



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0151

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FER0443617
Dated: 16 July 2012

Appellant: James MacFarlane

Respondent: Information Commissioner

Additional Party: Department of Energy & Climate Change

On the papers

Date of decision: 30 November 2012

Before

John Angel
(Judge)
and

Michael Jones and Jacqueline Blake

Subject matter: Regulation 13 EIR Personal Data

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 16 July 2012 and dismisses the appeal.

REASONS FOR DECISION

Relevant legal framework

1. In this case it is helpful to set out the relevant legal framework at the beginning of these reasons for the decision.
2. Regulation 12(3) of the Environmental Information Regulations 2004 (“EIR”) states:

To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

3. Regulation 13 EIR provides:

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.

13(2) The first condition is –

(a) in a case where the information falls within any of the 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;

...

4. Section 1(1) Data Protection Act 1998 (“DPA”) states:

“personal data” means 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 the individual and any indication of the intentions of the data controller or any other person in respect of the individual;”

The data protection principles are contained in Schedule 1 to the DPA and provide 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 of Schedule 2 is met,

2. Personal data shall only be obtained for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

Schedule 2

6.(1) The Processing 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.”

Background and request for information

5. A Feed-in Tariff’ (“FIT”) financial scheme was introduced by the Government on 1 April 2010 to promote the uptake of small-scale renewable electricity generation. It requires participating licensed electricity suppliers (FIT Licensees) to pay tariffs to generators for electricity generated and exported. The scheme is applicable to a number of different renewable technologies, including solar energy. In February 2011, there were over 24,000 installations that had registered to participate in the scheme. Ofgem is responsible for the administration of the FIT scheme and the Department of Energy and Climate Change (“DECC”) is responsible for the policy.
6. On 25 January 2012 Mr MacFarlane made a request for information to DECC in the following terms (the Original Request),

“Could you please provide me with the MCS database which the DECC uses to record solar photovoltaic installations”

7. The MCS database is the Microgeneration Certificate Scheme. The MCS is an internationally recognised quality assurance scheme, supported by the DECC. MCS certifies microgeneration technologies used to produce electricity and heat from renewable sources. MCS is also an eligibility requirement for the Government's financial incentives, which include FIT and the Renewable Heat Incentive.

8. DECC responded on 16 February 2012 indicating that the request for information was being considered under the EIR as the information sought is environmental information. It withheld the information relying on regulations 12(5)(e) and 12(3) EIR and set out the balance of the public interest test indicating the balance was in favour of withholding the information.
9. Following receipt of the response, Mr MacFarlane on the same day sent a further request for information, ("the New Request")

"If the entire database can't be provided, could you summarise the data?"

I am looking for the number of installations per street within the TD1 postal district."

10. On 15 March 2012, DECC responded to the New Request. Again, it considered the request under the EIR. DECC provided some information - as of March 2012 there were 113 solar photovoltaic installations ("solar PV installations") in the TD1 post code area.
11. DECC refused to supply the installation data per street within the post code area, relying on regulation 12(3) with reference to regulation 13(1) and (2) EIR. DECC informed Mr MacFarlane that the information he requested was personal data as it made reference to identifiable individuals. DECC referred to the DPA and that it considered the First Data Protection Principle to be relevant. It concluded that the disclosure of the information would not be fair, and that no conditions of Schedule 2 DPA were met.
12. The same day, Mr MacFarlane requested an internal review of the decision. Mr MacFarlane stated, without providing any reasons or particulars, that disclosing the number of solar PV installations at street level would not contravene any of the DPA data protection principles. He also complained DECC had not provided the information (or refusal) as soon as possible as required by regulation 5(2) or regulation 14(2) EIR.
13. The internal review response was provided on 4 April 2012. DECC upheld the decision to withhold the information. However, DECC provided a website link to other information on solar PV installations accredited for FIT per area, which is available from Ofgem's FIT Central Register. On the first issue of personal data, DECC explained the information found showed that only a small number of installations are within each street in the post code area, and that providing the information could make it possible for individuals to be identified. On the second issue about the timing of the responses, DECC noted its staff carry out information requests processing along side their other duties and responsibilities and that the responses were sent within 20 working days.
14. Mr MacFarlane made a complaint to the Commissioner about how his request was handled. He raised two issues: 1) that disclosing the information would not contravene any of the data protection principles and 2) that the provision of the information (or refusal) was not provided as soon as possible as required by regulation 5(2) (or 14(2)) EIR.

The Commissioner's Decision

15. On 16 July 2012 the Commissioner decided by issuing a Decision Notice ("DN") that the information requested was personal data under regulation 13 EIR and DECC had been correct in applying the exception.

16. In particular, the DN records:

- (i) DECC holds the information with reference to the full post code, rather than the street name, although the two are closely linked. The number of installations was very small – fewer than 5 except in one instance, and often with only one installation per postcode. [DN§11]
- (ii) Solar PV installations were not always visible at street level, but with internet tools such as Google satellite and other publically available resources, in conjunction with the postcode data, individuals with solar PV installations could be easily identifiable. [DN§11]
- (iii) The requested information is personal data as defined by section 1 DPA, relating to living individuals which would allow the individuals to be identified when considered in conjunction with other information already in the public domain. [DN§12-13]
- (iv) There is a reasonable expectation of participating individuals that their information would be held in confidence and used only for the purpose intended - namely to obtain certification as valid under the FIT Scheme. There was no process by which the individuals provide consent to disclosure. [DN§§15-17]
- (v) Participating individuals receive an income relating to the generation capacity of their solar PV installation. This will relate to the private lives of the individuals and that in some circumstances disclosing information about an individual's income may cause damage and/or distress to that individual [DN§§18-19]
- (vi) There is no legitimate public interest (under Schedule 2 paragraph 6(1) DPA) in disclosing information which would allow individuals to be identified who are participating in the FIT Scheme. Therefore, it would be unfair to those individuals to have this information released and regulation 13 is correctly engaged. DECC has disclosed the number of approved installations for the TD1 postcode, thus providing information about the number of installations in the geographical area. [DN§§20-21]

The appeal to the Tribunal

17. Mr MacFarlane lodged a Notice of Appeal (“NA”) with the First-tier Tribunal (“FTT”) on 23 July 2012.
18. His grounds of appeal are contained in the NA. There are two grounds, which are:
 1. The Commissioner erred in considering the disputed information to be personal data.
 2. The Commissioner failed to address the complaint that the public authority had not responded to the request for information ‘as soon as possible’ as is required by the EIRs.
19. The Commissioner applied in his response dated 20 August 2012 for the appeal to be struck out on the grounds it had no reasonable prospect of success. Mr MacFarlane was given the opportunity to make representations as to why his appeal should not be struck out which he did on 4 September 2012 accepting that the Commissioner’s submissions in relation to his second ground of appeal but not the first ground. On 11 September 2012 Judge Angel ruled that the first ground should remain but that the second ground should be struck out and issued directions on how the case should proceed.
20. Both parties agreed that the case should be considered by the FTT on the papers before it.
21. Before the hearing the Tribunal asked the Commissioner to provide certain information. He lodged it in closed format but later agreed that it could be largely provided in open evidence with small parts redacted as follows:

The Tribunal has raised specific questions about the disputed information. The commissioner endeavours to respond to these questions. However, as the public authority has not joined as a party to the appeal, some of the responses may be limited.

The closed bundle has a list of post codes. Do these represent villages, streets, houses or other?

The Commissioner has undertaken a sampling of the postcodes to determine the level of address provided – of the postcodes were used – with a mix of those containing one installation, and those containing more than one installation. This was done using the post office publically available website – find an address. The sampling resulted in addresses being given by street address including house numbers, by street address including house names, and street addresses in rural areas. Based on the sampling, the postcodes represent street addresses by street, rural areas, and it appears small hamlets or villages.

If the post codes represent streets how many houses/addresses are in each street?

Based on the sampling exercise set out above, the number of addresses per post code varied between 4 and 36. The majority had less than 20 properties per postcode. These consisted of full street residences, (i.e. all house numbers in a street), some contained only odd or even numbers from a street - only one side of the street, and some were listed by house name, with the street and town address.

How many houses/properties are in the total post code area?

The Commissioner was not able to determine this information. However, the Commissioner can indicate that the TD1 postcode area is located in the Scottish borders, and incorporates 15 small towns, villages and other rural locations.

Was any consideration given to providing the requested information by way of a larger area than a street, such as a village?

This information is not known to the Commissioner. However, the Commissioner notes that DECC indicated that if all solar PV installations were not visible, and that there was no other information available they would release the information. DECC did provide the total installations in the TD1 area.

Written submissions

22. Mr MacFarlane argues that the disputed information is not personal data. He says that the information will consist of a list of streets or their postcodes and, for each, the number of properties with such installations (that are recorded on the MCS database). Although it may be possible to identify properties included in the count, for example by the householders themselves, who will know their property is entered on the MCS database, such identifiers would be made entirely by using other information in their possession.
23. Mr MacFarlane notes that in paragraph 11 of the DN, the Commissioner acknowledges that “the use of internet tools such as Google Satellite and other resources” makes most properties with solar PV installations easily identifiable. Therefore Mr MacFarlane says in the majority of cases a property that has a solar PV installation is public knowledge (or, at least, will be once satellite imagery is updated).

24. He disputes that the MCS database will only contain FIT installations. Although he believes that will be mostly correct he points out the MCS scheme was set up before FITs became available. Therefore entry on the MCS database does not necessarily mean that the property's owner is benefiting from a FIT. All it will determine is that that property has a solar PV installation and that it may or may not be on the FIT.
25. He argues this is insufficient to qualify as personal data and refers us to the Court of Appeal's judgment in Durant v Financial Services Authority [2003] EWCA Civ 1746 ("Durant").
26. The Commissioner relies on his DN. He maintains that the disputed information is personal data.
27. The DN records that in considering whether the information is personal data the detail of the information and other information which would assist with identification were examined.
28. The Commissioner maintains that he took into account that the information is held by reference to the full post code. While this is closely linked to a street name, it is not the same information. It was also taken into account that there are a small number of installations, mainly one per full postcode and fewer than 5 in all but one instance, which the total number was 6.
29. The Commissioner notes that solar PV installations are not always visible from the street. But, with the postcode information and other publically available resources, such as the electoral role, address finder, other online directories, and mapping and imagery websites such as Google maps/satellite it would be easy to identify the property and individual with solar PV installations.
30. However, the Commissioner says, in this instance, it is not simply noting that there are solar PV installations at a property. The request for information specifically seeks the information held on a database which relates to an accreditation which is necessary for inclusion on a FIT. Thus, it is likely (although not definitive) that this information will provide details about income of those individuals. While an individual may not be in actual receipt of income from the FIT, the details must be maintained on the database to be eligible for such income. As such, the individuals would be entitled to receive income from the FIT, whether they have chosen to receive such income or not.
31. The Commissioner finally argues that the disputed information is personal data applying Durant.
32. In relation to Mr MacFarlane's observation that that MCS database was in place before the FIT started operating, the Commissioner argues this does not assist his appeal. The MCS scheme does not just relate to solar PV installations. The MCS scheme is for small scale onsite energy technologies, solar PV installations are one of five technologies supported by the scheme. The database was funded by the Secretary of State to facilitate the

implementation of the scheme and it is also used for other DECC financial incentives, relating to energy. The reason for the creation of the database in which the disputed information is held was specifically for financial incentives.

33. The Commissioner notes that DECC has indicated that if solar PV installations were not visible and there was no additional information available, then it would have released postcode-level data. Further, DECC indicated that it was not possible to provide the information disaggregated by street. To provide some level of information, DECC did disclose the total number of solar PV installations held on the MCS database for the TD1 postal area – 113.

Is the disputed information personal data?

34. Mr MacFarlane argues that the information is not personal data, by reference to Durant. He notes that Durant refers to two notions that may assist in determining whether information is personal data, namely that it is biographical in nature and that the data subject needs to be the focus of the information. He further notes that Durant holds that the information must affect his [a person's] privacy, whether in his personal life, business or professional capacity.
35. Other First-tier Tribunals have held that addresses are personal data. In *England and London Borough of Bexley v IC* (EA/2006/0060 & 0066), the Tribunal found that the address of a residential property constitutes the personal data of the resident. We are not bound by such decisions but can be guided by them. However we are bound by decisions of the High Court and in *Corporate Officer of the House of Commons v IC, Brooke, Leapman and Thomas* [2008] EWHC 1084 (Admin), [2011] 1 Info LR 987 per Latham LJ at §41:

“No one would disagree that the address of each individual's private residence is personal data, and represents an aspect of private and family life, but a residential address is an aspect of private life which may not be very private at all... Everyone eligible to vote must have his or her address recorded in the register of electors, full versions of which are available for public scrutiny in local libraries and local government offices. The reality is that an individual who is determined to discover a residential address of an adult law-abiding citizen is likely to be able to do so by one legal means or another, and where the person concerned is the holder of a public office and in the public eye, such an inquiry is likely to be easier.”

36. This approach that an address would also constitute personal data has also been held by the Tribunal in recent cases, including *Exeter City Council v Information Commissioner and Guagliardo* (EA/2012/0073). In that case, the Tribunal ordered that the Council should release a list of all properties owned, rented or leased by the Council, with certain exceptions. While the principle that the addresses are personal data, the decision of the Tribunal to order the release of the information concerned the legitimate public interest balance, which took into account factors such as the properties are publically owned,

the information furthers transparency and accountability about a major social issue, housing stock.

37. The Commissioner submits that in the present case, there is no evidence that the postcodes relate to publically owned properties. Further, while DECC holds the information for the accreditation, the scheme itself is industry led and funded. Therefore, the Commissioner argues, it is not the same as publically owned housing stock. This scheme relates to income from industry to private individuals.
38. The information, however, in the present case is not addresses, it is full postcodes. The Commissioner maintains that such information about where a property is located is, in effect, also information about the individual associated with it. The context of the related information and other variables such as the number of households covered by a postcode is a key factor. As the disputed information is held by a full postcode, this combined with the other available information, as present in this case, can result in personal data of the individual being disclosed. The other factors present in this case are: the information is held because it is contained on a database that is a pre-requisite for eligibility of the FIT. It would therefore inform not just that a property has a solar PV installation, but that it has an accredited solar PV installation, which is eligible for income. The disputed information, along with the other present factors, namely, the reason for the information being held on the database, with the postcode information would make it easy to search via street level or internet tools for the exact property. In addition, combined with other publically available information, such as the electoral role, would identify an individual.
39. Mr MacFarlane has informed us that it is possible to identify properties with solar PV installations, either from street view, or using imaging sites, such as Goggle satellite. While that may be possible, it would not provide information that the solar PV installations are MCS accredited and thus eligible for the FIT. The Commissioner contends that these arguments are misguided. He says the question for this Tribunal is not whether an individual can be identified by visually locating solar PV installations (not all of which are visible from the street). The question is whether the specific information which is the subject of this request, i.e. the information contained in the database, can lead to the identification of an individual either by itself or in combination with other information the public may be able to access.
40. The Commissioner therefore maintains he was correct to conclude that the information is personal data.
41. The definition of personal data under the DPA referred to above requires that the data relates to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (section 1(1)(a) and (b) DPA) i.e. in this case DECC. The MCS database is a database of applicable installations enabling users to obtain a certificate to claim financial benefits such as FIT where relevant. It clearly holds more information than

postcodes as individuals and/or the supply/installer of the microgeneration technology apply for a certificate and will need to provide other personal information, such as postal address, in order to do so. All this data is held by DECC. This data satisfies the test under the DPA and there is no need to go any further to show that Mr McFarlane's first request is for personal data.

42. However his narrowed request asks for the number of installations per street within the TD1 postal district. The Commissioner says that this information together with other information in the public domain is personal data. Mr MacFarlane questions this. In any case we have learnt that DECC does not hold the information in this form, only by TD1 postal district. From other evidence before us postcodes represent addresses by street, rural areas, small hamlets and villages. Therefore we can only consider the information by TD1 postal district.

43. The test as to whether it is personal data is that it relates to a living individual who can be identified from the number of installations in a TD1 postcode and other information which is in the possession of the DECC. The MCS holds such other information so the test is satisfied. Clearly this information taken together relates to a data subject's personal life and is biographical in the sense that it provides information as to the data subject's use of microgeneration technologies and any associated grants or subsidies. There is no need for us to consider whether other information in the public domain would help identify living individuals, although from the evidence before us it is likely to do so in most cases.

44. Therefore we find that disputed information is personal data.

If it is personal data, would it be fair and lawful to disclose the information?

45. There is no evidence that the data subjects in this case have given their consent to disclosure of the requested information. Therefore we have gone on to consider the only other relevant condition (DPA Schedule 2 Condition 6(1)) in this case – the balance of legitimate interests.

46. The Commissioner sets out the analysis of whether disclosure of the disputed information would be fair under the data protection principles, in the DN [§16-21] which is summarised at paragraph 16 above, such as the data subjects reasonable expectation of privacy and possible damage and distress. We find these amount to substantial legitimate interests of the data subjects.

47. Mr MacFarlane does not make any comments about whether there is a "necessary" legitimate public interest he is pursuing for the disclosure of the disputed information which would override the legitimate interests of the data subjects.

48. We therefore find that, applying the test under Condition 6(1), in this case that there would be a breach of the first data protection principle to disclose the disputed information.

Conclusion

49. We uphold the DN and dismiss this appeal.

50. Our decision is unanimous.

Observation

51. We note from the evidence in this case and the information already disclosed that it would be possible for Mr MacFarlane to find out most of the information he wants, even though, following our finding, he is unable to do so through the legal route he has been pursuing.

Signed

John Angel
Tribunal Judge

Dated: 30 November 2012