

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

Date: 26 June 2014

Public Authority: The National Archives
Address: Ruskin Avenue
Kew
Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested mining records dating from 1998 which are now held by The National Archives (TNA), having been transferred by The Coal Authority (CA). After consulting with the Coal Authority, The National Archives refused the request under regulation 12(5)(g) – protection of the environment to which the information relates.
2. The Commissioner's decision is that the exception provided by regulation 12(5)(g) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information; KD 2/8 Mining Reports System: Coal Authority's legacy system, 1998 snapshot.
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 16 November 2012, the complainant contacted TNA by email. The email was headed:

"Document reference: KD 2/8"
6. He then went onto request:

"I would like access to and/or a copy of the information contained in the document reference. The records are marked as 'closed'. I would like them to be 'opened'.
7. The fuller description of the document referred to as KD 2/8 is 'KD 2/8 Mining Reports System: Coal Authority's legacy systems, 1998 snapshot'. It is described by TNA's website as an electronic data set which identifies and records information on coal mining activity. It contains information on past activity and activity which was current as at the time it was produced in 1995. It was used to provide information for mining reports, in response to enquiries from prospective property purchasers and land developers.
8. TNA originally responded to the request under the Freedom of Information Act 2000 (FOIA). On 2 January 2013 it informed the complainant that the information was being withheld under section 43(2) of FOIA on the basis that disclosing the information would prejudice commercial interests and explained that it needed additional time to consider the public interest in maintaining that exemption. On 15 March 2013 TNA advised the complainant that it had reached a decision that the public interest favoured withholding the information. TNA upheld its decision on 30 April 2013 following an internal review.
9. The complainant raised a concern that the request should have been dealt with under the EIR with the Commissioner on 15 October 2013. Following the Commissioner's intervention, TNA agreed to reconsider the request under the EIR.
10. On 4 February 2014 TNA refused the request under the EIR, relying on the exception provided by regulation 12(5)(g). This exception allows a public authority to withhold information if its disclosure would have an adverse affect on the environment to which the information relates.
11. Following an internal review TNA wrote to the complainant on 3 March 2014. It maintained its reliance on regulation 12(5)(g) to withhold the information.

Requests for transferred public records

12. The requested information has been transferred to TNA by the CA and as such constitutes a transferred public record. When TNA receives a request for such a record it is obliged under regulation 17(2) to consult with the 'responsible authority'. The responsible authority in this case is the CA. Although the final decision whether to apply an exception is retained by TNA, that decision is obviously strongly influenced by the advice provided by the responsible authority as the responsible authority is likely to have more expertise in the relevant subject area.
13. Once TNA decides to apply an exemption, the matter is referred back to the responsible authority, ie the CA, which then conducts the public interest test. TNA is obliged to accept the responsible authority's decision regarding the public interest test.

Scope of the case

14. The complainant contacted the Commissioner on 11 March 2014 to complain about the way his request for information had been handled under the EIR. In particular he did not accept that TNA's claim that there was a realistic possibility of the data base being used to create information products for the property market which would then lead to people making misinformed decisions.
15. The Commissioner considers that the matter to be decided is whether the exception provided by regulation 12(5)(g) is engaged and, if so, whether the public interest favours maintaining the exception.

Reasons for decision

16. Regulation 12(5)(g) of the EIR states that a public authority may refuse to disclose information if its disclosure would have an adverse affect on the protection of the environment to which it relates.
17. The focus of the exception is the protection of the environment. As the information relates to mining activity, and therefore the state of the land, the onus is on the public authority to explain how disclosing the information would have an adverse affect on the state of the land.
18. It is clear from TNA's refusal notice, which is based on its consultation with the CA, that the reasons for withholding the information do not relate to the protection of the environment. In its refusal notice to the complainant dated 4 February 2014, TNA state that,

"... should this information be used to provide information products to the property market it could lead to misinformed decisions being made by the public and others on property purchase and new property

development. Such decisions could both impact on public safety and possible long term public sector liability in the coal field areas of Britain.”

19. TNA was unable to expand on this argument at the internal review stage explaining that the CA had not added any further reasoning. However it appears from correspondence between TNA and the CA which had been provided to the Commissioner, that the CA's main concern was public safety.
20. Neither the issue of public safety, nor the liability of the public sector for damage to land and property caused by coal mining, are matters that the exception provided by regulation 12(5)(g) is designed to protect. It follows that exception cannot be engaged based on either of these arguments.
21. The Commissioner has considered whether decisions based on misleading property search information could damage the environment. He recognises that it is possible that if, for example, using out of date information did result in land liable to subsidence being built on and as a consequence that land collapsed, there may be an argument that this was an adverse affect to the environment. However in the absence of fuller arguments from the TNA or the CA the Commissioner is left having to speculate what the possible impact may be. When considering the application of exceptions the onus is on the public authority to demonstrate that an exception is engaged. In light of this the Commissioner cannot be satisfied that reliance on misleading property search information would damage the environment.
22. Furthermore this is based on the assumption that disclosing the requested information would result in the production of misleading property market information and that, if such products were produced, they would be relied on by prospective purchasers. As is discussed below the Commissioner is not satisfied that this would in fact happen.
23. It is important to recognise that the exception can only be engaged if the adverse affect to environment 'would' occur. The Commissioner interprets the wording 'would adversely affect' to set a relatively high threshold in terms of the likelihood which has to be met in order for the exception to be engaged. Therefore, although he may speculate that if misleading property search information is produced, and if purchasers rely on those reports, it is possible that there could be some form of damage to the environment, the Commissioner cannot be satisfied that the likelihood of that occurring satisfies the required threshold.
24. In refusing the request TNA has raised the issue of public safety. As a responsible regulator, the Commissioner is reluctant to order the disclosure of information if he believes there is a risk to public safety.

Therefore before ordering the disclosure of the information he has considered whether such a risk exists.

25. The argument presented by TNA is that the data base only reflects the mining activity known about in 1995. The information is therefore out of date. TNA explained in its refusal notice that the CA had made 93,112 updates including the location of new coal mine entries and coal mining hazards to the mining report data between the deposit of the snapshot with TNA in 1998 and it being replaced by its successor, a database known as Inferis, in January 2012. TNA also explained that the authoritative and up-to-date Inferis database can be accessed, under licence from the CA.
26. The Commissioner accepts that the requested information is out-of date and unreliable as a basis identifying mining activity and any associated hazards. However the Commissioner is sceptical of the argument that property searches information would be produced based on the data base and that even if they were, that individuals would rely on such reports.
27. Having seen the database the Commissioner considers it is unintelligible to the lay person. To interpret it, manipulate it, or interrogate it would take a degree of expertise. He considers that those with the necessary expertise to produce reports are most likely to already have some knowledge of such databases, probably gained by working in the property search industry. As such the Commissioner anticipates that such individuals would appreciate the risks in marketing unreliable information. As the complainant points out, if someone wished to market a rival report product in the property search industry this would attract the scrutiny of their rivals who are likely to highlight its weaknesses.
28. The complainant has also argued that conveyancing is usually undertaken by solicitors who, being under a duty to act in the interests of their client, are unlikely to rely on a report which is not authoritative. As TNA pointed out in its refusal notice, up-to-date, authoritative reports are readily available from the CA. From the information published on the CA's website the Commissioner understands that a variety of coal mining reports are offered by the CA. These range in price from £30 to £99 for residential properties and from £70 to over £1,000 for non-residential sites up to 120 hectares. Whilst recognising that the provision of property search services is a competitive market, the Commissioner is not convinced that the cost of the products available from the CA would deter those offering property search services, or commissioning those services, to seek reports from unreliable sources, particularly when you consider the overall costs involved in purchasing property.

29. It is possible that a lay person acting on their own behalf could unwittingly purchase an unreliable report, but this is likely to depend on that report being misrepresented as being based on more up to date data.
30. The complainant has also argued that where an individual is undertaking work to a property they already own in coal field area, the process of seeking planning permission would involve referrals to the CA where necessary. This it is argued would reduce the risk of a house owner relying on an out of date report.
31. The Commissioner has not considered every argument presented by the complainant in depth. However he is satisfied that the challenges raised to the proposition that the public would be put at risk by relying on out of date property search reports are sufficient to cast doubt on it being a realistic outcome.
32. Based on the arguments presented to him by TNA, the Commissioner is not satisfied that there is a risk to public safety. Even if there was a risk, it is not a matter which is protected by regulation 12(5)(g); its focus is the protection of the environment. However if there had been a risk, the Commissioner would have considered providing TNA with the opportunity to apply another, more appropriate exception.
33. The Commissioner does not accept that simply because information is out of date it will be misleading to the public. There is nothing to prevent a public authority from making the status of the information clear at the time it is released. In this particular case the involvement of professionals, who are bound to act in accordance with professional standards and codes of practice, also provides some safeguard against the misuse of the requested information.
34. The Commissioner is satisfied that the information cannot be withheld under regulation 12(5)(g) and TNA is required to disclose it.

Right of appeal

35. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.

37. 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

Pamela Clements
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SK9 5AF