

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 August 2019

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to archaeological works undertaken at the former Reading prison. The Ministry of Justice (MoJ) provided some information but withheld the remainder, citing regulations 12(3) and regulation 13 (personal data), regulation 12(4)(d) (information in the course of completion), regulation 12(5)(e) (confidentiality of commercial or industrial information) and regulation 12(5)(g) (protection of the environment) of the EIR.
2. The Commissioner has investigated its application of regulation 12(5)(g). The Commissioner's decision is that the exception provided by regulation 12(5)(g) is engaged and the public interest in maintaining the exception outweighs the public interest in disclosure.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. The request in this case was made to HM Prison and Probation Service (HMPPS)¹. HMPPS is an executive agency, sponsored by the MoJ.
5. Historic England's guide '*Scheduled Monuments - A Guide for Owners and Occupiers*'² states that:

"Scheduling refers to the legal system for protecting nationally important monuments and archaeological remains in England...

Not all scheduled monuments are ancient. Monuments and archaeological remains of all dates can be given the protection of scheduling, whether they are prehistoric burial mounds, 20th-century remains of the coal industry or from World War II. Some scheduled monuments contain standing buildings or ruins. Others have no visible remains above ground: it is the buried archaeology that is of national importance".

6. With regard to the report under consideration in this decision notice, the Commissioner acknowledges that the MoJ told the complainant that, as part of Scheduled Monument Consent to carry out the archaeological works, it is obliged to submit the report to the publicly accessible County Records within two years of the completion of the excavation.

Request and response

7. On 30 January 2019, with reference to an earlier response from the MoJ about the former Reading Prison, the complainant wrote to the MoJ and requested information in the following terms:

"Please can you send me the report relating to the archaeological work, and correspondence relating to the archaeological work".

8. The request was made using the '*whatdotheyknow*' website.

¹ <https://www.gov.uk/government/organisations/her-majestys-prison-and-probation-service>

² <https://historicengland.org.uk/images-books/publications/scheduled-monuments-guide-for-owners-and-occupiers/guideforownersofscheduledmonuments/>

9. The MoJ responded on 6 February 2019. It confirmed it held the requested information, but refused to provide it, citing sections 35(1)(a) (the formulation of government policy etc) and 43 (commercial interests).
10. Following an internal review, the MoJ wrote to the complainant on 6 March 2019, revising its position. It advised that the request should have been responded to under the EIR rather than the FOIA. It provided some information to the complainant, namely correspondence including emails and a letter from Historic England. However, it continued to withhold the remaining information within the scope of the request.
11. In that respect, the MoJ told the complainant that the report and some of the associated correspondence he had requested were exempt from disclosure under regulation 12(3) and regulation 13 (personal data), regulation 12(4)(d) (information in the course of completion), regulation 12(5)(e) (confidentiality of commercial or industrial information) and regulation 12(5)(g) (protection of the environment) of the EIR.

Scope of the case

12. The complainant contacted the Commissioner on 2 March 2019 to complain about the way his request for information had been handled. He asked the Commissioner to review the MoJ's refusal to publish:

"...an archaeological report of an excavation it commissioned in the car park of Reading gaol, which is the site of the east end of Reading Abbey where Henry I was buried".
13. The complainant considered that it is in the public interest to publish publicly funded archaeological work.
14. He also provided the Commissioner with further arguments which questioned whether the MoJ had considered his request under the correct regime.
15. During the course of her investigation, the MoJ confirmed that the report was exempt from disclosure by virtue of regulations 12(4)(d), 12(5)(e) and 12(5)(g) of the EIR.
16. The analysis below considers the MoJ's application of regulation 12(5)(g) of the EIR to the requested archaeological report.

Reasons for decision

17. The Commissioner accepts that the MoJ told the complainant that it had revised its view as to the appropriate access regime in this case. However, she considers that, other than providing him with a website link, the MoJ relied, to a large degree, on the requested material being self-evidently exempt under the EIR.

Is the withheld information environmental information?

18. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition it must be considered for disclosure under the terms of the EIR rather than the FOIA.
19. The Commissioner's published guidance '*What is Environmental Information*³ states that the test that public authorities should apply is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter.
20. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant parts of the definition are found in 2(1)(a) to (f) which state that it is any information in any material form on:
- the state of the elements of the environment and the interaction among these elements;
 - factors affecting or likely to affect those elements;
 - measures or activities affecting or likely to affect those factors or elements, or designed to protect those elements;
 - reports on the implementation of environmental legislation;
 - cost-benefit and other economic analyses and assumptions used within the framework of those measures and activities; and
 - the state of human health and safety, conditions of human life, cultural sites and built structures.

³ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

21. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
22. The information under consideration in this case relates to archaeological works.
23. Having considered the matter, the Commissioner is satisfied that the requested information is environmental within the meaning of the EIR as it is information on, or about, the state or condition of elements of the environment – namely land and landscape - which are elements of the environment referred to under regulation 2(1)(a).
24. As the withheld information is information 'on' issues defined within regulation 2(1) as environmental information, the MoJ was correct to consider the information under the EIR.

Exceptions

25. The MoJ considers that the following regulations apply in this case:
 - Regulation 12(4)(d) (material in the course of completion, unfinished documents or incomplete data)
 - Regulation 12(5)(e) (commercial confidentiality)
 - Regulation 12(5)(g) (protection of the environment)
26. The exceptions in regulation 12(4) relate to the nature of the request or the type of information while those listed under regulation 12(5) relate to situations where disclosing the requested information would have an adverse effect.
27. The Commissioner has first considered the MoJ's application of regulation 12(5)(g).

Regulation 12(5)(g)

28. The Commissioner's guidance on regulation 12(5)(g)⁴ states:

⁴ https://ico.org.uk/media/for-organisations/documents/1630/eir_guidance_protection_of_the_environment_regulation.pdf

"To refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities will need to establish:

- that the information in question relates to the aspect of the environment that is being protected;*
- how and to what extent the protection of the environment would be affected; and*
- that the information is not on emissions".*

29. In this case, it is not in dispute that the information is not on emissions.

30. Her guidance also states:

"Under regulation 12(5)(g) a public authority may refuse to disclose information "to the extent that" its disclosure would adversely affect environmental protection. The phrase "to the extent that" means the authority must consider what exactly the adverse effect would be and how the protection of the environment would be affected by disclosure. A key question to ask is, whether disclosing the information would actually enable a person to do something that would harm the elements of the environment in question?".

31. With respect to 'harm' her guidance states:

"Harm could result, for example, simply from the effect of a large number of people going to look at a sensitive site, or alternatively from an individual deliberately stealing or interfering with a protected species. Disclosing the exact location, with a full grid reference, of a rare plant may enable someone to steal or damage it. However, if the actual information held by the authority is at such a general level that it is not possible to pinpoint the exact location, it may be that disclosure would not adversely affect the protection of the plant".

32. In correspondence with the complainant, the MoJ told him:

"The Ministry of Justice (MoJ) is in the process of preparing the site for disposal. ... An important part of that consideration for the department and others is the fact that the former HMP Reading sits on part of a Scheduled Ancient Monument. As a result, the department is required to carry out an archaeological assessment in order to inform that the process [sic]".

33. It told him that the report contains information about the location of archaeological finds on the site of a scheduled ancient monument. The MoJ considered that disclosing that information:

"...would expose the site to interference or damage".

34. The MoJ also told him:

"There is a risk that by prematurely disclosing the report before the two-year period an individual would seek to interfere with a protected site and therefore adversely affect the protected environment".

35. The MoJ provided further arguments in support of that position in its submission to the Commissioner. The Commissioner accepts that those arguments, while acknowledging the historical significance of the site, emphasised the environmental content of the requested information.
36. The Commissioner interprets the wording of *'would adversely affect'* in regulation 12(5) to set a relatively high threshold in terms of likelihood which has to be met in order for any of the 12(5) exceptions to be engaged. It is not sufficient that disclosure may, or could, have some level of adverse effect, but rather that disclosure *'would'* have an adverse effect. In the Commissioner's opinion this means that the likelihood of an adverse effect must be more likely than not (ie a more than 50% chance).
37. The Commissioner has considered the representations submitted by the MoJ and has viewed the withheld information. She has also taken into account the purpose of the exception – namely to allow a public authority to refuse to disclose environmental information if it would harm the protection of the environment to do so.
38. From the evidence she has seen, the Commissioner is satisfied that the requested information relates to the aspect of the environment that is being protected, namely the site of a scheduled ancient monument, and therefore it falls within the scope of this exception.
39. Disclosure under the EIR is essentially a disclosure into the public domain. The Commissioner accepts that disclosing the report would enable a person to do something that would harm the elements of the environment in question - disclosure would provide intelligence about the location of archaeological finds, intelligence which could be used by members of the public intent on interfering with, or damaging, the site.
40. As disclosure of the withheld information would endanger the land in question, and would adversely affect the protection of the environment, the Commissioner has determined that the exception at 12(5)(g) is engaged, and has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

41. Arguing in favour of disclosing the withheld report, the complainant considered that the public interest *"is best served by transparency and a public discussion of the best future use of the site"*.
42. The MoJ recognised the public interest in transparency and the government's aims to demonstrate transparency in its business.
43. It also recognised that there is local interest in the site in relation to its historical significance and in relation to how it will be used in the future. It told the Commissioner:

"Disclosure would indicate the support shown by the MOJ for the public's interest in their local heritage and would serve to increase the level of confidence held by the public for decisions made in their name".

Public interest arguments in favour of maintaining the exception

44. The MoJ considered that it was not in the public interest to release the requested information until the full extent of the archaeological status of the site is known.

Balance of the public interest

45. The Commissioner acknowledges that there is always some public interest in disclosure of information to promote transparency and accountability in the work of public authorities.
46. In assessing the weight of the arguments for disclosure, she has taken into account the nature of the information and the timing of the request. She has also taken into account how far disclosing the requested information would further the public interests identified.
47. She is also mindful that Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.
48. However, the Commissioner must also take into account the purpose of the exception – namely to allow a public authority to refuse to disclose environmental information if it would harm the protection of the environment to do so. Having accepted that regulation 12(5)(g) is engaged at all means that there is some public interest in not disclosing the information.
49. The Commissioner has balanced the real and significant threat to the land in question which would occur through disclosure against the public interest arguments in favour of disclosure.

50. Having considered the arguments and reviewed the information at issue, the Commissioner does not consider that the disclosure of the withheld report justifies the risk to the protection of the environment. She has therefore concluded that the MoJ correctly applied regulation 12(5)(g) to the request in this case.

Other exceptions

51. In light of the above finding, the Commissioner has not considered the MoJ's application of other exceptions to the same information.

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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

**Carolyn Howes
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