



**IN THE FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]**

EA/2014/0144

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50521784

Dated: 14 May 2014

Appellant: CHARLES ADAMS

Respondent: THE INFORMATION COMMISSIONER

Heard at: Bedford Magistrates' Court

Date of hearing: 14 October 2014

Date of Decision: 11 November 2014

**Before
Annabel Pilling (Judge)
Dave Sivers
Nigel Watson**

Subject matter:

EIR or FOIA – Which access regime applies to the requested information

Representation:

For the Appellant: Charles Adams

For the Respondent: Adam Sowerbutts

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 14 May 2014.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 14 May 2014.
2. The Decision Notice relates to a "Freedom of Information" request made by the Appellant to the Health and Safety Executive ('the HSE') for information in relation to the operation of the Gas Safe Register. He sought answers to eleven questions and requested copies of a list of four documents.
3. The Appellant's request stems from his concerns about the Gas Safe Register scheme (previously the Corgi scheme) which provides "the official list of gas engineers who are registered to work safely and legally on boilers, cookers, fires and all other gas appliances." The scheme is operated by Capita Gas Registration and Ancillary Services Ltd (CGRAS), the parent company of which is Capita plc. The Appellant's primary concern is the apparent lack of monitoring by the HSE, in particular a failure to have in place its own procedure for handling complaints submitted to it relating to the Gas Safe Register.
4. The initial request for information was made on 7 May 2013 in the following terms:

"Please supply answers to the following questions from the documents which the HSE hold relating to the Gas Safe Register scheme

- (1) What is the purpose of the Gas Safe Register?*
- (2) Does the HSE have a legally binding contract with Capita Group to administer the scheme on behalf of the HSE, and what is the duration of this contract?*
- (3) How are Capita Groups activities in administering Gas Safe financed?*
- (4) What are Capita Groups obligations to the HSE and the public under this contract?*
- (5) How does the HSE monitor and ensure Capita Group meet these obligations?*
- (6) Does Capita Group submit both financial accounts and KPI's (Key Performance Indicators) relating to its Gas Safe activities to the HSE?*
- (7) Is there a documented process for the public to escalate complaints relating to Gas Safe to the HSE once Gas Safe's complaints process had been completed, and are Capita Group obliged to advise the public of their rights to refer a complaint to the HSE?*
- (8) How many complaints have the HSE received relating to the Gas Safe register since its inception and does the HSE perform an analysis of these complaints by category?*
- (9) Does the HSE audit Capita Groups complaints process, register and documentation relating to the Gas Safe Register?*
- (10) Does the HSE audit the Gas Safe Register independently of the Capita Group?*
- (11) How often does the HSE test samples of the businesses shown on the register to ensure a reasonable proportion of them are accurate and up to date?*

Copies of documents requested

(1) A copy of the schedule of Capita Groups obligations contained within its contract with the HSE.

(2) A copy of the latest KPI's submitted to the HSE by Capita Group together with any related targets agreed with or given by the HSE to Capita Groups.

(3) A copy of HSE's own procedure for handling complaints submitted to it relating to the Gas Safe Register.

(4) Analysis of the complaints received relating to the Gas Safe Register by category.

5. The HSE initially dealt with the request under the Freedom of Information Act 2000 (the 'FOIA') and responded on 3 June 2013. Some of the information was reasonably accessible and the Appellant was provided with the details of how to find it.
6. The HSE provided the link to the publicly available Gas Safe Register's complaints policy, and stated that *"there is no documented process for the public to escalate complaints relating to Gas Safe Register to HSE. Gas Safe Register has a rigorous complaints mechanism in place, including internal reviews and accountability of their senior management. They are not obliged to advise the public to complain to HSE but will provide HSE's contact details upon request. Gas Safe Register provides HSE with a monthly summary of all complaints against the service with progress updates and how the complaint has been resolved. These complaints are reviewed as part of their monthly performance review and any issues or concerns from HSE are fed back to Gas Safe Register's Customer Services Director to investigate."* It also advised that HSE *"has received complaints via various routes (e.g. directly, via MP's letters) about Gas Safe Register which HSE addresses on a case by case basis. As such, no separate records are kept."*

7. In respect of the copies of documents requested, (1) the Services Concession Agreement was attached and (2) the latest KPIs and targets shown in the appendix to the response. In respect of (3) and (4), the HSE stated that it does not hold this information. It explained that it *“does not have a specific procedure for handling complaints submitted to it relating to Gas Safe Register. HSE does occasionally receive complaints and address these case by case.”* It also stated that *“[g]iven the low level and intermittent nature of complaints HSE receives about Gas Safe Register HSE does not direct additional resource into analysing the complaints by category.”*
8. The Appellant was not content with the information provided and there followed correspondence with the individual who had provided the response. On 23 June 2013, still dissatisfied, the Appellant requested an independent review of the decision before lodging an appeal with the Commissioner. He made a further request for an internal review on 27 July 2013. In this request, the Appellant set out eight points to which he wanted the HSE to respond as part of the internal review.
9. The internal review was conducted by the FOI policy advisor who considered that the information requested amounted to environmental information and therefore the applicable legislative framework was the Environmental Information Regulations 2004 (the EIR). As part of the review it disclosed some further schedules to the Service Concession Agreement, either in full or in part. The remainder was withheld under Regulation 12(5)(e) [confidentiality of commercial or industrial information] or Regulation 13 [personal data].
10. The Appellant complained to the Commissioner about the way in which his request for information had been dealt by the HSE. In establishing the scope of the investigation, the Appellant stated that he was content with the information which had been provided, and the focus was on the failure of HSE to respond to all eight of the points raised in the request for an internal review dated 27 July 2013, as well as the apparent lack of procedures in place by the HSE for dealing with

freedom of information requests and other complaints to it

11. The Commissioner explained the limits of his investigation and role. In particular, he informed the Appellant that he could not oblige the HSE to respond to questions that did not form part of the initial request for information and which were raised in the request for an internal review.
12. A dispute also arose between the Commissioner and the Appellant in respect of the applicable legislative framework. The Commissioner disagreed with the conclusion of the HSE's internal review and considered that FOIA applied not the EIR. He considered that as the request related to information concerning the administration of the Gas Safe Register and the complaints procedures in place in relation to its operation, this was not environmental information within the meaning of Regulation 2(1)(c).
13. The Commissioner concluded that the HSE had breached section 17 of FOIA as it had failed to notify the Appellant that it was refusing to disclose information within 20 working days of the initial request. He did not require the HSE to take any further action.

The appeal to this Tribunal

14. The Appellant appealed to this Tribunal on 7 June 2014. He requested an oral hearing of the appeal at which the Commissioner did not appear.
15. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. On the day of the hearing, the Appellant provided additional written submissions, a copy of the decision of the Tribunal in *The Office of Communications v Information Commissioner and T-Mobile (UK) Ltd* EA/2006/0078 and a copy of the Commissioner's Decision Notice in another case involving the HSE, FER0519055.
16. Although we cannot refer to every document in this Decision, we have

had regard to all the material before us.

17. At the start of the hearing, we discussed with the Appellant the limitations on the Tribunal in respect of our jurisdiction. An appeal to this Tribunal under section 57 of FOIA arises only in relation to the findings of the Commissioner contained in a Decision Notice issued following a complaint to the Commissioner under section 50 of FOIA; this will only deal with the question of whether or not the request for information has been dealt with in accordance with Part I of FOIA.

18. In particular, we have no power to direct or advise the Commissioner or the HSE to conduct their business in a particular way. We cannot direct the HSE to redraft or reconsider the wording of their correspondence with the Appellant or to provide him with the opportunity to discuss his concerns in person. We have no role in relation to the adequacy or otherwise of the HSE's arrangements with Capita plc in respect of the Gas Safe Register and in respect of complaints made about the Gas Safe Register.

19. The focus of the hearing was therefore in respect of whether the initial request was for environmental information. If so, the Appellant appeared to submit that the significance is that he would have been entitled to an internal review in which the HSE would have been obliged to answer each of his eight points raised.

EIR or FOIA?

20. The Appellant submits that his request for information was for environmental information and therefore the applicable legislative framework is the EIR and not FOIA.

21. Before us, the Appellant appeared to suggest that information could fall within both access regimes and in that situation there was an obligation to "choose" to use the more favourable regime for requesters, the EIR.

22. Regulation 2(1) of the EIR defines environmental information as any information in written visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a), or through those elements, by any of the matters referred to in (b) and (c).

23. The Appellant submits that the information requested falls within paragraphs (a), (b), (c) and (f) above, although he accepted that he had

relied only upon selected words within these parts of the definition of environmental information.

24. The central theme of the Appellant's submissions was that as gas appliances can release emissions which would have an environmental impact, and could cause significant impact to the safety of humans, it would be reasonable to consider the EIR apply in this case. The Appellant submits that as this was the view of the HSE in conducting the internal review, with their expertise, its conclusion that this was a request for environmental information is relevant and we should accept its conclusion over that of the Commissioner.
25. The Commissioner is the independent statutory regulator of FOIA and the EIR¹. In that capacity, he has to assess whether or not a public authority has applied the correct legislative framework; if he does not, his Decision Notice may not be in accordance with the law. The Commissioner reminds us that it is not for either the requestor or the public authority to specify under which legislative framework or access regime they would prefer a request be dealt, not for them to reach an agreement which then binds the Commissioner's decision.
26. The primary purpose of the Gas Safe Register is the official registration of gas engineers qualified to carry out gas installations. The request is for information concerning the administration of that register and the procedure for handling complaints about the administration of that register.
27. We agree with the Commissioner that the link to the possible impact upon environmental factors should gas appliances not be installed correctly is too remote a link for this information to be considered environmental information. This was not a request for environmental information and so the applicable access regime in FOIA and not the EIR.

¹ Also the Data Protection Act 2000.

28. We do not consider that there would have been any practical difference to the Appellant in any event. The HSE did conduct an internal review as requested by the Appellant. Regulation 11 of the EIR does not require a public authority to conduct an internal review in a particular way and would not have required the HSE to consider all of the eight points raised by the Appellant where they amounted to new queries or questions relating to other matters.

29. The Appellant does not specifically challenge the Commissioner's finding that the HSE was in breach of its statutory duty under section 17 FOIA. We are satisfied that the HSE was in breach of section 17 by failing to notify the Appellant that it was refusing to disclose information within 20 working days of the initial request.

30. For these reasons, we are satisfied that the Decision Notice issued by the Commissioner is in accordance with the law.

31. We therefore unanimously refuse this appeal.

Annabel Pilling

Judge

11 November 2014