

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

Decision notice

Date: 13 April 2017

Public Authority: Lower Severn Internal Drainage Board

Address: Waterside Buildings
Oldbury Naite
Thornbury
Gloucestershire BS35 1RF

Decision (including any steps ordered)

1. The complainant has requested information from Lower Severn Internal Drainage Board ('the Board') concerning maintenance works carried out on a particular watercourse running alongside a public by-way in Eldersfield, Worcestershire. The Board withheld the information because it says it is the personal data of third persons.
2. The Commissioner's decision is that, under regulation 12(3), the requested information is the personal data of third persons and it is excepted from release by virtue of regulation 13(2)(a)(i) as disclosure would breach the first data protection principle.
3. The Commissioner does not require the Board to take any steps.

Request and response

4. On 22 September 2016, the complainant wrote to the Board and requested information in the following terms:

"1. In your email to me of 10th August 2016 you state that 'the justification for the works was to reduce the risk of flooding to 2 nearby properties'.

Please tell me which properties these are.

2. In your letter of 13th June 2016 to Eldersfield Parish Council you state at para 4 that you had received a 'written request asking the Board to undertake maintenance'.

Please provide me with a copy of that request. (A response by email is acceptable)."

5. The Board responded on 20 October 2016. It refused to disclose the requested information saying it was of a sensitive nature and disclosure would breach the Data Protection Act (DPA). The Board did not refer to a specific regulation under the EIR (or section of the FOIA).
6. The complainant requested an internal review on 17 October 2016. The Board provided an internal review on 24 October 2016. It upheld its original position but, again, did not refer to any regulation or section of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 26 October 2016 to complain about the way his request for information had been handled. He was not satisfied with the Board's categorisation of the information as 'sensitive' and considered the information should be disclosed.
8. In its submission to the Commissioner the Board has acknowledged that, although it had described the requested information as 'sensitive' in its response to the complainant, it had not intended to suggest that it was sensitive personal data. Sensitive personal data concerns, for example, an individual's racial or ethnic origin, political opinions, religious beliefs or health and is information an individual will consider to be their most private. The Board has confirmed, however, that it *does* consider the requested information to be the personal data of third persons.
9. The Commissioner's investigation has therefore focussed on whether the requested information is the personal information of third persons and excepted from disclosure under regulation 12(3) of the EIR by virtue of regulation 13.

Reasons for decision

Background

10. The Board has provided a background to the request. It says that Eldersfield Parish Council has been in dispute with the Board about the way in which, in 2016, the Board exercised its legal rights under the Land Drainage Act 1991 to gain access to and to cleanse and maintain an adopted watercourse running along a public by-way in Eldersfield.
11. The Parish Council claims that, in gaining access to the watercourse, the Board caused environmental damage to wildlife habitats and felled trees far in excess of what was necessary. The Board has told the Commissioner that this work was undertaken without prior notice to the Parish Council as no such notification is required.
12. The Board says it has consistently and strenuously asserted that it has acted properly and conscientiously within its statutory powers and it considers it has improved land drainage in the immediate area, thereby reducing the risk of flooding.
13. The dispute with the Parish Council remains unresolved. The Parish Council has complained about the Board's action to the local Member of Parliament and to a number of statutory bodies including the Environment Agency and Worcestershire County Council. The Board has pointed out that the Parish Council has not pursued any action of a formal nature against the Board, elsewhere.

Regulation 12(3) – third person personal data

14. Regulation 12(3) of the EIR says that personal data of third persons can only be disclosed in accordance with regulation 13. The Commissioner has first considered whether the information in question is personal data.

Is the requested information personal data?

15. The DPA says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
16. The Board has provided the Commissioner with the information falling within the scope of the two requests that it is withholding; being email correspondence that identifies the two properties in question.
17. The Commissioner is satisfied that the withheld information – correspondence that identifies particular private properties (and their owners), and further identifies those properties as either having suffered or being at a perceived risk of flooding – relates to living individuals, ie the owners of the properties, and that they could be identified from the information. The Commissioner is therefore satisfied that, under

regulation 12(3), the requested information can be categorised as the personal data of third persons. She has gone on to consider whether any of the conditions under regulation 13 provide an exception to disclosing this information.

Is a condition under regulation 13 satisfied?

18. Regulation 13(1) together with the condition in 13(2)(a)(i) or 13(2)(b) provides an exception if disclosure would breach one of the data protection principles.
19. The Board's position is that releasing the requested information would contravene the first data protection principle as it would not be lawful or fair to the individuals concerned.
20. In assessing fairness, the Commissioner considers whether the information relates to a data subject's public or private life; whether the data subject has consented to their personal data being released and the data subject's reasonable expectations about what will happen to their personal data.
21. In this case, the information relates to individuals' private life – their homes. The Board has told the Commissioner that the property owners concerned would not reasonably expect that their concerns about flooding (whether historic or potential) and enquiries about future maintenance would be put into the public domain. The Board considers these individuals would expect this information to be treated with a high degree of confidence.
22. The Board says that this expectation accords with the reciprocal manner in which it has treated individual concerns expressed to it in the past. It has regarded the sources of such concerns as being of a strictly confidential nature unless the member of the public indicates that he or she does not regard the matter as being confidential.
23. The Board has told the Commissioner that it considers that it is not conceivable that any party would be content to let their property be identified to the world at large, under the FOIA, as one where there was a risk of flooding. Such a revelation would not be in the owners' financial interests as it would potentially blight a property's value and saleability, and result in an increase in insurance premiums.
24. The Board argues that if, for example, one of the properties concerned was to be put on the market, then any potential buyer would be protected by the customary surveys, searches and legal enquiries. There is no necessity therefore to put the information withheld in this case in the public domain.

25. It does not appear that express consent has been sought for disclosure of their personal data. The Board says it did not inform the property owners that any information they supplied to it was liable to disclosure under the FOIA because its understanding was that, unless there were significant public interest reasons for doing so, the implied expectation of confidence, above, would not be breached.
26. In addition, the Board has argued that disclosing confidential information of this nature would inhibit the proper operation of public bodies such as Land Drainage Authorities and the Environment Agency to best protect the public interest. Landowners and the owners of domestic and other properties who may, or who may potentially be at risk from flooding could be reluctant to provide information on an assumed basis of confidentiality to such statutory organisations, if they consider there is a real risk that the information will be put into the public domain as a consequence of successful FOI or EIR requests. The Board considers that disclosure would also prejudice the public interest by inhibiting the ready, free flow of information between public bodies and citizens.
27. Having considered the Board's and the complainant's submissions, the Commissioner agrees with the Board that disclosing the requested information would be unfair and would breach the first data protection principle. The information concerns individuals' private lives and, given the nature of the information ie that it concerns flood risk to particular private properties, the Commissioner is satisfied that the individuals would reasonably expect that this information, gathered from email correspondence between those individuals and members of Board staff, and Eldersfield Parish Council, would not be released to the wider world under the FOIA.
28. Despite the factors above, the requested information may still be disclosed if there is compelling public interest in doing so that would outweigh the legitimate interests of the data subjects; the property owners, in this case. The Commissioner has noted the Board's arguments for it not being in the public interest to disclose the information.
29. She appreciates that the complainant may have an interest in knowing the specific properties about which concerns about flooding have been expressed, and which may have contributed to the Board's decision to undertake the particular ditch maintenance work that is in dispute.
30. The complainant has told the Commissioner that, with respect to planning applications, residents' comments on particular applications are made public. He argues that the individuals concerned in this case would therefore expect that their comments would be put in the public

domain. While it is true that residents' comments are published as part of the planning application process, the Commissioner notes that this case does not concern a planning application. It concerns particular residents who communicated privately with the Board and Eldersfield Parish Council about local drainage maintenance.

31. The Commissioner has also noted that no formal action has been taken against the Board regarding the maintenance work that is in dispute. Evidence that the Board did not undertake this work in line with its statutory powers and responsibilities *might* have been a matter of wider public interest. As it is, she has received no such evidence and consequently does not consider that the request has sufficient public interest that it overrides the legitimate rights and interests of the data subjects.
32. The Commissioner is therefore satisfied that the Board is correct to withhold the information the complainant has requested under regulation 12(3). It is the personal data of third persons and it is excepted from release by virtue of regulation 13(2)(a)(i) as disclosure would breach the first data protection principle.

Right of appeal

33. 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

34. 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.
35. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF