

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2013

Public Authority: Department of Energy and Climate Change
Address: 3 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested the Department of Energy and Climate Change (DECC) to disclose a full list of all registered Green Deal Advisors. The DECC responded refusing to release this information under section 40 of the FOIA.
2. The Commissioner has reviewed the request and he is satisfied that the requested information is exempt from disclosure under section 40 of the FOIA. He therefore requires no further action to be taken.

Request and response

3. On 21 January 2013, the complainant wrote to DECC and requested information in the following terms:

"I would kindly request under the Freedom of Information Act I am provided with a full list of registered GD [Green Deal] Advisors."
4. The DECC responded on 18 February 2013. It stated that it considered the requested information was exempt from disclosure under section 40 of the FOIA.
5. The complainant requested an internal review on 28 February 2013.
6. DECC carried out an internal review and notified the complainant of its findings on 27 March 2013. It stated that it remained of the view that the requested information was exempt from disclosure under section 40 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 17 April 2013 to complain about the way his request for information had been handled. He does not consider the requested information is exempt from disclosure under section 40 of the FOIA. He believes DECC are interpreted section 40 of the FOIA "very disingenuously" in order to protect Green Deal Advisors from having a "rightful influence" in the Green Deal market.
8. The Commissioner did not consider that it was necessary to obtain a copy of the withheld information in this case. He was satisfied that a decision on the application of section 40 of the FOIA could be made from DECC's description of the requested information.
9. DECC's confirmed that the requested information consisted of a list of 2256 Green Deal Advisors. The list contain each advisor's name, telephone number, email address, date of birth, identification number, the date they became an advisor, the date that status was revoked (if applicable) and whether they are active or not.
10. The Commissioner decided to look at the list in its entirety and whether in its entirety it constitutes personal data. He accepted that, arguably, some of the information in isolation is not personal data – for example, the dates each data subject became an advisor and whether their status is current or not. However, the Commissioner was of the view that this information in isolation would be rendered useless if it could not be connected to each data subject and therefore of no use to the complainant. This approach was communicated to the complainant on 2 October 2013.

Background

11. The Green Deal framework is established by legislation and enables the creation of Green Deal Plans. A Green Deal Plan allows energy efficiency improvements to a property to be paid by instalments, by the person who is for the time being liable to pay the energy bill for the property, through the energy bills for the property.
12. An agreement is only a Green Deal Plan if, amongst other things, the energy efficiency improvements are recommended in a qualifying assessment conducted by an authorised Green Deal Assessor, they are installed by an authorised Green Deal Installer and the Green Deal Plan is entered into with an authorised Green Deal Provider.

13. The Green Deal legislation establishes a scheme to:
 - a) authorise Green Deal Assessors, Green Deal Installers and Green Deal Providers in the event that they meet certain standards;
 - b) place comprehensive requirements on these persons; and
 - c) allow for the monitoring and enforcement of these requirements.
14. According to DECC, the concept of a Green Deal Advisor is not provided for in the Green Deal legislation. Green Deal Advisors can only operate within the Green Deal market if contracted or employed to act on behalf of a Green Deal Assessor.
15. Public registers of all Green Deal Providers and Green Deal Assessors exist to enable customers to contact or be contacted by an appropriately and certified person. The public registers also allow customers to verify the details of an assessor or provider and enables a customer to make sure the person they are in contact with has the appropriate certification and authorisation.
16. A register of all Green Deal Advisors is held but this is not a public register.

Reasons for decision

17. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and disclosure of that data would be in breach of any of the data protection principles outlined in the Data Protection Act (DPA).
18. 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..."
19. DECC has claimed that disclosure would be in breach of the first data protection principle outlined in the DPA. 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."

20. If the Commissioner decides that disclosure would be unfair/and or unlawful, the consideration of section 40 stops there – the information should not be disclosed. If, however, the Commissioner decides that disclosure would be fair and/or lawful he will then need to go on to consider schedule 2 (and 3 if the information is sensitive personal data) and whether one of the conditions listed can be met.
21. The Commissioner must first consider whether the requested information is personal data. If he is satisfied that it is, he then needs to consider whether disclosure of this information would be unfair and/or unlawful. If he finds that disclosure would be unfair and/or unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if he decides that disclosure would be fair and lawful on the data subjects concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3 if appropriate are also met.

Is the requested information personal data?

22. As explained earlier in this notice, the requested information is a list of 2256 Green Deal Advisors – their names, contact details, identification numbers, dates of birth and the dates they became an advisor and whether they are still active or not.
23. The relevant question here is whether a data subject can be identified from this information or other information that may otherwise be available. A data subject can quite obviously be identified from their name. The Commissioner also considers a data subject could be identified from their contact details, individual identification number and date of birth from this information alone or from other information that is otherwise available and therefore this information constitutes personal data.
24. As stated previously, the Commissioner does not consider the dates each advisor became a Green Deal Adviser and their current status to be personal data in isolation. In isolation the Commissioner does not consider a data subject could realistically be identified from this information. However, as he has also stated previously, this is not the information the complainant is seeking and in isolation, this information

is rendered useless. The Commissioner has therefore taken the approach to consider the list in its entirety.

25. As the Commissioner is satisfied that the list as a whole constitutes the personal data of each of the 2256 Green Deal Advisors listed, he now needs to consider whether disclosure of this information would be unfair and/or unlawful.

Would disclosure be in breach of the first data protection principle?

26. DECC provided detailed submissions to the Commissioner explaining why it considers disclosure of this information would be unfair.
27. DECC stated that the Green Deal legislative framework provides for the establishment of a public register of Green Deal Assessors and Green Deal Providers, it does not do so in respect of Green Deal Advisors because of how the Green Deal was designed and operates. It advised that customers are required to have a qualifying assessment carried out by appropriately certified and authorised Green Deal Assessors in order to enter into a Green Deal Plan. Customers are able to contact or be contacted by a Green Deal Assessor with a view to arranging a qualifying assessment. Alternatively, customers may be contacted or be contacted by an authorised Green Deal Provider who can then arrange for a Green Deal Assessor to carry out a qualifying assessment at the customer's property.
28. DECC confirmed that public registers of Green Deal Assessors and Green Deal Providers allow customers to identify suitable persons to contact and to confirm whether a person contacting them is properly authorised for the purposes of the Green Deal.
29. DECC outlined that it is the Green Deal Assessor or the Green Deal Provider (depending on whether or not a Green Deal Plan has been entered into) that assumes responsibility and legal liability for the qualifying assessment, rather than a Green Deal Advisor. Whilst in practice, a qualifying assessment may be carried out by a contracted or employed Green Deal Advisor on behalf of a Green Deal Assessor, or alternatively by a Green Deal Assessor themselves (where that assessor is an individual that has gone through the necessary steps to set themselves up as so), the legal contractual relationship will always be between the customer and the Green Deal Assessor or Green Deal Provider, not the Green Deal Advisor. A public register of Green Deal Providers and Green Deal Assessors therefore provides the necessary accountability where it is needed – i.e. those individuals and companies that are liable for the assessment undertaken.

30. DECC explained that it considered disclosure of the requested information would undermine the intended operation of the Green Deal, confuse customers (may not contact the right person when they want to organise an assessment) and undermine the consumer protections that are currently in place as a result of how the current system operates.
31. In terms of fairness, DECC confirmed that disclosure would be unfair on the 2256 Green Deal Advisors concerned, as they have not explicitly or implicitly consented to their names and contact details being made public and therefore have no expectation that their personal data would be used in this way.
32. The Commissioner is of the view that the main consideration here is the expectations of the data subjects concerned – i.e. the 2256 Green Deal Advisors that currently appear on the list the complainant requires.
33. The Commissioner notes that public registers exist for certain roles within the Green Deal and that a public register is available for all Domestic Energy Assessors (complainant confirmed that you have to be a registered Domestic Energy Assessor to become a Green Deal Advisor or Green Deal Assessor). However, it is the Commissioner's view that these individuals have a reasonable expectation that their name and contact details will be publicly available for these specific purposes, as they will have consented or at least expected their personal data to be used in this way when they qualified and became active. As public registers exist for these roles, new individuals attaining these positions and the necessary qualification will also have the same expectation as they too will have consented or at least be aware that their details will be contained on a public register. The Commissioner considers it can therefore be argued that their consent, whether implicit or explicit, has been obtained for these purposes.
34. The Commissioner also notes from DECC's submissions that anyone who does not wish to have their personal data released in this way does have the option to opt out.
35. As DECC has explained, this is not the case for Green Deal Advisors due to the way the Green Deal framework operates. Those individuals that become advisors will have no expectation that their personal data will be made available to the public in relation to this specific role. As they have no expectation of this and have clearly not consented for their personal data to be released in this way, the Commissioner agrees that disclosure would be unfair and unlawful.
36. The Commissioner accepts that disclosure of all Green Deal Advisors' details would more than likely confuse customers and lead to these advisors being contacted by members of the public wishing to arrange

an assessment or who have concerns with any advice or service provided. Advisors may or may not wish to receive such contact and again for these reasons disclosure would be unfair. The current Green Deal framework does not expect or require Green Deal Advisors to deal with customers in this way.

37. The Commissioner accepts that there is a legitimate interest in overall transparency and notes that the complainant is an advisor himself, considers the information should be publicly available and believes how the current Green Deal framework operates prevents advisors like him from competing in the Green Deal market. However, he does not agree that there is an overriding interest in this case that warrants prejudicing the rights and freedoms of the 2256 data subjects concerned. Due to how the current Green Deal framework operates (whether rightly or wrongly) the advisors listed have a genuine expectation of privacy and have no expectation that their details will be contained on a public register.
38. The complainant drew the Commissioner's attention to the fact that the requested information was available publicly for a short time at the beginning of 2013. However, the list of advisors was later removed. DECC confirmed that this was indeed correct and that for a limited period in January 2013 the list was publicly available due to a software error. However, DECC stated that once this error was identified it was immediately rectified and it believed this error did not warrant the disclosure of the requested information now.
39. The Commissioner has considered this point. It is his view that an error does not make personal data that would be otherwise unfair to disclose, fair to release.

Conclusion

40. The Commissioner is satisfied that in this case disclosure would be unfair and unlawful and therefore in breach of the first data protection principle outlined in the DPA. He is therefore satisfied that section 40(2) of the FOIA applies in this case.

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: 0116 249 4253
Email :

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

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

Rachael Cragg
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