

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

Date: 19 March 2019

Public Authority: Natural Resources Wales

Address: accesstoinformationteam@naturalresourceswales.gov.uk

Decision (including any steps ordered)

1. The complainant requested information relating to Peregrine Falcon nest sites. Natural Resources Wales ('NRW') withheld the information requested under regulation 12(5)(g) of the EIR. The Commissioner's decision is that NRW correctly applied regulation 12(5)(g) to the request. She does not require any steps to be taken.

Request and response

2. On 9 February 2019, the complainant wrote to NRW and requested information in the following terms:

"I would like to make a request under the Environmental Information Regulations (2004) for information held by NRW, a public body, on the data submitted to you as part of returns submitted to you for wildlife licenses to disturb schedule 1 species issued by yourself in relation to Peregrine Falcon.....For the species concerned your own guidelines state:

Scientific Name – Falco peregrinus

Common Name – Peregrine

Which part of the lifecycle is EFGR? – Breeding

What specific data are EFGR? – Detailed location of nest sites

Below what scale is it EFGR? – 2 figure grid ref or 10km sq

and in line with our policy it has to be provided under Licence". NRW provided licence information to the complainant and asked him to sign and date the relevant form and return it.

4. The complainant responded to NRW and stated that he had requested the information under the provisions of the EIR. The licence provided by NRW made it clear that any disclosure was given outside the provisions of the FOIA and the EIR and placed restrictions on the use of the information. The complainant requested that NRW reconsider his request under the provisions of the EIR.
5. NRW responded on 20 March 2018 and advised that the request would likely be refused under regulation 12(5)(g) and referred again to the fact that it would be able to release information under licence.
6. The complainant responded on 26 March 2018 and pointed out again that he had not requested the location of the nest sites, and in fact he had provided the location of the sites in his request. He asked whether NRW could provide the information using a letter code for each of the sites he had listed, eg the first on the list as Site A etc. He emailed NRW again on the same day with the same list of nest sites showing which, he believed to be occupied and which ones were abandoned. The complainant also provided a list of web addresses which provided details of the location of some sites using a simple google search. He indicated that concerns about the nest site location being put into the public domain were unfounded as details of some of the sites were already in the public domain.
7. NRW issued a refusal notice on 11 April 2018 stating that the information requested was exempt under regulation 12(5)(g) of the EIR.
8. On 6 May 2018 the complainant requested an internal review of NRW's decision relating to his request. He again pointed out that he had not requested details of the location of nest sites information about sites for which he had provided the location of (including the grid reference).
9. NRW provided the outcome of its internal review on 4 July 2018 and upheld its decision that the information requested was exempt under regulation 12(5)(g).

Scope of the case

10. The complainant contacted the Commissioner on 20 September 2018 to complain about the way his request for information had been handled.

11. The scope of the Commissioner's investigation is to determine whether NRW correctly applied regulation 12(5)(g) to the request.

Reasons for decision

Regulation 12(5)(g) - protection of the environment

12. Regulation 12(5)(g) of the EIR states that a public authority may refuse to disclose information if its disclosure would have an adverse effect on the protection of the environment to which it relates. 'The environment' in this context has a wide meaning, as shown by the list of the elements of the environment referred to in regulation 2(1)(a).
13. NRW has argued that compliance with the request would disclose sensitive information about nest occupancy of Peregrine Falcons, a protected species. This could lead to damage/disruption to the nest sites in question and a threat to the current and future breeding success of the species, which would in turn have a detrimental effect on the environment.
14. The complainant and NRW have both referred to NRW's operational guidance document on 'Ecological data and information exempt from general release under the EIR/FOI regulations'¹. This document sets out the type of ecological data which are deemed as being exempt from general release ('EFGR') under the EIR and the FOIA. "*That is data and information about the location of species and habitats which could, potentially, lead to them being damaged if the data were to be made publicly available*". The guidance document was produced in order to develop a consistent and defensible approach across NRW when disclosing or releasing certain ecological data for species or habitats across Wales. The guidance takes into account advice and guidance from the former Countryside Council for Wales, the Forestry Commission and the Environment Agency. The document includes a list of ecological features and the scale at which the restriction applies.
15. Peregrine Falcons are a protected species and are listed in Schedule 1, Annex 1 of the Wildlife and Countryside Act 1981. Peregrine Falcons are listed within NRW's EFGR guidance document which states that details of nest sites can only be given to a 2 figure grid reference of 10km square. NRW stated that the National Biodiversity Network ('NBN') Atlas

¹ <https://naturalresources.wales/media/681635/eng-ecological-data-exempt-under-eir.pdf>

(<https://nbnatlas.org/>), the primary repository for biodiversity data in the UK, also automatically reduces the spatial accuracy of records considered to be sensitive, in the same way as NRW. NRW explained that its approach to EFGR data has been agreed by NBN member bodies including statutory nature conservation agencies, conservation charities (including the British Trust for Ornithology and the RSPB). For these reasons, the Commissioner has redacted the addresses of the 18 nest sites which the complainant listed in his request in this decision notice.

16. The complainant has argued that he has not asked for the location of nest sites, but rather he has requested information about specific nest sites for which he provided the location for. He does not, therefore, consider NRW's EFGR guidance document is applicable. In correspondence with NRW the complainant asked if the information could be provided in an 'anonymised format'. He provided the same list of 18 sites that he had detailed in his original request, with a corresponding 'key' labelling them as 'Site A, Site B etc'. NRW's position is that even providing the information in this format would mean that disclosure would be linking sensitive information on nest occupancy to specific nest sites. Whilst NRW acknowledge that the complainant has not asked for the location of nest sites it contends that "*in order to meet your request would necessitate linking nest occupancy data to a location. Whether the nest occupancy information was sent with a grid-reference or a code linking it to a grid reference does not affect this*".
17. NRW explained to the Commissioner that the targeting of bird nests by egg collectors is well documented and provided links to two news articles on the issue². The second news article refers to an incident where an individual "*had taken 14 eggs from Peregrine Falcon nests in South Wales and tried to smuggle them out of the UK*". NRW also assert that the "*targeting of chicks for collection, photographers causing disturbance and game wardens and others with an interest in controlling raptor numbers can also affect survival and breeding success*".
18. The requested information is specifically for records of birds, eggs and chicks present at specific nest sites for which the complainant has provided 4 or 6 figure grid reference numbers for. NRW explained that Peregrine Falcons, like other birds of prey, are "*highly nest faithful meaning they reuse nest sites*". NRW states that many studies suggest that birds of prey are:

² <https://www.bbc.co.uk/news/uk-england-norfolk-46358627>

<https://www.bbc.co.uk/news/uk-england-cambridgeshire-46828326>

"incredibly faithful to their nesting territories with most raptor species found nesting in the same places year after year though two trends have emerged through study. First, high quality territories (ie rich in food) birds remained on the same territory from one year to another. Second, birds of prey more often changed territories after failed breeding attempts than after successful ones. Most species of Falcons use alternative nest sites within the same breeding territory between years. For example, Peregrines may have up to as many as 8 alternative nesting ledges, often on the same cliff/quarry, within the single territory.....For this reason, the fact that the requested data are historic does not stop it presenting a potential threat to current and future breeding success".

In light of the above, NRW contends that even if the data for a specific nest site was a 'nil' return this does not necessarily mean that the nest is no longer used.

19. Due to sensitivities around the information NRW offered to provide the complainant with some of the information, outside the provisions of the EIR. The information would be provided under Licence which allows use of the information, but restricts re-use i.e. publishing. As stated earlier in this notice, the complainant indicated that he did not wish to receive the information under licence because *"it restricts me for [sic] using information that I am actually providing to you i.e the nest location"*.
20. To refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities 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
21. The exception is concerned with an adverse effect on the "protection" of the environment, which means maintaining the quality of the environment. Furthermore, the adverse effect must be on the protection of the environment "to which the information relates". Therefore, the information in question must relate to the element of the environment that is being protected; it cannot simply be any information that would have some effect on environmental protection if a public authority

disclosed it. The Commissioner's guidance on regulation 12(5)(g)³ states that:

"However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect "the protection of the environment to which such information relates, such as the location of rare species" (Article 4(2)(h)). So if, for example, a public authority holds information about the breeding site of a rare bird species and disclosing the location of the site would expose the site to interference or damage, then the exception may be relevant because disclosure could adversely affect the protection of the environment".

22. The Commissioner has considered the representations submitted by NRW and has viewed the withheld information. Whilst she notes that the complainant has not specifically asked for the location of nest sites, he has asked NRW to link information about whether birds, eggs or chicks were present at nesting sites, to specific nest sites, for which he has provided addresses and 4 or 6 digit grid references. The Commissioner is satisfied that the information requested relates to the aspect of the environment that is being protected, namely the breeding sites of a protected bird species and therefore it falls within the scope of this exception.
23. The Commissioner also accepts that, because the address and the accompanying 4 or 6 digit grid reference of the 18 nest sites were listed in the initial request, it would not be possible to 'anonymise' the information in the way suggested by the complainant. If NRW were to provide the information in the anonymised format suggested ie by Site A, Site B, whilst the majority of the public may not be able to identify the exact location of each nest site from such information, the complainant (and possibly others) would be aware of which nest site the information relates to, not least because the complainant is in possession of the 'key' showing which nest location corresponds to Site A, Site B etc.

³ https://ico.org.uk/media/for-organisations/documents/1630/eir_guidance_protection_of_the_environment_regulation.pdf

24. 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).
25. The complainant has alleged that there is information already in the public domain about the location of some of the nest sites listed in his request, and provided links to support his position. The Commissioner has viewed the links in question and notes that they contain some reference to Peregrine Falcons and/or nesting sites in a general location. For example, in a regulatory committee report by Powys County Council for the construction of 3 wind turbines in 2012, there is reference to the fact that a "*Desk study and consultation identified the potential for birds, notable rare raptors (red kites and Peregrine Falcon) and waders to be affected by the proposed development*". However, the Commissioner considers that information about the *presence* of Peregrine Falcons or nests in a general area to be significantly less sensitive to more details information about whether birds, eggs or chicks were present at nests when such information is linked to addresses and grid reference numbers of specific nest sites.
26. The Commissioner notes the evidence provided by NRW about the targeting of bird nests. She is also aware that there is significant publicity⁴ about other targeting of birds of prey including the shooting and poisoning of these birds. Disclosure under the EIR is essentially a disclosure into the public domain. The Commissioner accepts that disclosure would provide intelligence on the specific breeding sites of the species which could be used by members of the public intent on inappropriately targeting these birds
27. The Commissioner accepts that disclosure of the withheld information would endanger the breeding success of the species in question, and

⁴ <https://www.itv.com/news/wales/2018-09-25/bird-crime-report-reveals-illegal-killing-continues-in-wales/>

<https://www.dailypost.co.uk/news/local-news/revealed-welsh-hotspots-birds-prey-15080417>

<https://www.bbc.co.uk/news/uk-england-41820270>

would adversely affect the protection of the environment. She has therefore 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

28. NRW is mindful of the presumption in favour of disclosure inherent within the EIR. It also acknowledges that there is a public interest in openness and transparency, public understanding and accountability in relation to the activities of public authorities.
29. The complainant has not submitted any specific arguments in favour of disclosure but he has indicated that the information concerned is to be used as part of a study being carried out into historical occupancy of Peregrine Falcon nest sites in Powys.

Public interest arguments in favour of maintaining the exemption

30. NRW contends that compliance with the request would involve *"providing information which is deemed sensitive by both NRW and the National Biodiversity Network as it would allow the spatially accurate identification of nest sites of a Schedule 1 breeding bird. This information could lead to the breeding success of the species being compromised by disturbance (eg photographers, bird watchers) or persecution (eg egg or chick removal)"*.
31. NRW reiterated that the targeting of bird nests by egg collectors is well documented in the news. Its crime teams have been involved in many cases of illegal activity. NRW's policy in respect of release of such information was introduced to reduce the impact on protected species. Whilst NRW accepts that the complainant has a private interest in the information concerned it does not consider that there is a wider public interest in disclosure of the information in this case. NRW does not consider that the information would provide the public with a better understanding about how it works, transparency or accountability – it would only provide information about the location of nest sites and whether birds, eggs or chicks were present at the sites.
32. NRW acknowledges that the complainant is sympathetic to environmental protection, however, it considers that it is more likely than not that the information could be used by another person to damage the environment. NRW stated that it *"is a Welsh Sponsored Body here to protect people and the environment and our responsibility is also to protect the species from being harmed"*. NRW does not

consider that it is in the public interest to disclose information which would put a protected species at risk through disclosure of information freely into the public domain and to do so would be irresponsible.

Balance of the public interest test

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

"It is in the public interest to avoid harming or causing any adverse effect to environmental protection. As noted above, the EIR implement EU Directive 2003/4/EC which says (in Recital 1) that "increased public access to environmental information and the dissemination of such information contribute ... eventually, to a better environment". Given that the Directive and the EIR are intended to contribute to a better environment, there is inevitably a public interest in avoiding doing something that would harm the environment. Therefore, the fact that regulation 12(5)(g) is engaged at all means that there is some public interest in not disclosing the information".

34. However, this does not mean that the public interest in maintaining this exception always outweighs that in favour of disclosure. Regulation 12(2) requires a public authority to apply a presumption in favour of disclosure.

35. In this case, the Commissioner has accepted that disclosure of the information would adversely affect the protected of the environment. This means that she accepts that it is more probable than not that there will be some adverse effect. In light of the evidence provided by NRW about the disturbance and persecution of the protected species in question, the Commissioner considers that the adverse effect would be severe, frequent and has the potential to have a significant impact on the protection of the environment. In light of this, she considers that the public interest in maintaining the exception in this case is particularly strong.

36. 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. Whilst the Commissioner accepts that the complainant has a personal interest in the information, she does not consider that there is a significant wider public interest which would override the interests inherent within this exception in respect of protecting the environment.

37. The Commissioner has balanced the real and significant threat to breeding success of the protected species which would occur through disclosure against the public interest arguments in favour of disclosure. The Commissioner does not consider that the disclosure of information

in this case justifies the risk to the protection of the environment. She has therefore concluded that NRW correctly applied regulation 12(5)(g) to the request.

Right of appeal

38. 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@hmcts.gsi.gov.uk

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

39. 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.
40. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF