

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

Decision notice

Date: 25 April 2022

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Herts
SG13 8DF

Decision (including any steps ordered)

1. The complainant has requested mapping data showing conservation areas. Hertfordshire County Council ("the Council") initially relied on Regulation 12(5)(c) of the EIR (intellectual property rights) to withhold the information, before eventually relying on Regulation 6(1)(b) (publicly available) and Regulation 12(4)(d) of the EIR (material in the course of completion) to withhold the information.
2. The Commissioner's decision is that, with the exception of the data relating to Broxbourne and Three Rivers, the information the Council holds is publicly available and easily accessible. It is therefore excepted from disclosure under Regulation 6(1)(b) of the EIR. In respect of Broxbourne and Three Rivers, the Council has not demonstrated that Regulation 12(4)(d) of the EIR is engaged and is therefore not entitled to rely on this exception.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the data it holds relating to the Broxbourne District Council and Three Rivers District Council areas
4. The Council 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 1 January 2021 the complainant requested information of the following description:

“I understand that the County Council holds a consolidated spatial dataset incorporating the boundary data for conservation areas designated by district councils across the county. I would like to request a copy of that dataset under Open Government Licence, so that it can be incorporated into an updated national dataset which already covers over 99% of LPAs.”
6. On 29 January 2021, the Council responded. It refused to provide the requested information. It relied upon Regulation 12(5)(c) of the EIR (adverse effect on intellectual property rights) as its basis for doing so.
7. The complainant requested an internal review on the same day. The Council sent the outcome of its internal review on 26 March 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 26 March 2021 to complain about the way his request for information had been handled.
9. The Commissioner commenced his investigation with a letter to the Council on 8 February 2022, asking it to set out its reasoning for relying on Regulation 12(5)(c) of the EIR.
10. The Council issued a fresh response to the complainant on 18 March 2022. It had now decided to deal with the request under FOIA. It noted that, of the ten district councils it covered, the data it held was either the same as, or older than, the data already available from Historic England and therefore it wished to rely on section 21 of FOIA (reasonably accessible) to withhold it. In relation to the two districts where no data had been published by Historic England, it relied on section 22 of FOIA as it said that the information was intended for publication.
11. The Commissioner drew the complainant's attention to the Council's response and noted that, even if he were to conclude that the Council was not entitled to withhold the data, he (the complainant) would only be entitled to receive what the Council had – which was, at best, the same as (and in some cases older than) the data he already had access

to. However, the complainant asked the Commissioner to reach a formal decision.

12. On 24 March 2022, the Commissioner wrote to the Council again. He noted that it was his view that the requested information would be environmental and therefore the request should fall to be treated under the EIR. He noted that Regulation 6(1)(b) contained equivalent provisions to section 21 of FOIA and invited the Council to confirm that it wished to rely on this exception instead (where it had previously relied on section 21 of FOIA). In respect of the information to which the Council had applied section 22, the Commissioner noted that there was no direct equivalent of this exception under the EIR and he therefore asked the Council to either disclose the information or explain which other EIR exception it wished to rely upon to withhold it.
13. The Council responded to the Commissioner on 4 April 2022. It now relied upon Regulation 12(4)(d) of the EIR to withhold the information in respect of Broxbourne and Three Rivers. It provided the Commissioner with an explanation for its use of the exception.
14. As this is now the Council's third different stance, the Commissioner did not consider it appropriate to seek any further submissions and has proceeded to a decision notice on the basis of the available evidence.
15. The Commissioner considers that the scope of his investigation is to determine whether any of the information is publicly available and, if it is not, whether the Council is entitled to rely on Regulation 12(4)(d) of the EIR to withhold that information.

Reasons for decision

Is the requested information environmental?

16. Regulation 2(1) of the EIR defines environmental information as being information 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)...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);*
17. The Commissioner has previously ruled that maps are environmental information as they are information “on” the state of the elements of the environment and they also show rights of way – which are a “measure” affecting the elements of the environment. A more detailed explanation can be found in decision notice FER0800428.¹
18. The Commissioner also note that the request relates specifically to conservation areas. Historic England explains the purpose of such areas as:
- “Conservation area designation introduces a general control over the demolition of unlisted buildings and provides a basis for planning policies whose objective is to **conserve all aspects of character or appearance, including landscape and public spaces**, that define an area’s special interest.” [emphasis added]
19. The landscape is one of the elements of the environment identified in Regulation 2(1)(a) of the EIR. Conservation areas are a measure designed to affect (in this case, by preserving) the landscape and data showing where such areas are located will be information “on” that measure.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2614049/fer0800428.pdf>

20. The Commissioner is therefore satisfied that the information in question will be environmental information and thus the request should be dealt with under the EIR.

Is any of the data publicly available and easily accessible?

21. Regulation 6(1)(b) of the EIR releases a public authority from its duty to provide environmental information if that information is:

“already publicly available and easily accessible to the applicant in another form or format.”

22. Regulation 6(1)(b) should be read in conjunction with Regulation 4 of the EIR which places an obligation on public authorities to make environmental information progressively available to the public. The more proactive a public authority is in making the environmental information it holds publicly available, the lower the burden of requests, as a public authority can shield itself from having to provide information that is already available.
23. The complainant has not disputed that Historic England does make such data available or that he was unable to access it. As his purpose is to compile a comprehensive, up to date database, he has little interest in the older information. However, he noted that Historic England will not release the data it holds to him under an Open Government Licence – which is why he had attempted to access the information from the Council.
24. In the Commissioner’s view, the data the Council holds for all its districts, apart from Broxbourne and Three Rivers, is publicly available and easily accessible because Historic England publishes that information on its website.
25. The conditions which Historic England chooses to place on the information it releases do not affect the complainant’s right to access the information – they only affect his right to re-use that information as he sees fit.
26. Whilst the data Historic England is willing to provide to the applicant may not be in the format that is most useful to him, the Commissioner does not consider that this renders the information either not publicly available or not easily accessible. The complainant is clearly able to access this information and no other explanation has been put forward as to why the information is not “easily” accessible.
27. Therefore in respect of all the districts apart from Three Rivers and Broxbourne, the information is publicly available and easily accessible.

The Council can thus rely on Regulation 6(1)(b) of the EIR to not provide this information.

Regulation 12(4)(d) – material in the course of completion

28. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that:

“(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

29. The EIR do not define what “material in the course of completion” actually is, but in *Highways England Ltd v Information Commissioner & Manisty* [2018] UKUT 423 (AAC), the Upper Tribunal laid down the following guidelines:

“The exception must, nevertheless, be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

“It is not engaged when a piece of work may fairly be said to be complete in itself. ‘Piece of work’ is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered...The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception...

“...The way that the public authority has treated the material is relevant but not decisive. A public authority cannot label its way out of its duty to disclose. A label like draft or preliminary thoughts may, or may not, reflect the reality. The scope of the exception depends on the substance, not the form in which the material is stored or presented.”

30. The Council did not explain whether it considered the data in question to be material in the course of completion, incomplete data or unfinished documents. However, it did say that:

"the basis of the argument that the County Council would like to rely on is, that to provide the information that we currently hold would be to provide information that is not produced by us and has been provided to us on an adhoc basis, when it is required for the County Council to meet one of its obligations. These are very different matters, that the local district and borough councils of Hertfordshire, have to adhere to and the maintenance of data in relation to conservation areas is their responsibility.

"The information that the Broxbourne Borough Council and Tree Rivers District Council, have provided to Historic England is their most recent and up to date information. I am aware of guidance from your office that states

'misleading or inaccurate impression. In most cases we do not consider that this argument in itself carries any significant weight, because it should generally be possible for the authority to put the disclosure into context.'

However, if the information that is held by the County Council was to be provided and subsequently put into the public domain, the County Council would have no control about how that information may be viewed, as whatever context was to be provided by the County Council, this will not be part of the GIS data that would be available. In a similar manner, if this information was recorded as being provided by the County Council, as a way of watermark, a high level of weight in relation to the accuracy of the information, would be placed on this information. Private individuals or organisations may use this for any kind of planning or environmental matter, which would impact on incorrect presentations being made to local authorities. These, local authorities, will then be forced to take time to investigate where this information may have come from and the correctness of it."

31. The Commissioner accepts that the Council has concerns about the manner in which the information might be used if it were made freely available to the world at large and these concerns are not wholly unreasonable. However, he also does not consider that the Council has set out why the exception applies in the first place. Given the nature of the information, the Commissioner struggles to see why it would be either unfinished documents, incomplete data or material in the course of completion.
32. A map can only ever be a snapshot of the situation at the time the data was compiled. Even with modern electronic mapping programmes such as Google or Apple Maps (which are constantly updating themselves)

there is almost always the possibility that new data may be available that has yet to be added to the map.

33. Almost every map will, at some point, become obsolete because area in question has changed in some way – whether that be a new housing development, tidal erosion or shifting political boundaries. However, the fact that a map is no longer up to date does not mean that it is unfinished or incomplete. A map is a snapshot and reflects the data that was available at that point in time. The process of compiling and presenting the necessary data therefore becomes complete at the moment that all the data has been compiled and presented.
34. If it is subsequently discovered that new data is available and that the map needs updating, it does not mean that the previous map was incomplete or unfinished – it simply means that a new process of compiling and presenting the data is required. Each earlier iteration of the map is complete in its own terms.
35. If Broxbourne or Three Rivers District Council were still in the process of compiling and presenting their data, the Commissioner might be prepared to accept that this information was still in the course of completion – but that is not the case that the Council has made. In any case, it would seem odd that the Council actually held this information if the two district councils were still in the process of completing it.
36. The Commissioner is therefore not persuaded that the information the Council holds in respect of Broxbourne and Three Rivers district councils is material in the course of completion. It thus follows that Regulation 12(4)(d) of the EIR is not engaged and the Council must therefore disclose this information to the complainant.

Other matters

37. The Commissioner notes that the complainant has specifically asked for the information to be made available to him under an Open Government Licence (OGL), which is a common, relatively unrestricted standard for re-using information. The EIR (and hence the remedial step required in this decision notice) do not require a public authority to place (or not place) any particular licensing conditions upon any information that is disclosed, restricting its further re-use.
38. However, the Commissioner also notes that the request that the complainant made might simultaneously be considered to be a request to re-use any information that is disclosed. As a public authority, the Council is subject to the Re-use of Public Sector Information (RPSI) Regulations. One of the provisions of the RPSI is that, where a request for re-use is made, a public authority may not unreasonably restrict further re-use of information it has made available.
39. The Commissioner offers no opinion, at this stage, as to whether it would be unreasonable for the Council not to allow the information he is requiring disclosure of to be provided under an OGL. However, should the complainant consider that the Council has placed unreasonable restrictions on re-use of this information, he would be entitled to make a fresh complaint to the Commissioner.
40. The complainant has also, during the course of this investigation, expressed concerns about the restrictions Historic England places on re-use of the data he is interested in. Whilst such concerns do not form part of this present complaint, the Commissioner notes that, as a public authority itself, Historic England is also subject to the RPSI.
41. Without having investigated the matter, it would, once again, be inappropriate for the Commissioner to reach any view on whether it is or is not reasonable for Historic England to place such conditions on further re-use of the information it publishes. However, should the complainant make such a request for re-use and believe that Historic England has placed unreasonable conditions on that re-use, he may, should he so wish, complain to the Commissioner once again.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF