

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

Decision notice

Date: 25 July 2019

Public Authority: The Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested EPC (Energy Performance Certificate) and DEC (Display Energy Certificate) data, as the current dataset, which is available via an open access database is around 2 years out of date. The Ministry of Housing, Communities and Local Government ('MHCLG') withheld the information on the basis of regulation 12(5)(c) – intellectual property rights.
2. The Commissioner's decision is that the MHCLG has failed to demonstrate that regulation 12(5)(c) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the information withheld under Regulation 12(5)(c)
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 30 October 2018, the complainant wrote to the Ministry of Housing, Communities and Local Government ('the MHCLG') and requested information in the following terms:

"I am formally requesting under FoI laws access to EPCs filed between December 2016 and July 2018. I have been monitoring the updated publication of this important data and I can see no reason why they should be nearly two years out of date. I should have expected to be able to see this data on <http://opendatacommunities.org> prior to now. The fact that I cannot do so is hindering my important research into pressing housing issues within the capital.

I am interested in seeing data for ALL London Boroughs for the period. It will not be enough for you to claim that it is too expensive or difficult to provide me with this data. I am not asking or expecting you to do anything other than publish the data for the relevant period in the usual way."

6. The MHCLG responded on 27 November 2018, and advised it was withholding the information on the basis of the exception at EIR regulation 12(5)(c), intellectual property rights. By way of explanation it stated that:

"There are restrictions on the use of address data held on the registers. Address level data held on the registers includes material in which intellectual property rights are owned by the Royal Mail Group Limited. MHCLG has published address level data on a publicly accessible open data communities website with the consent of the Royal Mail Group Limited, which reserves all its copyright, database rights, trade marks and other intellectual property rights. In effect, this means that Royal Mail has agreed that address level data can be published if this information is protected by its copyright notice."

7. Following an internal review the MHCLG wrote to the complainant on 7 December 2018. It upheld its position to withhold the information.
8. Following the Commissioner's enquiries, the MHCLG advised that it was withholding the information both on the basis of regulation 12(5)(c) as originally stated, and regulation 12(3) by virtue of regulation 13, personal information.

9. On 13 June 2019 the MHCLG advised the Commissioner that, following a review of privacy risks to individuals, it intended to continue "*publishing EFB (Energy Performance of Buildings) data at an individual address level on an ongoing basis as soon as possible. We will therefore not be relying on the personal data exception under EIR in this case. The data will be available from the Open Data Communities website, access to which is subject to the Royal Mail copyright notice.*"

Scope of the case

10. The complainant contacted the Commissioner on 14 December 2018 to complain about the way his request for information had been handled. Specifically he disputes that the MHCLG can withhold the information on the basis of regulation 12(5)(c) given that the data for previous periods has been published, with stated concessions, that allow its use for non-commercial research. Furthermore the complainant states there is a "*very clear public interest in ensuring that measures taken by the government to protect the environment are efficacious and transparent.*"
11. The complainant's request states "*I am not asking or expecting you to do anything other than publish the data for the relevant period in the usual way.*" The MHCLG answered the request in terms of releasing the information directly to the complainant, outside of the open access database. In the Internal Review the MHCLG explained that it was not currently updating the published data¹. It stated that: "*The Department is considering the data protection implications of this mass upload of address level data. Any further updates have been suspended owing to these ongoing data protection concerns.*"
12. During the course of the investigation the MHCLG confirmed that this review had been undertaken, and a decision made to publish the updated information to the website in July 2019.
13. Bearing in mind the imminent release of information, the Commissioner contacted the complainant regarding the scope of the case. The complainant confirmed that he remained dissatisfied with the period of time elapsed in obtaining the data and the MHCLG's reliance on regulation 12(5)(c) to withhold the information.

¹ <http://opendatacommunities.org>

14. At the time of reaching a decision the MHCLG had not uploaded the requested information. The Commissioner therefore considers the scope of this case is to establish whether the MHCLG has correctly engaged the exception at regulation 12(5)(c) to withhold the information. If it has, then she will consider where the balance of public interest lies.

Background

15. The MHCLG provided background information: "*EPC (Energy Performance Certificate) and DEC (Display Energy Certificate) data is stored on the domestic and non-domestic EPB (Energy Performance of Buildings) Registers, managed by Landmark Information Group. The registers contain data relating to over 20 million energy certificates. MHCLG has recently made data up to 2016 available on an open access website, subject to a Royal Mail copyright notice.*"

Reasons for decision

Regulation 12(5)(c) – intellectual property rights

16. Regulation 12(5)(c) states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(c) intellectual property rights"

17. As stated in the Commissioner's guidance on regulation 12(5)(c)², Intellectual property (IP) rights arise when owners are granted exclusive rights to certain intangible assets. To establish that there would be an adverse effect on IP rights a public authority must demonstrate that:
- the material is protected by IP rights;

² https://ico.org.uk/media/for-organisations/documents/1632/eir_intellectual_property_rights.pdf

- the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
 - the identified harm is a consequence of the infringement or loss of control over the use of the information; and
 - the potential harm or loss could not be prevented by enforcing the IP rights.
18. In determining whether this exception has been correctly applied the Commissioner considers that the onus is on the public authority to identify the specific IP right that would be adversely affected and its owner. The Commissioner considers that there are three main forms of IP rights: copyright, database rights, and copyright in databases. In demonstrating that information falls within the scope of the exception, public authorities must, therefore, identify the form of IP right which information is protected by and explain why.

Is the material protected by IP rights?

19. The MHCLG advises that the address level data held in the registers includes material for which the IP rights are owned by Royal Mail Group Limited ('Royal Mail'). It states that it is able to publish this information, in publicly accessible open data communities, because it has consent from Royal Mail Group Limited, which reserves all its copyright, database rights, trade marks and other intellectual property rights. It states that the Royal Mail has agreed that address data for EPCs can be published if this information is protected by its copyright notice.
20. The Commissioner has viewed and can confirm that the open access website contains the Royal Mail copyright notice³ ('the Copyright Notice') as described by the MHCLG. In order to access the data, a user's name and email address and acceptance to the licence and copyright must be submitted.
21. The Copyright Notice outlines the specific purposes, related to energy performance of buildings, for which it permits the use of address data. It states that in addition to the specific purposes "*there are certain exceptions to copyright which permit you to use copyrighted material for*

³ <https://epc.opendatacommunities.org/docs/copyright>

specific and limited purposes. These include non-commercial research and private study subject to compliance with certain conditions.”

Would the IP rights holder suffer harm?

22. The MHCLG states that if the IP rights were infringed then the IP holder, Royal Mail, would suffer harm through losing the ability to exploit the commercial value of the information, and being able to ensure that the information remains current and accurate.

Is the identified harm a consequence of the infringement or loss of control over the use of the information?

23. The MHCLG states that *“IP rights exist to reward the significant work that goes into producing the material and gives the rights holder control over how the information is used and by whom. It follows that harm would result from Royal Mail losing that control.”*

Could the potential harm or loss be prevented by enforcing the IP rights?

24. Disclosure of the requested information under the EIR would not extinguish any IP rights the Royal Mail may hold in the material. Accordingly, if the Royal Mail became aware of any further uses of the information that infringed its rights, it could still take action to prevent harm arising from that infringement. The Commissioner will therefore take into account the Royal Mail’s ability to enforce its IP rights when considering whether the alleged harm would actually arise.
25. In this case the MHCLG argues that Royal Mail may be able to take legal action to protect its IP rights, however, once the information is in the public domain it is probable that it would be unable to enforce the IP rights. It states that this is particularly the case as the information will be available in electronic format which can be easily reconfigured and communicated.
26. The Commissioner has enquired whether the format of the information provided via disclosure under the EIR would be different in any way to a disclosure through the open access website. The MHCLG confirmed that the data output would be exactly the same. The Commissioner therefore concludes that the key issue is the removal of the open access website control mechanism which gains user acceptance to the copyright prior to releasing the information.

Conclusion

27. In her guidance on this exception the Commissioner explains that in general, the owner of the IP rights has exclusive control over how the

asset is used. However there are circumstances under which some uses of protected material are permitted. Importantly, the different pieces of legislation that collectively provide protection to these IP rights contain provisions which mean that any act carried out under statutory authority will not infringe those IP rights. This is explained in more detail in her guidance on intellectual property rights and disclosures under the Freedom of Information Act⁴ which equally applies to Regulation 12(5)(c) of the EIR.

28. The key point is that a public authority will not infringe IP rights when it discloses information in response to an FOIA or EIR request, because it is an act authorised by statute. The issue when applying regulation 12(5)(c) is the infringement of IP rights by any user who may receive the information.
29. Copyright will still apply to the information once it has been disclosed under EIR. The person who receives the information under EIR is still obliged, by law, to respect the rights of the copyright owner. If they do not, the copyright owner can seek damages or an injunction in the same way as they could for any infringement of copyright. So, although the disclosure under EIR does not carry any restrictions, the restrictions imposed on the further use of that information by the Copyright Designs and Patents Act 1988 (CDPA) still apply.
30. For the Commissioner to be satisfied that the MHCLG has successfully engaged Regulation 12(5)(c) of the EIR she has to be persuaded that disclosure would adversely affect the identified IP rights for Royal Mail. In practice this means that a person or organisation would want to exploit the requested information (in other words that there is a potential market for it), could do so successfully and such infringements would go undetected or could not be protected.
31. Royal Mail have a number of address data licencing products (the Postcode Address File 'PAF' and associated products⁵) through which it raises charges for the commercial use of their address data. Clearly,

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https://ico.org.uk/media/fororganisations/documents/1150/intellectual_property_rights_and_disclosures_under_the_foia.pdf

⁵ <https://www.poweredbypaf.com/>

therefore, there is a market for the address and postcode information held in the database.

32. A technical infringement of IP rights is not sufficient to engage the 'would adversely affect' test in the exception. There must be some real loss suffered by the owner of the IP right, such as monetary loss. This was established by the Information Tribunal and subsequently endorsed by the Court of Appeal in the cases of *Ofcom v Information Commissioner & T-Mobile (UK) Limited EA/2006* and *Ofcom v Information Commissioner 2009 EWCA Civ 90*⁶. The Information Tribunal in this case stated:

"...we believe that, interpreting the exception restrictively requires us to conclude that it was intended that the exception would only apply if the infringement was more than just a technical infringement, (which in other circumstances might have led to a court awarding nominal damages, or even exercising its discretion to refuse to grant the injunction that would normally follow a finding of infringement). It must be one that would result in some degree of loss or harm to the right holder".

33. Furthermore, the harm in question has to be suffered by the holder of the IP right because the right holder can no longer rely on his IP rights to control the use of the information.
34. As explained previously, the Commissioner has enquired whether the format of the output provided by disclosure via this information request, would be any different from the format of the output provided via the open access website. The MHCLG confirmed it would be the same, therefore the Commissioner concludes that there is no change to the level of risk, or potential methods for, the possible infringement of the IP rights by any user receiving the information.
35. The MHCLG expressed concern that information provided outside of the open access website would not be protected by its access control, which requires the user to enter their details and accept the Copyright Notice. The Commissioner considers that the MHCLG could request and log the users' acceptance to the Copyright Notice via other means prior to issue under the EIR.
36. The Commissioner does not consider that a disclosure under the EIR, clearly stating copyright conditions attached to the information, would

⁶ <https://www.supremecourt.uk/cases/docs/uksc-2009-0168-judgment.pdf>

be likely to undermine the ability of the Royal Mail to continue to exploit its intellectual property through licensing. Since, in this case, the Royal Mail already has a method for protecting its commercial interest in the requested information. That is by either by refusing to issue an address licence, or by realising a financial benefit through provision of an appropriate licence to use the Postcode Address File.

37. The Commissioner has also considered the level of difficulty in policing an infringement of the intellectual property rights. She considers that for another person to derive value from the information they would have to provide it as a service and that such a service would therefore have to be advertised via the Internet. This would clearly need to be easily searchable and therefore, as a result, visible. As such the Commissioner considers that it would remain possible for the Royal Mail effectively police its intellectual property rights following disclosure under the EIR.
38. Regulation 12(5)(c) provides grounds for withholding information in very limited circumstances. It will only be engaged if the right holder cannot effectively prevent infringements to their IP rights and will suffer harm as a result. The Commissioner therefore concludes that Regulation 12(5)(c) is not engaged.
39. The Commissioner requires the MHCLG to disclose the requested information being withheld under regulation 12(5)(c).

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: 0300 1234504

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

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