

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

Date: 16 August 2022

Public Authority: Government Legal Department
Address: 102 Petty France
Westminster
London
SW1H 9GL

Decision (including any steps ordered)

1. The complainant requested information relating to the salvage of the cargo of the SS Astoria.
2. Government Legal Department (GLD) provided some information within the scope of the request but denied holding the remainder.
3. The Commissioner's decision is that GLD has conducted reasonable searches for the requested information which would have located further information if it was held. He has therefore concluded that, on the balance of probabilities, GLD does not hold any further information in the scope of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 10 January 2022, following earlier correspondence with GLD about First and Second World War wrecks, the complainant made the following request for information:

"1. Copies of emails between GLD and the salvor from 2nd August to 20th October 2016 and from 25th November 2017 until the

Salvage Agreement was closed sometime after 4th September 2019. Please also provide any information you are in receipt of showing where the salvor landed the salvage.

2. A copy of the Salvage Agreement for the SS Astoria.
 3. Any information and emails relating to or confirming that GLD (or some other government department, institution, person or any other organisation) eventually received the £2000 that the salvor offered to pay to GLD under the Salvage Agreement from 21st October 2016 onwards.
 4. Any information and emails relating to or confirming that GLD (or some other government department, institution, person or any other organisation) received payment of 12% (or some other amount) of the gross salvaged value of about 374,000 euros for the cargo salvaged in 2016 which was due to the Treasury Solicitor under the Salvage Agreement amounting to about 44,800 euros.
 5. Any information and emails relating to or confirming that the salvor carried out work on the salvage of the cargo of the SS Astoria under the Salvage Agreement from 2017 until September 2019.
 6. Any information and emails showing the tonnage and salvaged value of each type of cargo of the SS Astoria salvaged under the Salvage Agreement up to 4th September 2019.
 7. Any information and emails relating to or confirming that GLD (or some other government department, institution, person or any other organisation) received payment of 12% (or some other amount) of the total gross salvaged value of the cargo salvaged from SS Astoria under the Salvage Agreement ending on 4th September 2019 which was due to the Treasury Solicitor.
 8. If no payments for salvage of the cargo of SS Astoria under the Salvage Agreement were received by GLD (or some other government department, institution, person or any other organisation) any information, emails and detailed reasons relating to the reasons why not".
6. GDL responded on 8 February 2022, advising that the request had been considered under the EIR. It provided some information within the scope of the request (information relevant to parts 2 and 6 of the request) but denied holding the remainder.
 7. The complainant requested an internal review on 27 February 2022, asking GLD to review its handling of parts 1, 3, 4, 5, 7 and 8 of the request.

8. Following an internal review GLD wrote to the complainant on 24 March 2022, upholding its original position.

Scope of the case

9. The complainant contacted the Commissioner on 5 April 2022 to complain about the way his request for information had been handled.
10. Acknowledging that GLD had provided some information in response to his request, he considered it was improbable that GLD did not hold further information. He referred the Commissioner to his correspondence requesting GLD to conduct an internal review, asking the Commissioner to accept that as the basis of his complaint.
11. As is practice, the Commissioner wrote to both parties setting out the scope of his complaint. Having been advised that the scope of his investigation was GLD's handling of parts 1, 3, 4, 5, 7 and 8 of the request, the complainant asked that the scope was extended to include GLD's handling of part 6 of the request. The Commissioner updated GLD accordingly.
12. The analysis below considers whether, on the balance of probabilities, GLD holds further information within the scope of parts 1, 3, 4, 5, 6, 7 and 8 of the request.

Reasons for decision

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

13. 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.
14. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
16. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, at the time of the request, GLD held further

information within the scope of parts 1, 3, 4, 5, 6, 7 and 8 of the request.

17. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, he will consider any other information or explanation offered by the public authority which is relevant to his determination.

The complainant's view

18. The complainant told GLD that it appears more than improbable that no further information is held relating to a three-year Salvage Agreement. He explained that he understood that, under the agreement, the Salvor had a duty to report on the progress of the salvage operation on a regular basis.
19. In support of his view that further information must be held, he also told the Commissioner:

"We find it highly improbable that no further correspondence was entered into, given the potentially high value of the salvage proceeds to GLD".

GLD's view

20. Confirming that it had conducted a manual search of its paper and electronic records, GLD told the complainant:

"We have used our best endeavours in our searches and was extremely hopeful we may find information in our manual search of the 8 boxes but unfortunately it did not yield any further information relating to your request".

21. As is his practice, the Commissioner asked GLD to revisit its handling of those parts of the request under consideration in this case. He also asked it to explain what enquiries it had made in order to reach the view that it does not hold further information within the scope of those parts of the request.
22. He did so with a series of detailed questions. These included asking about the searches that had been undertaken and the search terms used. He also asked whether any recorded information was ever held relevant to the scope of the complainant's request, but deleted or destroyed.
23. In its submission, GLD told the Commissioner:

"We have conducted searches of both physical and digital stores using search terms and hierarchical file structures specific to the request. We have provided the applicant with everything we have discovered".

24. It confirmed the teams that had been consulted and said that where relevant information had been found during a manual search, this had been provided to the complainant.

25. With regard to any information that may be held electronically, GLD confirmed that it has checked the electronic material, explaining that such material comprised:

"...copies of old letters, agreements, receipts, notes, e-mails and other documents".

26. In that respect, GLD stated that it had searched its Client Management System and shared drives, using keywords including 'Wreck(s)' and/or 'SS Astoria'.

The Commissioner's view

27. The Commissioner's role is not to consider whether a public authority should hold information that has been requested but whether, on the balance of probabilities, it does or does not hold it.

28. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that the public authority holds no further relevant information. However, as explained earlier in this notice, the Commissioner is required to make a judgement on whether further information is held on the civil standard of the balance of probabilities.

29. In reaching his decision in this case, the Commissioner has taken account of the arguments put forward by the complainant and the explanations provided by GLD.

30. The Commissioner accepts that the requested information is clearly of interest to the complainant and that he considers that further information must be held somewhere. He acknowledges that the complainant believes that there is important correspondence missing relating to the salvage agreement and salvage exercise.

31. However, having considered GLD's response, and on the basis of the evidence provided to him, the Commissioner is satisfied that, on the balance of probabilities, at the time of the request, GLD did not hold further information falling within the scope of the complainant's request.

32. Although regulation 12(4)(a) is a qualified exception, the Commissioner's position is that it is not necessary to consider the public interest. To do so would be illogical because the public interest cannot favour disclosure of information which is not held.
33. The Commissioner is therefore satisfied that GLD has complied with the requirements of regulation 12(4)(a) of the EIR.

Section 1 general right of access

34. Section 1 of FOIA states that:

"Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him".

35. In light of his decision above, and to the extent that any information within the scope of the request does not comprise environmental information, the Commissioner is also satisfied that GLD has conducted reasonable searches in the areas most likely to hold the requested information. His decision is that, on the balance of probabilities, no further recorded information is held. He is therefore satisfied that GLD has complied with the requirements of section 1 of FOIA in this case.

Advice and assistance

36. The duty to provide advice and assistance under EIR is wider in scope than under the FOIA regime.
37. Regulation 9(1) of the EIR states:

"(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

38. In its submission to the Commissioner, GLD confirmed that it had provided the complainant with details of other public authorities that may hold information relevant to his request.
39. The Commissioner is satisfied that GLD complied with Regulation 9(1) of the EIR.

Right of appeal

40. 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

41. 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.
42. 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

Laura Tomkinson
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