

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

Decision notice

Date: 25 July 2012

Public Authority: Powysland Internal Drainage Board

Address: PO Box 250
Llandrinio
Powys
SY10 1EH

Decision (including any steps ordered)

1. The complainant requested a current copy of the 25" OS plans showing the Board's maintained drains, ditches, water courses etc. The Board initially refused to provide the information stating that it was against copyright rules. It also offered the complainant access to inspect the maps on its premises however the complainant considered this alternative as impractical. PIDB subsequently refused the request on the basis of section 14(1) of the Act. Following the Commissioner's determination that section 14(1) was not engaged and that the information should have been considered under the EIR, the Board then cited regulation 12(4)(b) on the basis that the excessive costs required to comply with the request made it manifestly unreasonable. During the course of the Commissioner's investigation it became clear that regulation 12(4)(b) could not apply as the Board did have electronic copies of the maps. However, PIDB continued to refuse the request, citing regulation 13 of the EIR on the basis that it could not provide it without redacting third party personal information.
2. The Commissioner's decision is that PIDB has breached regulation 6 of the EIR by not providing the information in the form and format requested by the complainant. The Commissioner also considers that regulation 13 of the EIR is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide an electronic copy of the maps to the complainant.

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.

Request and response

5. On 22 July 2011, the complainant wrote to PIDB and requested information in the following terms:

"A current copy of the 25" OS plans showing the boards maintained drains, ditches, water courses, water pipes, electricity overhead and under ground lines (unless clearly indicated on map as PIDB responsibility, please include a detailed list of those that are PIDB responsibility."

6. PIDB responded on 28 July 2011. It stated that:

"I have checked with OS and have been informed that this licence does not extend to reproducing these documents and passing them on to a third party...If you merely wish to view the maps you could make an appointment with the Board's engineer..."

7. The complainant disputed PIDB's comments regarding the OS licence providing a copy of the Ordinance Survey 'Copying under the principle of Fair Dealing' extract which stated:

"This entitles you to make copies of our mapping for the purposes of criticism, review, news reporting and research for a non-commercial purpose."

8. On 2 August 2011 the PIDB informed the complainant that it had approached a third party owning equipment capable of reproducing the maps to the required size and that the total cost of reproducing them would be £325.62 plus an additional £15 per hour for doing the maps on behalf of PIDB (two hours work). PIDB also confirmed that it had asked OS to clarify its position regarding copying the maps and repeated its offer to the complainant to inspect the maps.

9. On 3 August 2011 the complainant confirmed that he is a member of PIDB as he pays rates directly to the Board, and as a Landowner he has member voting rights. The complainant also queried the need for the third party to actually carry out the photocopying and informed the Board that as the machine only copies in black and white, that it would be the Board's responsibility to clearly identify PIDB's responsibilities on

the copies of the maps. The complainant also pointed out that his request should have been considered under the EIR and provided information regarding the rules dealing with charging for environmental information.

10. On 3 August 2011, the Board reiterated that it did not consider that it was either entitled or obliged to provide the complainant with a copy of the OS maps but repeated its offer to view the maps. It also informed the complainant that it considered that his:

"requests have become vexatious."

Correspondence between the complainant and PIDB continued with the complainant also contacting the Commissioner. There was some confusion regarding whether the Commissioner had contacted PIDB instructing it to conduct an internal review. This was subsequently clarified and on 4 October 2011 the complaint was accepted for investigation.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He did not accept PIDB's assessment that his request had become vexatious and he did not consider that PIDB's offer to view the maps on the Board's premises was practicable.
12. Before considering the exemptions/exceptions cited by the authority, the Commissioner noted PIDB's concerns regarding copyright of the OS maps referred to at paragraph 6 of this notice. However, he does not consider that copyright automatically prevents information from being disclosed under either the Act or the EIR. Notwithstanding the provisions for 'fair dealing' under section 29 of the Copyright Design and Patents Act (CDPA) 1988, which allows for the limited copying of data for non-commercial purposes, section 50 of the CDPA also provides that where the copying or publishing of information is specifically authorised by legislation, copyright will not be infringed. The Commissioner considers that providing information in response to a request made under FOIA or EIR constitutes an act specifically authorised under legislation.
13. However, copyright would still apply to the information once it has been disclosed under FOIA or EIR. The person who receives the information is still obliged, by law, to respect the rights of the copyright owner. If they do not, a copyright owner can seek damages or an injunction in the same way as they could for an infringement of copyright.

14. The Commissioner subsequently went on to consider section 14(1) of the FOIA, however could find no evidence to support PIDB's assessment that section 14(1) (vexatious requests) was engaged. He also pointed out to PIDB that it should have considered the request under the EIR.
15. Although PIDB accepted the Commissioner's findings, it now informed the Commissioner that it considered that the request was manifestly unreasonable on the basis of the excessive costs that would be incurred in the course of complying with the request. During the Commissioner's investigation of this issue, it came to light that PIDB did in fact hold electronic copies of the maps rendering PIDB's reliance on this exception as untenable.
16. However, PIDB now refused to provide the complainant with electronic copies of the maps on the basis that a by-product of complying with the request for information meant that this would result in the disclosure of the names of the landowners owning the land on the various maps and therefore the disclosure of third party personal information into the public domain. It now cited regulation 13 as the basis for its continued refusal to provide the information to the complainant.
17. The Commissioner asked PIDB if it was possible to redact the landowners names from the electronic copies and in the event that it was possible, to provide an estimate of the cost of doing so. PIDB confirmed that it is possible to redact the information but indicated that it would expect the complainant to meet this cost under regulation 8 of the EIR. The actual estimate provided by PIDB was in the region of £512 to £687 but possibly even £850. The Commissioner has therefore considered regulation 8 which provides for a public authority to make a charge for environmental information and has concluded that such a charge would be in breach of Regulation 8(3).
18. As PIDB has repeatedly offered to make the information available to the complainant for inspection, the Commissioner has therefore considered whether this was appropriate under regulation 6(1) of the EIR and he has concluded that it was not reasonable for PIDB to make the information available in another form or format to that requested by the complainant.
19. The Commissioner therefore went on to consider PIDB's application of regulation 13 of the EIR and has concluded that it is not engaged for this information.

Reasons for decision

The appropriate legislation

20. The Commissioner notes that PIDB originally considered this request under the FOIA. However, the Commissioner considers that the information requested falls within regulation 2(1)(a) and 2(1)(b) of the EIR. Regulation 2(1)(a) and (b) concerns information regarding

- (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);"*

21. PIDB accepts that it should have considered this request under the EIR.

Regulation 6(1) – Form and format of information

22. The Commissioner has also considered the fact that the Council has repeatedly offered to make the unredacted information available to the complainant for inspection. Whilst the Commissioner accepts that where a public authority makes information available for inspection it is considered to have made it publicly available, regulation 6(1) provides that:

"Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless-

- (a) *it is reasonable for it to make the information available in another form or format: or*
- (b) *the information is already publicly available and easily accessible to the applicant in another form or format.*

23. The Commissioner notes that the complainant has asked for copies of all 81 maps. During the course of the Commissioner's investigation, it has been established that the maps have been uploaded onto electronic form and that copying them onto a CD is a simple and inexpensive process. However, PIDB has refused to provide the information in the

form and format requested by the complainant but has offered to allow the complainant free access up to eight hours to view these maps, after which time it intends to charge the complainant for any additional time he requires to inspect the maps.

24. The Commissioner notes that although a public authority offering the complainant the opportunity to inspect information at its premises would normally be considered to be making it publicly available, imposing a time limit after which it will then charge for inspection of the information is inconsistent with this claim. Additionally, even if PIDB were not going to provide unlimited access to inspect the maps before imposing a charge, the complainant has stated that viewing the maps on Council premises is impractical as it would take many hours and numerous visits to complete this task.
25. Based on the inconvenience to both the complainant and PIDB of making the maps available for inspection, compared to the ease and inexpense of producing an electronic copy of the maps, the Commissioner considers that it would not be reasonable to make the information available in another form or format to that requested by the complainant and has therefore concluded that Regulation 6(1)(a) of the EIR is not engaged.

Regulation 8 - Charging

26. Regulation 8(1) states that where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available. However, Regulation 8(3) states:

"A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount."

27. Although Regulation 8(3) does not offer any assistance as to what is meant by the word reasonable, the Directive provides some guidance that 'as a general rule, charges may not exceed actual costs of producing the material in question'. In *David Markinson v ICO* (EA/2005/0014; 28 March 2006), the former Information Tribunal indicated that this will comprise the costs of producing the copies of the information requested. The Tribunal concluded that:

"...the cost of paper and printing is a relevant factor and can be included in the charge. However, the cost of staff time in identifying, locating and retrieving the information is an irrelevant factor and cannot be included."

28. The Commissioner notes that copying the unredacted electronic maps is a simple and inexpensive process and charging the complainant for the

cost of the CD and postage would therefore be reasonable. However, the issue of redaction is only relevant in this instance as in the process of providing copies of the unredacted maps, PIDB would also be disclosing third party personal information. The Commissioner does not consider it reasonable to expect the complainant to pay for the redaction of information he has not even requested and he considers expecting it to do so is in breach of Regulation 8(3) of the EIR.

Regulation 13 – Personal data

29. Regulation 13 of the EIR states that a public authority shall not disclose information which is the personal data of a third party where its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

30. In order to rely on regulation 13, the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

31. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data"*.

32. On the basis of this guidance, there are two questions the Commissioner has considered when deciding whether disclosure of the information into the public domain would constitute the disclosure of personal data:

(i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"

(ii) "Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"

33. The information in this case constitutes the names of the owners of the land contained on the maps.

34. The Commissioner is satisfied that the names of the individual landowners does constitute personal data as defined by section 1 of the DPA. PIDB considers that disclosure of this information would breach the data protection principles and in particular principle 3 of the DPA. However, for the purposes of disclosure under the Act, it is only the first principle (that data should be processed fairly and lawfully) that is likely to be relevant. The third principle is only likely to be relevant to holding and using data, not to disclosure. The Commissioner has therefore considered whether disclosure of the information would breach the first data protection principle.

Would disclosure contravene the first data protection principle?

35. The first data protection principle requires that the processing of personal data be fair and lawful and,
- (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 met.
36. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

37. In considering whether disclosure of the information would be fair, the Commissioner has taken into account the following factors:
- (a) The reasonable expectations of the data subjects.
 - (b) Consequences of disclosure.
 - (c) The legitimate interests of the public.

The reasonable expectations of the data subjects

38. The Commissioner's awareness guidance regarding regulation 13 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private

life.¹ Although the guidance acknowledges that there are no hard and fast rules it states that:

“Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.”

39. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
40. However, whilst the information may relate to the data subjects' private lives, in that it reveals land privately owned by them, this does not automatically preclude it from disclosure as the nature of the information itself is a key consideration and more closely intertwined with the consequences of disclosure.
41. Furthermore, the Commissioner considers that the fact that details of land ownership are available from the Land Registry will affect the land owners' reasonable expectations about disclosure.

Consequences of disclosure

42. The Commissioner acknowledges that in an assessment of the consequences of disclosure, it is not always possible to quantify or prove the impact that disclosure may have on the data subjects. In this particular case, it is unlikely that there would be any consequences of disclosure of the names of the landowners, particularly as this information is available (for a fee) from the Land Registry or even electoral registers. The Commissioner has not therefore been able to identify any harm (damage or distress) to the data subjects resulting from disclosure of the information.

¹http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specalist_guides/PERSONAL_INFORMATION.ashx

The legitimate public interest in disclosure

43. Notwithstanding the data subjects reasonable expectations or any damage or distress caused by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. For example, in the case involving the MPs expenses the former Information Tribunal commented that:

79. ...in relation to the general principle application of fairness under the first data protection principle, we find:

(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'.

44. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
45. Where the requested information is already in the public domain, this is likely to affect an individual's reasonable expectations about disclosure and may also mean that disclosure is unlikely to cause significant additional prejudice to the interests of the data subject. There may be no overwhelming public interest in disclosure, but no significant interference with the data subject's privacy either. In such cases the Commissioner considers that disclosure can still be necessary simply to meet the (albeit limited) legitimate public interest in full disclosure, for the sake of transparency.
46. In this particular case, in balancing the reasonable expectations of the data subjects and the consequences of disclosure of the information against the legitimate public interest in disclosure, the Commissioner considers that the balance is weighted in favour of disclosure.

Schedule 2 condition 6

47. The first principle of the DPA provides that personal data must not be processed unless at least one of the conditions in Schedule 2 of the DPA is met. The Commissioner has therefore considered whether any of the Schedule 2 conditions apply in this case. The most relevant condition is 6(1), which provides that:

“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”.

48. The former Information Tribunal in the case of *House of Commons v ICO and Leapman, Brooke, Thomas* (EA/2007/0060) set out that the following test should be applied:
- There must be a legitimate interest in the disclosure of the information;
 - The disclosure must be necessary to meet this legitimate interest, i.e. there must be no way that the legitimate interest could be met other than by disclosure of the information; and
 - The disclosure must not constitute an unwarranted interference into the individual's private life.
49. The Commissioner has already concluded that there is a legitimate public interest in disclosure and as he is not aware of any alternative to fulfill this public interest, he considers that disclosure is necessary for this purpose. Additionally, the Commissioner is not aware that the disclosure of any of the information would constitute an unwarranted interference into the data subjects' private lives as he has not been able to identify any harm/detriment resulting from disclosure. The Commissioner has therefore concluded that the disclosure would comply with schedule 2 condition 6 and the disclosure of this information would be fair.

Lawful

50. In the context of freedom of information requests, it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In this case, the Commissioner has seen no evidence that any of these breaches would occur and he has concluded that disclosure would not be unlawful.
51. Since the Commissioner has concluded that disclosure of the information would be fair and lawful, he does not therefore consider that disclosure of this information would breach the first principle of the DPA.

Right of appeal

52. 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: informationtribunal@hmcts.gsi.gov.uk

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

53. 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.
54. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF