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

Decision notice

Date: 25 July 2016

Public Authority: Department for Environment, Food and Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between the Department for Environment, Food and Rural Affairs (Defra) and the Direct Marketing Association (DMA) about the Door-Drop Preference Service scheme, covering the period from 7 May 2012 to 31 May 2014. Defra provided a limited number of records in response to the request, with information relating to some individuals redacted in accordance with the 'third party personal data' (regulation 13(1)) exception to disclosure in the EIR. The complaint to the Commissioner is two-fold. Firstly, the complainant considers that Defra holds additional records that have not been identified and provided. Secondly, the complainant has disputed Defra's reliance on regulation 13(1) to withhold the names of Defra's officials listed in the correspondence that has been supplied. The Commissioner has decided on the balance of probabilities that Defra does not hold any further information caught by the scope of the request and that regulation 13(1) of the EIR was correctly applied. In light of her findings, the Commissioner does not require any steps to be taken by Defra.

Request and response

2. On 2 April 2015, the complainant wrote to Defra and requested information in the following terms:

I am writing to request the release of all correspondence DEFRA has had with the Direct Marketing Association (DMA) about an opt-out scheme for unaddressed mail (the 'Door-Drop Preference Service'), covering the period from 7 May 2012 to 31 May 2014. I trust this request will be handled under the Environmental Information Regulations 2004.

To clarify my request, the 'Door-Drop Preference Service' was part of a voluntary 'Responsibility Deal' between the UK, Scottish and Welsh Governments and the so-called 'direct marketing' sector, dated November 2011. A previous request for information about the opt-out scheme (RFI 4791) learned that the DMA told Defra in April 2012 that they would not be launching the scheme that month because they felt Defra had not done enough to "improve the environmental performance" of "delivery channels" that aren't part of the industry's self-regulatory framework. A later request for information (RFI 7052) learned that Defra has since had meetings with, among others, the Professional Publisher's Association (PPA) and that these talks have now ended.

My request only covers correspondence between Defra and the DMA but does cover every aspect of the opt-out scheme. I'm interested, for instance, in correspondence between Defra and the DMA about the meetings Defra has had with the likes of the PPA; about how failure to launch the opt-out scheme would impact the 'Responsibility Deal' and how the delay (and subsequent scrapping) of the scheme should be communicated to the outside world.

3. Defra responded on 3 June 2015 and confirmed that the request had been handled under the EIR. It enclosed copies of several emails between Defra and the DMA that were caught by the request. Some information relating to officials featured in the correspondence, such as names and contact details, were though withheld in accordance with the 'third party personal data' (regulation 13(1) by way of regulation 12(3)) exception to disclosure in the EIR. Defra explained that the individuals to whom the information related were not in public facing roles or in senior positions and therefore disclosure would breach the first data protection principle as it would be unfair to the data subjects. For completeness, Defra clarified that the aforementioned exchanges were the only records held that matched the request.

4. On 11 June 2015 the complainant asked Defra to review its response. His concerns about Defra's handling of the request had two parts. Firstly, he challenged Defra's position that additional relevant information had not been produced and retained. In doing so, the

complainant highlighted the significance attributed to the proposed Door-Drop Preference Service scheme and also referred to information that he considered indicated further material would be held. Secondly, he objected to Defra's decision to redact elements of the personal data contained in the copies of the correspondence he had received.

5. After a considerable delay, which resulted in the complainant making a complaint to the Information Commissioner, Defra provided the outcome of its internal review on 11 February 2016. The reviewer accepted that Defra had failed to comply within the timescales set out in the EIR for responding to requests and completing internal reviews. With regard to the substantive points raised by the complainant, the reviewer stated that further searches for relevant information had been undertaken but no additional documents had been discovered. The reviewer also upheld the original application of 13(1) of the EIR.

Scope of the case

6. The complainant has contacted the Commissioner to complain about the way his request for information had been handled.

7. The substance of the complaint has two parts, which correspond to the findings of Defra's internal review. Part A concerns the complainant's argument that Defra would hold further records falling within the scope of the request in addition to those that had been identified. Part B relates to the complainant's assertion that Defra had misapplied regulation 13(1) of the EIR to withhold elements of the information that had been produced.

8. The Commissioner's analysis of each part of the complaint is set out in the body of this notice.

Reasons for decision

Background

9. The Door-Drop Preference service is a proposed voluntary agreement designed to introduce a single opt out mechanism for consumers in relation to unaddressed direct marketing mail. A press release issued by Defra on 1 November 2011 explained the thinking behind the proposal as follows:

> *A new free-to-use website is being set-up as part of a joint Defra and direct marketing industry deal so householders can opt-out*

of receiving all types of advertising mail. This replaces the current out-dated system, where households have to register on three separate websites or apply by post to stop the different types of unwanted direct mail from being delivered.

Under the new deal, a package of measures will reduce the amount of unwanted advertising mail produced and cut waste through greater recycling.[1]

10. On 27 July 2012 the BBC reported that the delivery of the scheme had stalled due to a disagreement between the DMA and Defra about the necessity of including other trade bodies in the opt-out scheme[2]. In its recent correspondence with the complainant, Defra informed the complainant that the Responsibility Agreement with the DMA was a voluntary agreement, so is reliant on industry taking action. Although the DMA had developed a pilot Door to Door Preference, it had not been possible to secure similar agreements from other sectors that contribute to household waste. As such, it was decided that the DMA would not take this aspect of the voluntary scheme forward at the current time.

11. The request under consideration is an extension of a request submitted to Defra on 6 November 2012, the handling of which was considered by the Commissioner under the reference FER0517476[3].

12. In FER0517476 a request had been made for copies of 'correspondence DEFRA has had about the implementation of the so-called "Door Drop Preference Service", covering the period from 7 May 2012 to today (6 November 2012).' Defra provided some correspondence but withheld the remaining records under the 'material in the course of completion' (regulation 12(4)(d)) and 'internal communications' (regulation 12(4)(e)) exceptions in the EIR. The Commissioner was only required to consider Defra's reliance on regulation 12(4)(d) and she decided that the EIR was the correct legislation and within this the exception was correctly applied. Regulation 12(4)(d) is subject to the public interest test and the Commissioner found that on balance the public interest favoured withholding the information in question.

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[1] https://www.gov.uk/government/news/new-service-for-householders-to-stop-unwanted-advertising-mail

[2] http://www.bbc.co.uk/news/uk-politics-19016096

[3] https://ico.org.uk/media/action-weve-taken/decision-notices/2014/950850/fer_0517476.pdf

Part A – extent of information held

13. Defra considers that it does not hold any information in addition to the records it has already identified. The complainant disputes this position.

14. The EIR is solely concerned with recorded information that is held by a public authority. This means that the legislation does not require a public authority to provide opinions or explanation, generate answers to questions, or create or obtain information it never held, or no longer holds, even where this would be helpful.

15. As her guidance 'Determining whether information is held'[4] explains, when the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there is not either any information or anything further to add. The Commissioner will therefore apply the normal civil standard of proof in determining the case, ie she will decide on the balance of probabilities whether the required information is held. To exercise this test, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out and, or any other explanations offered that demonstrate why the information is not held.

16. In his request for an internal review, the complainant outlined his reasons for believing that it was highly unlikely there was not further correspondence between the parties identified in the request. These are summarised below:

    - The volume of correspondence identified did not correspond with the cited significance of the scheme for Defra.

    - It is reasonable to assume that Defra would have kept the DMA informed of the outcome of its discussions with other parties and particularly the News Media Association and Professional Publishers Association.

    - The DMA had previously offered detailed suggestions about how news relating to the project should be published. It is unlikely that the DMA would not want to make similar recommendations in terms of the communications that should be given to the media about putting the media on hold.

[4] https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

- Defra would be required to contact the DMA about the potential effect that the failure to launch the opt-out website would have on the 'Responsibility Deal'.

- The complainant has made reference to a response from Defra which referred to the DMA's view that the launch of the scheme would not have the desired effect without commitment from across the whole sector. The complainant considers this indicated that the DMA had specifically expressed this view, which was not apparent in the records provided, and further expected Defra to have responded on this point.

17. The Commissioner accepts that these points, considered separately and in combination, strongly lend weight to the impression that there must have been further correspondence between the parties. The Commissioner has therefore put this to Defra and asked it to provide a chronology of the policy stages and significant decisions relating to the scheme before explaining the steps it had taken in order to establish as far as reasonably possible that all of the relevant information had been discovered.

18. It would appear from Defra's submissions that difficulties in securing a wider agreement with other trade sectors meant that the level of activity associated with the project reduced from around the beginning of 2013, with Defra confirming that there had not been any meetings with the DMA since December 2013. In that month, the DMA produced a report, made available to the complainant, which briefly referred to the Door-Drop Preference Service, saying:

> *Launch of an improved single opt-out service for unaddressed mail. As none of the other industries had agreed to participate in an opt-out scheme it was agreed that the proposed scheme by the DMA would have negligible effect and negatively impact DMA members so would be postponed.*

19. In the view of the Commissioner, the lack of progress on the policy might be expected to be reflected in the amount of correspondence generated between the DMA and Defra during the period in question – after a more intensive period of communications following the launching of the voluntary agreement. In saying that, the Commissioner understands why the complainant would still find surprising the limited amount of records located by Defra. It is therefore for Defra to demonstrate that the quality of its searches were appropriate in the circumstances.

20. Defra has indicated that any information would be held electronically and that the electronic records are held in shared drives, accredited

shared drives and Sharepoint. Defra's policy is for all information that could form part of the official record to be placed in one of these three corporate repositories. The current position is that no official entries post-2001 would be deleted without formal review by the Defra Records Management team. Two Defra teams were consulted as part of the original response: the Resource Programme – Producer Responsibility team and the Information Rights team that is responsible for handling FOI and EIR requests. Technical input on records and information management and the associated Defra process and policy was provided by members of the Knowledge and Information Management directorate, including Defra's Records Management team and Defra's Departmental Records Officer.

21. According to Defra, the corporate repositories used by its teams have been systematically searched on a number of occasions using a visual check of the relevant folders and a search tool with relevant terms that would pick up any relevant files, regardless of location. Defra has informed the Commissioner that this process would have located any information that had been filed incorrectly. Defra has further explained that these searches have been repeated on a number of occasions by different people to cross-check the situation for this request and previous applications for information. No additional material had been found. To test the integrity of the process, a search was also carried out for unrelated material. This material was found, which Defra considers strongly indicates that the process and work instructions were being followed consistently.

22. Additionally, Defra has advised that all the personal mailboxes (inboxes and sent items) for the policy team have been re-checked for staff working in the area during the period 2011 to the present. In accordance with the team's way of working, the team shared key information with colleagues in the team, so information would have been held by one or more team members if it had not been placed in a corporate repository.

23. The Commissioner is satisfied that the direction and scope of the searches were proportionate and properly tailored to the systems where any relevant information was most likely to be held. Although appreciative of the cogency of the complainant's arguments, the Commissioner considers that she has not seen anything which specifically indicates that Defra does or should hold further information which would not be captured by the searches. For completeness, the Commissioner has also checked whether any of the withheld information considered under FER0517476 was relevant to the present case and, if so, had been considered by Defra. If it failed to do so, this might indicate that the searches were not as robust and all-encompassing as

was indicated. However, the Commissioner is satisfied that this is not the case.

24. As stated, the test to be applied where there is a dispute over whether all the information captured by a request has been located is the balance of probabilities. Weighing up the evidence put before her, the Commissioner has decided that on balance Defra was correct to say that it does not hold any further information.

Part B – application of the third party personal data exception (regulation 13)

25. Defra has redacted parts of the information provided to the complainant, citing regulation 13(1) which must be read in conjunction with regulation 12(3) of the EIR. Regulation 12(3) of the EIR provides that third party personal data can only be disclosed in accordance with regulation 13. The structure and wording of the EIR provisions on personal data mirror the 'personal data' (section 40) exemption in FOIA and can be used in the same way.

26. Regulation 13(1) of the EIR effectively has two conditions, which if both are met mean that a public authority is not obliged to disclose the information requested. Firstly, the requested information must constitute the personal data of a third party. Secondly, disclosure of the personal data would contravene a data protection principle in the Data Protection Act 1998 (DPA).

27. Personal data is defined by section 1 of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information. In short, information will only be classified as personal data where it 'relates to' an 'identifiable' individual. A name will typically represent the clearest example of personal data. However, even in the absence of a name, it may be possibly to directly link, say, a telephone number to an individual using other pieces of contextual information accessible to a member of the public. In that instance, the telephone number would 'relate' to the individual and therefore would be his or her personal data.

28. In the copies of correspondence provided to the complainant Defra redacted the following categories of information: the contact details of an identified individual; the names of internal officials and external representatives and, or personal email addresses; and one sentence contained in an email. The Commissioner is satisfied that all of this information comprises personal data. The complainant has confirmed with the Commissioner however that he is only seeking the names of Defra employees contained in the correspondence.

29. The Commissioner is aware that the complainant has had in his private capacity extensive correspondence with Defra about the Door-Drop Preference scheme and it is possible that through this normal course of business he will already be familiar with some of the persons whose names have been redacted. Notwithstanding this, it is for the Commissioner to decide whether it would be appropriate to place information in the public domain by virtue of a disclosure under the legislation.

30. For the purposes of a disclosure under the EIR or FOIA, it is only the first principle that is likely to be relevant. In accordance with this principle, personal data can only be disclosed if it would be fair, lawful and meet one of the Schedule 2 conditions (and Schedule 3 conditions if the information represents sensitive personal data). If the application for disclosure does not meet any of these conditions, then it would fail.

31. The Commissioner's guidance on 'personal data'[5] sets out at paragraph 41 her approach to assessing whether the first principle is satisfied. This confirms the starting point for the Commissioner is to consider whether disclosure would be fair to a data subject. With regard to this test, the guidance recognises that 'fairness' can be a difficult concept to define. In the context of disclosing personal information under FOIA, it will involve balancing the consequences of any disclosure and the reasonable expectations of an individual with general principles of accountability and transparency. In order to strike the correct balance, it will be necessary to consider the circumstances of the case in the round.

32. Various factors will potentially effect whether an individual should have a reasonable expectation that his or her personal data would be disclosed upon request. These will typically include whether the information represents sensitive personal data as described by section 2 of the DPA, if the information refers to an individual's public or private life, and the seniority of the individual to whom the information relates.

33. Sensitive personal data consists, for example, of information as to an individual's racial or ethnic origin of the data subject (section 2(a)), or his or her religious beliefs (section 2(c)); information that is unlikely to be fair to disclose as it comprises information that individuals will regard as the most private. This categorisation does not apply to the disputed information in this case and, furthermore, the individuals in question are referred to in their professional capacity, which in most circumstances

[5] https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

will mean that the chances of disclosure being fair will be greater than if the information related to a data subject's private life. Defra remains of the view, however, that the release of the personal data would not be fair for the purposes of the first data protection principle

34. Defra has explained that its policy is not to release the names of staff below the Senior Civil Service (SCS) and not in public facing roles; a policy that it explains is well known amongst staff. It has though noted that there may be deviation from this policy in particular cases, with regard given to the roles and responsibilities of the individuals in question.

35. With respect to the application of the first data protection principle, Defra has not argued that there would necessarily be any distress or damage arising from disclosure. It nevertheless considers that the release of the names would not lie within the individuals' reasonable expectations. The complainant has rejected this view, however.

36. In contrast to Defra, the complainant considers that the officials in question were of sufficient seniority to expect scrutiny of their involvement in a relatively significant government initiative. He argues that the level of seniority is borne out by the fact that the officials were talking with industry on behalf of the government and it would have been necessary for them to report on any developments to the Minister of the Department. By extension, the officials will have had an influential role in the development of the initiative and, ultimately, its failure to be delivered in the way intended. The complainant has also challenged the claim that the officials' functions are not public-facing. As senior officials with considerable responsibilities, they will according to the complainant help Defra's media team to formulate answers to enquiries directed to them. As such, in the opinion of the complainant the officials are partly responsible for the information made available to the public.

37. As acknowledged by Defra, its policy on the disclosure of the names of staff is effectively only a guide and any decision must reflect the responsibilities of the members of staff. The Commissioner considers that the correspondence evidences the extent to which the staff were involved in the administration of, and discussions relating to, the initiative. Furthermore, the absence of any substantial damage or distress arising from disclosure will strengthen the position that disclosure would be fair in the circumstances. Against this, however, is the realisation that any significant policy decisions concerning the development of the initiative will ultimately be taken by a more senior official. Insofar as the officials were not therefore 'responsible' for the initiative, the Commissioner allows that the individuals may reasonably have expected that their names would not be placed in the public domain through a disclosure made under the EIR.

38. Despite the reasonable expectations of an individual though, it may still be fair to release personal data if there is an overriding legitimate interest in disclosure to the public. This means balancing the rights and freedoms of an individual against the legitimate interest in disclosure to the public. The Commissioner's guidance explains at paragraph 81 that legitimate interests 'include the general public interest in transparency, public interest in the issue the information relates to and any public interest in disclosing the specific information. There may for example be occasions when the requirement to demonstrate accountability and transparency in the spending of public funds will outweigh the rights of the individuals.'

39. With regard to the legitimate interest in disclosure, the complainant argues it is irrelevant that the correspondence is, as he deems it, relatively 'meaningless'. Rather, the public still has a right to know who was supposed to work with the relevant partners to keep the implementation of the opt-out project on track. Building on this point, the complainant considers that the records released suggest that any failure to deliver the initiative could be attributed to poor staff performance. Defra, for its part, considers there is not any substantial legitimate interest in revealing the personal data.

40. The Commissioner considers the public has a legitimate interest in knowing more about the reasons why an initiative, which was designed to assist householders, stalled. The Commissioner has also found however that the documents which have been released do not evidence any decisions made by the individuals concerned and nor do they include comments that would directly influence judgements. For this reason, she considers that the legitimate interest in the personal data is relatively weak and further disagrees with the complainant that disclosure is necessary for the purposes of accountability. The Commissioner has therefore concluded that the release of the names would not constitute the fair processing of those individuals' personal data, meaning regulation 13(1) of the EIR is engaged.

Right of appeal

41. 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

42. 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.

43. 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 ……

Alun Johnson
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