

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

Decision notice

Date: 30 November 2017

Public Authority: Department for Communities and Local Government

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant asked the Department for Communities and Local Government ("the DCLG") to provide details of the postcodes and/or addresses of properties where assessments were made over a four year period by 8 accredited assessors, for the purpose of gaining Energy Performance Certificates.
2. The Commissioner's decision is that the DCLG has correctly applied Regulation 12(3) of the EIR to the information requested by the complainant and by virtue of Regulation 13, the DCLG is entitled to withhold that information.
3. No further action is required by the Commissioner in respect of this complaint.

Request and response

4. On 30 March 2017 the complainant wrote to the DCLG and submitted the following request for information:

"I am writing to request information concerning Energy Performance Certificates held in your database:

<https://www.epcregister.com/home.html>

Whilst I am able to locate EPCs based on postcodes of known addresses or individual certificate numbers I am unable to search for those addresses of properties by assessor name or number. This is of particular importance to me in my work investigating serious anomalies in the provision of EPCs for Houses in Multiple Occupation.

Therefore I should like to request a list of the postcodes and/or addresses of properties which were assessed in the last four years by the following accredited assessors¹:

- QUID205724 [a named assessor No.1]
- STRO023368 [a named assessor No.2]
- QUID204298 [a named assessor No.3]
- STRO025513 [a named assessor No.4]
- QUID205616 [a named assessor No.5]
- EES/005731 [a named assessor No.6]
- QUID203098 [a named assessor No.7]
- STRO011597 [a named assessor No.8]

Should the full request prove onerous I would be satisfied with the first four named and the list should be considered in order of descending preference. Similarly, I could work with merely the postcodes of the properties these individuals assessed and take my work from there.”

5. On 17 May 2017 the DCLG wrote to the complainant to advise him that his request had been considered under the EIR and that the Department held the information requested. The DCLG refused to disclose the information to the complainant on the grounds that it fell within the exception to disclosure provided by Regulation 12(3) of the EIR, by virtue of regulation 13. The DCLG informed the complainant that disclosure of the information he has requested would breach one or more of the data protection principles in the Data Protection Act 1998 (“the DPA”).
6. On 18 May 2017, the complainant asked the DCLG to conduct an internal review of its handling of his request. The complainant argued that the EPC is a document in the public domain which carries

¹ Hereafter referred to as data subjects

information such as the name of the assessor, the property they assessed, an email address, a phone number and a related party disclosure. He noted however that it is possible for assessors (or at least property owners) to opt out of inclusion in the database and he expressed his opinion that "this is a very bad idea..."

7. The complainant argued that this opt-out would only establish a reasonable expectation of privacy in respect of a public document where it had been exercised, which he believes is not the case here. The complainant expressed his belief that the postcodes and addresses which he seeks is not the personal data of the individuals stated in his request, being merely the addresses of properties which they have assessed, and as this information is already in the public domain. He argued that he is merely asking for the data to be sorted differently.
8. The complainant asserted that "the inclusion of the related party disclosure goes to the integrity of the EPC and is not included in the data at the link [the DCLG] provide". He expressed his concern regarding the integrity of the EPCs generated by the assessors named in his request and explained that he wanted the information in order to understand the scope of the problem they pose.
9. The complainant then went on to make assertions regarding certain deficiencies/irregularities in the EPCs generated by the individuals named in his request, which he alleged were achieved with the collusion of the owners of the properties concerned. He then stated his view that "there is an overwhelming public interest in the disclosure of the data I have requested as it directly impacts upon the integrity of the process by which Energy Performance Certificates are obtained and relied upon by the general public".
10. On 16 June 2017, the DCLG wrote to the complainant to confirm its refusal of the complainant's original request in reliance on Regulation 12(3) of the EIR, by virtue of Regulation 13.
11. The DCLG advised the complainant that it considers "a list of postcodes and/or addresses of properties which were assessed in the last 4 years by named assessors" to be the personal data of those individuals. The Department explained that disclosure of the requested information would breach the First Principle of the DPA on the grounds that it would be unfair to the data subjects as they would have no reasonable expectation that their data would be disclosed.
12. The DCLG informed the complainant that it is possible to search its EPC database for information using various search parameters, such as postcode, local authority and date. It also informed the complainant that

the database is not constructed in a way where "specific assessors' visits to a property can be linked".

13. The DCLG advised the complainant that the purpose of the database is to show how energy efficient properties and commercial buildings are or could be, and that it does not consider that "individual assessors have a legitimate expectation that their personal data could, or should, be searchable in this way". The Department said that it supports wider access to EPC data and it acknowledged the value of this information to research and in reducing carbon emissions and it advised you that some EPC data is now more widely accessible via:

<https://epc.opendatacommunities.org>

14. The DCLG informed the complainant it must consider the effect of disclosure and potential detriment to the individuals that might arise from the disclosure of their personal data and it stated that the Department "has a duty to consider the possible damage, distress and adverse consequences that may occur as a result of such disclosure" which it considers may lead to the harassment and distress of the named assessors.
15. The DCLG asserted that disclosure of the assessors' personal data would be unfair, and as a consequence of this it would be an unlawful breach of the first data protection principle. The DCLG also stated, "There is no schedule 2 condition in place to allow lawful disclosure". To support its position, the DCLG referred the complainant to the Information Commissioner's guidance on section 40 of the Freedom of Information Act and Regulation 13 of the EIR.

Scope of the case

16. The complainant contacted the Commissioner 19 June 2017 to complain about the way his request for information had been handled.
17. The Commissioner has investigated the DCLG's application of the exception to disclosure provided by Regulation 12(3) of the EIR, by virtue of Regulation 13.

Relevant background information

The following information about EPCs has been provided by the DCLG:

18. Almost 40% of the UK's energy consumption and carbon emissions come from the way buildings are lit, heated and used. Even

comparatively small changes in energy performance and the way we use each building will have a significant effect in reducing total energy consumption.

19. The DCLG is responsible for the EU's Energy Performance of Buildings Directive (EPB Directive) which was transposed into regulations in 2007. The EPB Directive requires that properties (homes and commercial) must have an Energy Performance Certificate (EPC) when constructed, sold or let; larger buildings occupied by a public authority where the building is frequently visited by the public must display an energy certificate; in England and Wales this is a Display Energy Certificate (DEC); all air-conditioning systems over 12kW must be regularly inspected by an energy assessor and given an Air-Conditioning Inspections Report (ACIR).
20. The principle underlying the Directive is to make energy efficiency of buildings transparent through the provision of a certificate showing the energy rating of a building and recommendations on how to improve its efficiency.
21. For an EPC, DEC or ACIR to be valid, it must be lodged by an accredited energy assessor on an Energy Performance of Buildings Register (EPB Register): The Domestic Energy Performance Certificate Register holds EPC data for dwellings; the Non-Domestic Energy Performance Register holds EPCs, DEC and ACIRs data for non-domestic and public buildings.
22. The owners of buildings or tenants are able to opt-out of an EPC. This opt-out is not available to assessors. The owner or occupier of the building to which the data relates is able to notify the keeper of the register, in writing, or by email, that the data is not to be disclosed. The owner or occupier may withdraw the opt-out in the same way. Details of how both of these may be done are available at:

<https://www.epcregister.com/opt-out/>
23. The DCLG has publicised why data relating to EPCs was being made available and how individuals could opt-out of having their data disclosed publicly. It has also produced and published a Privacy Impact Assessment and Privacy Notice before releasing the data. This can be found at:

<https://www.gov.uk/guidance/energy-performance-certificates-opt-out-of-public-disclosure>
24. The 'open' data is also protected by licensing, copyright and the Data Protection Act 1998 requirements - details can be found at:

<https://epc.opendatacommunities.org>

Reasons for decision

Regulation 12(3)

25. The Council has confirmed its reliance on Regulation 12(3) of the EIR. This provides an exception to the duty to disclose environmental information where the applicant is not the data subject and, by virtue of Regulation 13, where disclosure would contravene any of the data protection principles.
26. To engage regulation 12(3), the information requested by an applicant must satisfy the definition of personal data provided by section 1(1) of the DPA.
27. Section 1(1) of the DPA defines personal data 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.”
28. Here, the DCLG asserts that the information requested by the complainant is the personal data of the data subjects because it relates to living individuals who are identifiable from that information.
29. The DCLG provided the Commissioner with a spreadsheet containing the information which the complainant has requested and which it is withholding. The Spreadsheet contains a large number of lines of information under three headings: “Assessor Code”; “Lodgement Datetime”; and “Postcode”. It is possible to interrogate the spreadsheet to identify relevant information concerning each of the data subjects listed in the complainant’s request.
30. On the grounds that each of the data subjects can be identified by their associated assessor codes, the Commissioner accepts that the withheld information satisfies the definition of personal data provided by section 1 of the DPA.
31. Additionally, the Commissioner acknowledges the point made by the DCLG in respect of the potential for the withheld information to also be considered as sensitive personal data as defined by section 2(b) of the DPA.
32. In the context of the complainant’s request, where post codes and addresses have to be considered in relation to the eight named data subjects, the information can be considered as being personal data. Because the data subjects appear to belong to a specific ethnic or

religious group the information might satisfy the definition of sensitive personal data provided by section 2(b)(a) of the DPA.

33. Section 2(b) of the DPA defines sensitive personal data consisting of information as to—
- a) the race or ethnic origin of the data subject,
 - b) his political opinions,
 - c) his religious beliefs or other beliefs of a similar nature,
 - d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
 - e) his physical or mental health or condition,
 - f) his sexual life,
 - g) the commission or alleged commission by him of any offence, or
 - h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.
34. Whilst requests made under the EIR are blind to the identity of the requester and to his motives, the Commissioner cannot ignore the assertion made by the complainant concerning the data subjects having made false statements claiming that they have no connection with the owners of the properties they were assessing and producing inadequate assessments. This assertion is an allegation that the data subjects have committed an offence. Consequently the Commissioner has decided that, in the context of this request, the information sought by the complainant can also be characterised as sensitive personal data under section 2(b)(h) of the DPA.
35. In order to determine whether a public authority may disclose personal data under the regulation 13 of EIR, the public authority must determine whether such disclosure would contravene the first data protection principle.
36. 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.”
37. To satisfy the first data protection principle the public authority must conclude that the processing is fair to the data subjects and also would

satisfy at least one condition from Schedule 2 of the DPA, and, where the requested information is sensitive personal data, at least one condition from Schedule 3 of the DPA.

38. The DCLG has confirmed its conclusion that the first data protection principle would be contravened should it disclose the withheld information into the public domain. Additionally, the DCLG consider that the second data protection principle would also be contravened.
39. The DCLG explained that the raw data relates requested by the complainant relates to the data subjects' public lives in terms of the work they carry out as energy assessors. The aggregation of that data for this specific group, however, relates to their private life as an identifiable religious/ethnic group.
40. In the DCLG's opinion, the individuals concerned would have no legitimate expectation that their visits to particular properties or areas would be aggregated and publicly disclosed in the manner required by the complainant and consequently release of this information would have an unjustified adverse effect. It would be contrary to the data subjects' expectations and therefore release of the information requested by the complainant, in the manner required by the request, would be unfair.
41. The DCLF accept that the data subjects will have consented to the disclosure of data in the form that it is released and made available through the public facing EPC register. However the Department has not sought their consent for release of data in the way it has been requested.
42. The DCLG argues that the legitimate interests of the data subjects would be prejudiced by release of the requested information. They would have no expectation that information would be released in this way and, given the profiling that has apparently been applied as part of this request, could face unwarranted intrusion into their private lives.
43. The Department considers that the requestor has identified a specific ethnic/religious group for reasons that are not entirely clear. Its interpretation is that the DCLG believes that release of this information is not only unfair but adversely affects the data subjects' legitimate interests given that the complainant is alleging wrong-doing on the part of the assessors, both in terms of them allegedly making false statements and by virtue of the inadequacy of their assessments.
44. Condition 6 of Schedule 2 of the DPA allows personal data to be disclosed where:

"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.

45. The Commissioner understands that the complainant is investigating "Lockdown Landlords"² and seeks the postcodes where the data subjects have worked in order to assist him in identifying Lockdown Units in London. The complainant has informed the Commissioner that what is happening in respect of lockdown tenancies is prohibited by the Homelessness (Suitability of Accommodation) (England) Order 2012 Number 2601 which makes unlicensed homes in multiple occupancy unsuitable for formerly homeless tenants.
46. In the Commissioner's opinion the complainant's purpose does represent a legitimate interest particularly in light of the complainant's assertion that there is "an enormous and hidden scandal operating [...] which must be exposed and brought to public attention". The question however is whether disclosure of the requested information is necessary under the Environmental Information Regulations?
47. To answer this, the Commissioner asked the DCLG to respond to the following:

How are concerns, such as those expressed by the complainant, investigated? Where such wrong-doing is discovered how is it dealt with? What assurances can the public have in knowing that EPC's are carried out properly and ethically and that, where concerns are raised, they are investigated and dealt with efficiently and effectively.
48. The DCLG advised the Commissioner that the Guide to Energy Performance Certificate for the marketing, sale and let of dwellings, sets out the complaint procedures. A complaint regarding the quality and accuracy of an EPC should be directed to the energy assessor in the first instance and, if the matter cannot be resolved, the complainant should

² 'Lockdown landlords' is a term used to refer to landlords who have converted properties into tiny 'micro flats' so that they may be rented to housing benefits claimants who are allegedly collected from the streets, from homeless shelters and from local charities working with the homeless.

contact the accreditation body of the energy assessor who produced the EPC. Contact details of both the assessor and accreditation scheme can be found on the EPC.

49. The Accreditation Scheme must investigate the complaint and, where necessary, provide the appropriate redress. Where it is found that the information is incorrect, a new EPC will be issued and the information on the register amended.
50. This procedure should be followed at no cost to the complainant. In the event that the complaint cannot be satisfactorily resolved, the accreditation scheme will refer the matter to an independent third party for adjudication.
51. The energy assessor has a duty of care under the regulations, both to the seller or landlord and to the prospective buyer or tenant, to carry out an energy assessment on a building with reasonable care and skill. This duty is enforceable for as long as the EPC subsequently produced remains valid. If an energy assessor is proven to have been in breach of their duty under the regulations or negligent in any other way, this is a matter that can be taken up in the first instance with their accreditation scheme before recourse to an action in civil law. Energy assessors will have professional indemnity cover against the eventuality that any person to whom they have a duty may suffer loss as a result of their actions. If an EPC is subsequently alleged to have been produced fraudulently, this is a matter of criminal law, to be pursued by making a complaint to the police.
52. The role of the Accreditation Schemes is to uphold quality standards in energy assessment, including checking assessors are qualified and undertaking CPD. Schemes in England and Wales must comply with DCLG's Scheme Operating Requirements (SORs) as a condition of operation, along with the conditions of their Letter of Approval to operate an Accreditation Scheme from the Secretary of State. Accreditation Schemes are regularly audited by an independent auditor to monitor their practices, against the SORs.
53. In the Commissioner's opinion, the availability of the procedures outlined above makes disclosure of the data subjects' personal data unnecessary under the EIR. This, taken with the data subjects not having a legitimate expectation that their personal data would be disclosed in the way required by this request, is sufficient for the

Commissioner to determine that condition 6 of Schedule 2 is not met and disclosure would be unfair to the data subjects.

54. The Commissioner notes that the complainant has previously used the complaints process (above) by submitting an appeal to Quidos³.
55. The Commissioner has therefore decided that the DCLG has correctly applied Regulation 12(3) of the EIR to the complainant's request and it is entitled to withhold the requested information by virtue of Regulation 13. The Commissioner considers that her decision is strengthened by the absence of any condition in Schedule 3 of the DPA which would allow the disclosure of sensitive personal data.
56. In view of this decision, the Commissioner has not gone on to consider the DCLG's assertion that disclosure would also contravene the second data protection principle.

Other matters

57. The Commissioner accepts the DCLG's advice that specific data is retained on the EPC register (not a spreadsheet) where it is possible to search on various parameters such as postcode, local authority and date. She accepts that it is not the purpose of the public facing EPC register to link data in the way that has been requested by the complainant.
58. In order to obtain the data requested by the complainant and by the Commissioner for the purpose of dealing with this complaint, it was necessary for the DCLG to pay for a specific computer programme to be run on the register at a cost to the Department.

³ Quidos Ltd is a company providing Government approved energy assessor accreditation for professionals who carry out energy performance assessments.

Right of appeal

59. 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

60. 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.
61. 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

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