA explained it is the regulatory body with responsibility for a duty to investigate offences under this legislation.
15. The EA considers that disclosure of the withheld information would adversely affect the course of justice and the conduct of this and similar criminal inquiries.
16. In deciding whether this exception has been applied correctly the Commissioner has considered whether the withheld information related to an inquiry or investigation conducted by the EA of a criminal or disciplinary nature. The Commissioner is satisfied that the information would form part of the evidence the EA would rely on in the course of its investigation into waste management.
17. The arguments of the EA focus on the need to preserve the confidentiality of the investigatory process and the voluntary supply of information. The EA believes that an erosion of this confidentiality would result in potential defendants and their employees being less willing to participate in investigations.

18. The Commissioner recognises the strength of the argument made by the EA about the difficulty of finding individuals willing to participate in an investigation and that this willingness would be further reduced if potential defendants and their employees were concerned that their contributions, which would otherwise have remained confidential, could be disclosed. The Commissioner agrees that an erosion of the willingness of individuals to participate would have an adverse effect on the ability of the EA to conduct an inquiry of a criminal nature.
19. The withheld information consists of interviews taken under caution and detailed draft witness statements as well as a statement from the Trust. This information was all provided voluntarily as the EA does not have the power to compel attendance at interview under caution. The EA maintains that these individuals cooperated on the understanding that the information would be confidential and only used in the context of the investigation.
20. The Information Tribunal (EA/2011/0112 & 0113) has considered this issue in the context of witness statements and found that statements given in relation to criminal investigations and voluntary interviews conducted under caution are done so in the expectation that, if not used at a trial, they will not be made publicly available. The Commissioner therefore recognises the importance of the EA having space to carry out investigations confidentially.
21. In assessing whether the exception is engaged in this case the Commissioner has also considered the stage that the investigation had reached and the age of the requested information at the time the request was made.
22. The Commissioner considers that when assessing whether or not the exception is engaged it is relevant to take into account the stage the investigation has reached. In assessing the arguments about the adverse effect on the investigatory process put forward by the EA, the Commissioner has considered the fact that the investigation is closed and that no formal prosecution was made, although a caution notice was served.
23. Although the investigation was concluded some time ago, the Commissioner is nonetheless satisfied that disclosing the requested information would adversely affect the ability of the EA to obtain information voluntarily from individuals, specifically potential defendants and their employees and those with in-depth knowledge of incidents. The Commissioner therefore accepts that regulation 12(5)(b) applies by virtue of an adverse effect on the investigation process. He has therefore gone on to consider the public interest arguments.

Public interest arguments in favour of disclosure

24. The complainant argued that the disclosure of the information is important to his ability to challenge decisions made against him and withholding the information is disadvantageous to him.
25. The Commissioner is mindful of the fact that there is a strong presumption in favour of disclosure of information under the EIR. He has also considered the arguments that the disclosure of the requested information would promote a general transparency and accountability in relation to the actions of the EA and the Trust.
26. More specifically, the Commissioner also recognises that disclosure of the information could build confidence in the EA investigative and enforcement activities as it would demonstrate that the EA has conducted a thorough and fair investigation of the issues. This in turn would enhance its standing in terms of its investigation of complaints.
27. The Commissioner agrees that there is a public interest in ensuring that the EA is accountable for its decisions and transparent about the reasons for reaching those decisions. Greater accountability and transparency is also likely to increase public confidence in the decisions of the EA.
28. The complainant believes that disclosure in this case is in the public interest given the subject of the investigation that the information relates to. The EA also recognises that there is likely to be public interest, at least at a local level, in the management of waste and clinical waste by NHS Trusts. The Commissioner acknowledges that local communities are likely to be interested in ensuring that Trusts effectively manage waste.

Public interest arguments in favour of maintaining the exemption

29. The Commissioner is mindful that there is a strong public interest in the public maintaining confidence in the ability of the EA to ensure that its conduct of the investigation into this complaint is fair and thorough. The Commissioner therefore considers that disclosure would be prejudicial to the Council's ability to conduct a fair, thorough and effective investigation.
30. The Commissioner is also mindful of the fact that disclosure could endanger the confidentiality of information provided by individuals and organisations. He recognises that its disclosure may inhibit its ability to communicate freely and frankly with individuals in the course of future investigations. This in turn would inhibit its ability to conduct future investigations thoroughly and effectively as third parties would be less willing to volunteer information.
31. The Commissioner recognises the importance of witnesses when carrying out an investigation. He is satisfied that releasing the requested information would adversely affect the ability of the public authority to obtain co-operation from potential defendants and their employees which in turn is

likely to reduce its ability to effectively investigate potential breaches of environmental legislation. The public interest in protecting the ability of the EA to obtain full evidence from relevant parties is considerable.

Balance of the public interest arguments

32. In this case the Commissioner has concluded that the public interest arguments in favour of maintaining the exception outweigh those in favour of disclosure. In reaching this decision he has taken into account the level of harm that is likely to arise to the public authority's ability to carry out investigations. He is satisfied that if the public authority were unable to obtain full and frank information from witnesses or people were dissuaded from voluntarily providing information this would seriously impact on the ability of the EA to carry out investigations, particularly as it does not have powers to compel individuals to provide information in interviews under caution.
33. Whilst the Commissioner acknowledges the weight of the arguments in favour of disclosure and the presumption in favour of disclosure, in this case he considers that the arguments in favour of maintaining the exception are compelling. There is a clear public interest in ensuring that the EA are able to fully investigate and to charge those alleged to have committed offences. The ability to secure full information from potential defendants and their employees and to decide how to pursue an investigation away from public scrutiny are central to that process.
34. The Commissioner notes the complainant's argument about his right to a fair trial but whilst he fully concurs with the right of an individual to a fair trial he considers that the private interests that might be served by a limited disclosure of information to a particular individual are less relevant to an assessment of the public interest.
35. The Commissioner has therefore concluded that the balance of public interest favours maintaining the exception and accordingly, regulation 12(5)(b) is engaged. As the Commissioner has determined that regulation 12(5)(b) is engaged, he has not gone on to consider the EA's application of regulation 12(5)(f) or regulation 13(1) in respect of the third party data contained within the transcripts.

Right of appeal

36. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

Pamela Clements
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