Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **11 May 2017**

Public Authority: **The Oil and Gas Authority**
Address: **21 Bloomsbury Street**
London
WC1B 3HF

Decision (including any steps ordered)

1. The complainant has requested a copy of all the comments received in response to a consultation on fracking. The Oil and Gas Authority (OGA) initially refused the request on the basis of regulation 13(1) – that the information would be personal data. Following an internal review, the OGA sought to apply regulation 12(4)(b) to refuse the request as manifestly unreasonable due to the volume of information involved.

2. The Commissioner's decision is that the regulation 12(4)(b) exception is engaged and the public interest favours maintaining the exception. However, she finds the OGA has not met the requirements of regulation 9 by offering advice and assistance to the complainant on how to refine the request.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Provide the complainant with advice and assistance to refine the scope of his request

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The request was sent to the Oil and Gas Authority ("The OGA") who were an executive agency of the Department of Energy and Climate Change ("DECC"). The refusal notice was issued by the OGA on behalf of DECC. In July 2016 DECC became part of the Department for Business, Energy and Industrial Strategy ("BEIS") and until 1 October 2016 the OGA remained an executive agency of BEIS. On 1 October the OGA vested as an independent Government Company and now holds the requested information and is the relevant authority. For ease this decision notice refers to the OGA throughout.

Request and response

6. On 11 March 2016, the complainant wrote to the Oil and Gas Authority ("OGA") and requested information in the following terms:

   "I am requesting information concerning the consultation announced by DECC on 17 April 2012: https://www.gov.uk/government/news/comments-sought-on-recommendations-from-independent-experts-on-shale-gas-and-fracking in which DECC asked for comments on the document Preese Hall Shale Gas Fracturing Review and Recommendations for Seismic Mitigation.

   1. I should like a copy of all the comments submitted in response to the consultation call.

   2. I wish to know whether the comments were made available online, and if so, between what dates approximately."

7. The OGA responded on 12 April 2016. It stated that the information requested at (1) was exempt from disclosure on the basis of regulation 13(1) of the EIR as the information constituted personal data. At the same time, the OGA provided a link to the material published online at the time of the consultation in response to part (2) of the request.

8. Following an internal review the OGA wrote to the complainant on 6 July 2016. It stated that it upheld the view that personal information would be contained in the original responses to the consultation exercise. The complainant had argued that only the names and contact details of the respondents would be personal data.

9. The OGA maintained that the responses themselves may contain information which, when combined with other information, could identify the individual responders even with their names redacted. The OGA

went on to explain that there may be some responses which would not be personal data or that responders may not object to having published if they were contacted about this; however, the OGA would have to interrogate each response individually and due to the sheer scale of responses this would trigger the manifestly unreasonable exception (regulation 12(4)(b)).

Scope of the case

10. The complainant contacted the Commissioner on 31 July 2016 to complain about the way his request for information had been handled.

11. The Commissioner considers the scope of her investigation to be to consider whether the request is manifestly unreasonable and if it is found that is not to consider whether any of the information is exempt from disclosure as it constitutes personal data.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

12. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that - the request for information is manifestly unreasonable. In this case the OGA has said that it would be manifestly unreasonable because of the time and cost implications of compliance.

13. The OGA considers that the time it would take to carry out the exercise of seeking to locate, retrieve, extract and collate the information sought would be in excess of a minimum of 21 hours.

14. When considering the time taken to deal with a request the Commissioner refers to the cost limit set out under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 as a starting point to assess the reasonableness of this request. Whilst these Regulations do not apply under EIR, the Commissioner has recognised in her Guidance that "…we take these regulations to give a clear indication of what Parliament considered to be a reasonable charge for staff time."

15. The regulations stipulate that a cost estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to

undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities.

16. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:

    (a) determine whether it holds the information

    (b) locate the information, or a document which may contain the information

    (c) retrieve the information, or a document which may contain the information, and

    (d) extract the information from a document containing it.

17. The Commissioner is satisfied that it is reasonable to use the Regulations as a starting point under EIR, but all of the circumstances of the case must be taken into account to determine whether a request can be deemed manifestly unreasonable on the grounds of cost under EIR.

18. The OGA has sampled 100 of the responses it holds and has gone through each of these to analyse the information they hold. Whilst it is not in dispute that all of the information in the responses is relevant to the request, the OGA considered it appropriate to review the information to determine if any of it constituted personal data or sensitive personal data. In reviewing these first 100 responses the OGA identified a further 200 responses that could easily be retrieved but also an additional 1700 responses which were more problematic to access.

19. The Commissioner has firstly considered the detail provided by the OGA for the time it has already spent reviewing and collating the information from the first 100 responses it has sampled. One of the key points the Commissioner highlights in her guidance[1] on the use of this exception is that, unlike under the FOIA, the cost of considering whether information is exempt can be taken into account when deciding whether the appropriate limit would be exceeded. The OGA has explained that it took approximately seven hours for one member of staff to go through the 100 responses it sampled.

20. To understand this time it is important to understand the nature of the responses and the information contained in them. The OGA explained to

[1] https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf

the Commissioner that the responses came from a range of correspondents, some commenting in their capacity as an industry representative, others in their capacity as a public official such as a council employee and others in a private, personal capacity. Some of the responses also straddled these areas and were from public figures with some personal references. In the sample of responses the Commissioner has had sight of it is clear that some of the information beyond just the name and contact information of the responder would be personal data. The Commissioner cannot comment further on whether this information should be withheld as she is not considering this in any more detail at this stage. That being said, what is clear is that there are certain responses where the OGA will legitimately require additional time to identify personal data and determine if this engages regulation 13(1) of the EIR. The OGA also argues that some of the responses contain other information which may engage exceptions under the EIR and time would need to be spent on each response to analyse this.

21. The 100 responses reviewed by the OGA as part of its sampling exercise were of variable lengths and complexities. The shortest response sampled took 46 seconds to review, another response took 1 minute and 3 seconds to read and two further responses took 2 minutes and 21 seconds and 2 minutes and 22 seconds respectively to read. The OGA states this is representative of the often detailed and technical information contained in the responses. Overall the OGA states it took one member of staff seven hours to review the first 100 responses. Therefore, to review the next 200 responses would take an additional 14 hours, taking the total time required to 21 hours.

22. However, added to this the OGA has also identified, in conjunction with BEIS, an additional 1700 responses. The OGA argues that these will also need to be analysed and considered in the same way as the other 300 responses and this will significantly increase the amount of time needed to respond to the request. The difference with these responses is that they are held by BEIS but the OGA has clarified that they are being held on the OGA's behalf by BEIS. The Commissioner therefore accepts that these responses are also held by the OGA and fall within the scope of the information request.

23. As well as the time needed to analyse these additional responses, the OGA has also explained there are additional issues with retrieving these 1700 responses. The OGA contacted BEIS at the internal review stage to ask about the possibility of recovering these responses. BEIS advised it had already taken over three and a half hours work to locate one potential mailbox export and it was not clear if this contained all the remaining responses. The OGA has not been able to estimate how much longer it would have taken to continue this extraction but it states that the fact that 300 responses held by the OGA would already exceed the

18 hour time limit to locate, extract, redact and collate, suggests that adding in the time for these 1700 would far exceed the reasonable cost limit.

24. The Commissioner has considered the arguments presented by the OGA and does accept that the OGA has conducted a thorough sampling exercise to reach its position. The Commissioner acknowledges that each response would have to be reviewed to make a decision on what information could be released and the variable length of the responses and the different levels of complexity would make this exercise more than just a simple scanning of the information. She therefore accepts that even if the OGA was only able to extract and review the 300 responses it directly holds the time required to review this information would exceed the cost limit. Added to this are the 1700 responses which are held on the OGA's behalf by BEIS and the difficulties in retrieving these archived responses and it is clear that the cost limit is exceeded.

25. The Commissioner therefore considers that regulation 12(4)(b) of the EIR has been correctly engaged by the OGA on the basis of the time and cost involved in responding, she has therefore gone on to consider the public interest test.

Public interest test

26. The Commissioner notes that the responses that are being considered in this case related to a 2012 call for comments from DECC on an independent report recommending measures to mitigate the risk of earthquakes arising from fracking. The complainant argues that it is matter of great public interest that the policies and decisions around the risk of fracking-induced tremors in the UK be transparently arrived at and that disclosing the responses to the public consultation would assist in this transparency and show that the OGA has properly considered these responses when making future decisions.

27. The OGA accepts there is a general public interest in the information being released as disclosure would lead to greater transparency which enhances public scrutiny and makes public authorities more accountable. However, the OGA argues that it would not be in the public interest to disclose responses that may put individuals off from responding to future consultation and calls for evidence by putting information into the public domain when they had not expectation of this.

28. The Commissioner recognises there is a legitimate public interest in transparency with information about the environment and, specifically in this case, with information which would show a cross-section of views from industry experts, public sector officials and members of the public

on an undoubtedly controversial subject. It would also demonstrate that these views have been properly considered when making decisions on how to move forwards in making policy in this area.

29. However there is a strong public interest in not placing a manifestly unreasonable burden upon public authorities. In this case, the time required to locate, extract, review, redact and collate the responses would place a burden on the OGA. The question is whether this would be an undue burden. In deciding this, the Commissioner can take into account the time needed and the size of the public authority to determine how burdensome complying with the request would be and how much of a diversion of resources this would create. This can then be balanced against the public interest in this information being disclosed.

30. In this case the Commissioner notes that the volume of information is quite significant and based on the average times given by the OGA of 21 hours required for 300 responses, the Commissioner calculates this to be 7 hours per 100 responses. If this was then extended to the additional 1700 responses then the total time required to comply with the request would be 140 hours. The Commissioner is of the view that this would create an undue burden on even a large government department but the OGA is a small organisation who would almost certainly have disruption to its everyday functions by diverting resources to deal with the request.

31. The Commissioner accepts that the subject matter of the consultation is of significant public interest and disclosing information on this would help to understand the wide range of views on the subject and assist in transparency on the subject by showing that the views have been fully considered.

32. The Commissioner is therefore only inclined to accept that regulation 12(4)(b) is engaged and the public interest favours withholding the information on the basis that the volume of information is so significant as to be unreasonable to comply with without creating a huge burden on a relatively small public authority.

33. On balance therefore, the Commissioner considers that in this case, the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.

34. As the Commissioner considers that regulation 12(4)(b) EIR was correctly engaged in this case, she has not gone on to consider the application of other exceptions.

Regulation 9

35. Under Regulation 9(2) of the EIR a public authority must do the following:

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of the receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing these particulars.

36. The Commissioner views this as an obligation for public authorities to help requesters reduce the scope of manifestly unreasonable requests, where those requests have been refused because the burden of compliance is too great.

37. The OGA states it has tried to be helpful by providing a link to the summary of responses which was published after the consultation exercise in 2012. It acknowledges that it should have made clear to respondents that their comments may be subject to the FOIA/EIR and that not having done so has led to the situation it is in whereby the information would need to be thoroughly interrogated to ensure personal data is not disclosed. However, the OGA, as far as the Commissioner is aware has not offered any advice or assistance to the complainant to help refine the request to a point where it can be complied with without being manifestly unreasonable.

38. The complainant has also pointed out that the link the OGA provided to the summary responses was not in fact a link to responses but to a Q&A document. The complainant has also suggested that if the responses have been properly considered then the OGA should have a summary table or a spreadsheet which contains the main points and that this would be an acceptable disclosure as it would show that the responses have been considered without infringing on anyone's privacy.

39. The Commissioner believes that it would have been possible to offer advice and assistance to narrow the request. There seems to be a clear divide between the 300 responses held by the OGA directly and the additional 1700 held be BEIS on behalf of the OGA. It may have been possible to refine the request to only focus on those which were easy to identify and extract and whilst this would still require some time on the part of the OGA it would be considerably less burdensome. It is also possible the OGA could have asked the complainant if they wanted to focus on responses from particular groups of responders such as industry experts rather than private individuals, therefore reducing the time needed to consider the regulation 13 exception.

40. The Commissioner notes that the OGA believes that some of the information in the responses may be exempt from disclosure on the basis of other exceptions but this cannot be used as a basis for not offering advice or assistance as the validity of using exceptions cannot be determined without the information being identified.

41. The Commissioner therefore concludes that the OGA has not met its obligations to provide advice and assistance in relation to this request and she now asks the OGA to inform the complainant on how to reduce the scope of the request.

Right of appeal

42. 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

43. 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.

44. 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 ……

Jill Hulley
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