

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 July 2023

Public Authority: Welsh Government
Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant has requested geospatial or mapping data on all land owned and/managed by the Welsh Government and Welsh local authorities. Welsh Government("WG") advised that it does not hold the information.
2. The Commissioner's decision is that WG should have dealt with the request under the EIR and therefore were entitled to rely on regulation 12(4)(a) of EIR. The Commissioner considers that on the balance of probabilities, WG does not hold the information requested and regulation 12(4)(a) is engaged.
3. The Commissioner does not require WG to take any steps.

Request and response

4. On 19 December 2022, the complainant wrote to WG and requested information in the following terms:

"I would like to request under EIR and INSPIRE regulations, geospatial/mapping data on all land owned and/or managed by

- i) The Welsh Government
- ii) Welsh local authorities For information, my primary interest is in opportunities for improved countryside access and biodiversity

improvement, therefore I am happy for any redactions necessary for national security or other reasons.”

5. WG responded on 21 December 2022. It stated that the information is publicly available via HM Land Registry.
6. During the internal review, the complainant stated that they did not believe that the information is reasonably accessible via the HM Land Registry as it would require analysis of the entirety of the National Polygon Dataset (NSD) [sic] cross referenced with the Commercial and Corporate Ownership Data (CCOD). The complainant stated that it will require individual searches to be paid for.
7. Following an internal review, WG agreed with the complainant and explained that, whilst it is possible to use publicly available data, it required geospatial skills that is resource intensive and may incur a charge. It stated that it did not hold the information in that format as requested by the complainant.

Scope of the case

8. The complainant contacted the Commissioner on 23 February 2023 to complain about the way their request for information had been handled and raised a number of concerns.
9. On 28 February 2023 the Commissioner wrote to WG to advise that the case had been accepted as eligible for formal consideration and requested further submissions from the public authority. On 9 March 2023, he wrote again to WG and requested details of the EIR regulation it had relied on and its reasons for doing so.
10. In an email to the Commissioner, WG stated that its internal review referenced both the FOIA and EIR regime and argued that the Commissioner appeared to have taken this at face value and pre-judged EIR as the correct regime. It informed the Commissioner that it was relying on the FOIA as the correct regime and that their submissions were intended to provide supporting arguments why this was the case.
11. On 28 March 2023 WG provided its submissions in which it argued that the information captured by the request is not held in the format requested and that to compile it in that format would require significant time and judgement.
12. On 5 April 2023 the Commissioner wrote to the complainant advising them of the scope of his investigation. On 19 April 2023, the complainant provided further submissions to the Commissioner in which they challenged WG's position.

13. Following a review of the information before him, it was the Commissioner's view that additional information was required from WG and therefore wrote to WG on 27 April 2023. He also had conversations with the public authority to establish its interpretation of the complainant's information request and its final position. On 12 May 2023, the public authority furnished the Commissioner with its final submissions. WG have also confirmed that it does not hold any dataset that can be made available under INSPIRE regulations.
14. The Commissioner does not consider the INSPIRE regulations to be engaged and therefore he will not consider them in this case.
15. The Commissioner considers that the scope of his investigations is to determine whether on the balance of probabilities, WG stated correctly that the information is not held. In addition, the Commissioner will also consider which information access regime the request should have been dealt with under.

Reasons for decision

16. The Commissioner notes that in WG's submissions, it stated that the relevant regime on which it has relied to reach its decision is the FOIA and that it does not consider the requested information to be environmental.

Is the requested information environmental?

17. 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.

18. In the current case, WG argue that the keyword in the context of the request is 'on.' It considered the actual wording of the original request for:

Under EIR and INSPIRE regulations, geospatial/mapping data on all land owned and/or managed by:

- i) The Welsh Government.
- ii) Welsh local authorities.

In making this argument WG cited the decision in the case of *Department for Business, Energy, and Industry Strategy v Information Commissioner and Henney [2017]*¹, which cautioned against an over-broad interpretation of the EIR. The judgement in *Henney*, stated that environmental information "must fall within one or more of the...categories set out in that provision."

WG argues that the information captured by the request is purely objective and factual. It says that the information is not 'on' any factor or measure that will have any effect on the environment, either directly, indirectly, or tangentially.

19. To support its arguments, WG also pointed to the Ordnance Survey's external guidance which states that they do not consider maps and data to be classified as environmental information under the EIR. It says that map data merely shows that a topographical feature exists in a particular geographic position and does not declare either the state of a feature or whether any activity has an effect upon it.
20. The Commissioner refers to the view taken in the Decision Notice reference FER0800428². In his view, WG has adopted an overly narrow interpretation of the definition of the EIR and that the requested information would be environmental.
21. The Commissioner accepts that the wording of Regulation 2(1)(a) requires information to be on the "state of the elements of the environment" but he does not accept that maps do not contain information on the state of the elements of the environment.

¹ <http://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2614049/fer0800428.pdf>

22. It is the Commissioner's view that maps will provide information on the particular condition of the landscape "at a specific moment in time"- i.e., the time that the map was published.
23. In its submissions, the WG stated that it interpreted the request to mean a request for the locations or boundaries of those ownerships. The Commissioner considers that maps or spatial information would show the state of land and boundaries, in that it would indicate where and how those boundaries were marked on the landscape.
24. Even if the Commissioner is wrong on this particular point, he also notes he has previously determined (and the First Tier Tribunal has agreed) that information to be information on "measures" affecting the elements of the environment. It would follow that such maps would be environmental information under Regulation 2(1)(c).
25. The Commissioner therefore considers that any recorded information within the scope of the request would be environmental and thus the EIR was the correct regime to consider the request under.

Regulation 12(4)(a)-information not held at the time of the request.

26. Regulation 12(4)(a) of the EIR provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
27. WG argues that the information requested by the complainant is not held. It says that to compile the information in the format required by the complainant, would require significant time and judgement.
28. During the Commissioner's investigations, the complainant challenged the view taken by WG in that they state that they did not request the data in any specific format.
29. WG argues that their interpretation of the format requested was confirmed by the complainant's response on 21 December 2022 in which they set out the steps they would need to take, that would result in the location or boundary data they have requested for. The complainant stated:

"...Access to the information I have requested would, as far as I understand, require analysis of the entirety of the National Polygon Dataset (NSD) [sic] cross referenced with the Commercial and Corporate Ownership Data (CCOD). Alternatively, this would require individual searches of land registry cadastral parcels at £3 per search..."
30. In presenting its arguments, WG explained that to be able to answer the request, it will need to identify ownership using the CCOD from HM Land

Registry. It states that whilst it can be searched, the name of the owner is not consistent and could include previous names for constituent organisations and spelling mistakes. To explain this point further it cited an example that information on Cardiff Council could be listed under Cardiff Council or South Glamorgan. It says that information for Welsh Government could be listed as Welsh Development Agency, Welsh Assembly Government or Welsh Ministers. It also argues that Welsh Ministers may not be Welsh Government, as it could include bodies such as Natural Resources Wales. WG contends that this could involve many hours of manual searching.

31. WG says that there are instances where with only the title numbers of the address location included, associated land parcels with alternative title numbers can be missed. In such situations, WG has explained that further reference to Ordnance Survey address base is needed to identify those associated titles and an inference drawn that these are included in the ownership. It says that this is not always the case where neighbouring land is leased or further title search is required to identify ownership.
32. Once it has the list of titles or land owned, WG says it would need to use both the National Polygon Services and Ordnance Surveys address base to match those titles to the correct polygons to validate or enhance information. It argues that this can only be done by individuals with geospatial and data manipulation skills. WG argues that this would be labour intensive to work through the data to match the information from those services to provide the boundaries that would allow mapping.
33. WG contends that to present the information in the format requested would go far and beyond what could be considered a new task or a representation of existing information that would amount to the creation of new information. WG explains that while it does not hold the information, it is only possible to answer the request by bringing together raw information sources which can only be done with specialist skills.
34. During the internal review process, WG alluded to holding similar data for 2018. However, it has explained that this data was produced internally to understand the quality of public sector land ownership data held by HM Land Registry. WG argues that this information was created as a one-off exercise and has not been repeated as the information produced was found to be of poor quality and inaccurate. It says that the 2018 information would still require further processing to meet the complainant's request because it does not identify the public sector bodies as specified in the request. WG argues that this work will be more than simply re-structuring and although it comes from a licenced product, would amount to a new task irrespective of the terms and conditions.

The Commissioner's view.

35. In reaching his decision, the Commissioner has considered the representations made by the complainant when they challenged WG's position on this matter. The complainant has stated that the following:

"I) the authority (WG) have failed to provide identifiable grounds for refusal under EIR/INSPIRE regulations. For example, they have intimated that the data has been provided by a third party (land registry) but without reference to which regulation they are claiming justifies withholding this data.

II) The authority has failed to identify which regulation applies. This is particularly important since EIR regulations only allow refusal where BOTH an exclusion under regulation 12(4) or 12(5) applies AND the public interest justifies refusal. At no point has the authority sought to perform the required public interest balancing test or justified the public interest in refusal.

III) In this case, the public interest test under regulation 12(1)(b) is pertinent since it refers to land owned by the Welsh government - the original application explained that the context of the request was in identifying land that may be of use for increasing public access to the countryside. As such there is a clear and strong justification for release of the information being in the public interest.

IV) EIR regulation 12(2) requires the authority to apply a presumption in favour of disclosure, at no time has assessment of this duty been attempted

V) The authority claims that licencing restrictions prevent disclosure - however in this request was specifically for geographic information, which would include cadastral data, on what land was owned by the Welsh Government - it was not a broad request for title data or land registry data, but specific to data identifying land owned by Welsh Government."

36. The Commissioner has also considered the information before him together with the information provided to him during conversation with the public authority.

37. Whilst the Commissioner recognises that WG could have handled the request better in terms of its responses during the initial request and the internal review response, he considers that WG has set out in its submissions, a plausible explanation as to why the requested information is not held. He has considered his own guidance and accepts that whilst there is a presumption of disclosure under the EIR, the regulations cover recorded information which a public authority already

holds. Therefore, there is no obligation on public authorities to create new information or find out the answer to a question. In this case the Commissioner considers that regulation 12(4)(a) is engaged because the request is about whether WG holds the specific information that has been requested, i.e., geospatial or mapping data.

38. The Commissioner is therefore satisfied that on the balance of probabilities, WG did not hold the requested information at the time of the request and that regulation 12(4)(a) of EIR is engaged.

Right of appeal

39. 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

40. 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.

41. 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

**Esi Mensah
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