

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

**Decision notice**

**Date:** 19 December 2019

**Public Authority:** Natural Resources Wales

**Address:** [accesstoinformationteam@naturalresourceswales.gov.uk](mailto:accesstoinformationteam@naturalresourceswales.gov.uk)

**Decision (including any steps ordered)**

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1. The complainant requested information about the programme of works associated with flood defences of the River Elwy at St Asaph. Natural Resources Wales ('NRW') provided some information and applied regulation 12(4)(d) to some parts of request. At the time of its internal review NRW disclosed additional information. The complainant alleged that NRW had failed to provide the specific information held relating to one part of the request. The Commissioner's decision is that, on the balance of probabilities NRW does not hold any additional information relevant to the request other than that which it has disclosed. However, the Commissioner finds that NRW breached regulation 5(2) of the EIR in failing to provide all of the requested information within the required timescale. The Commissioner also finds that NRW breached regulation 11(4) of the EIR in failing to carry out an internal review within the statutory time limit. The Commissioner does not require any steps to be taken.

**Request and response**

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2. On 1 October 2018 the complainant wrote to NRW and requested information in the following terms:  
  
*"With respect to the recent programme of works associated with the improvement of the river Elwy flood defences at St Asaph, please provide the following information.*

1. *The achieved capacity, before overtopping of the upstream flood defences can be expected to occur, of the main bridge – high street.*
  2. *The achieved capacity, before overtopping of the upstream flood defences can be expected to occur, of the 'Pont Begard' bridge – behind the library.*
  3. *The achieved capacity, before overtopping of the upstream flood defences can be expected to occur, of the Spring Gardens bridge.*
  4. *With respect to the above, please use the same unit of measure for volume and the same unit of measure for time.*
  5. *Using these units of measurement, what was the flow rate of the river Elwy in the above area, during the peak flooding period of the November 2012 flood? Please state if this is estimated or known and if it takes account of water not within the limits of the river defences at that time?*
  6. *Within the above area, has provision been made to protect earth areas of the defences from river erosion, where vegetation has not sufficiently re-established to provide protection from erosion, following the works associated with above?*
    - (i) *Does the transition from the brick faced concrete defences, at the rear of the Roe Parc estate, to the ramp leading to the new Spring Gardens bridge meet the specifications of the planned defences for this area? (A difference of approximately 15", see photograph).*
    - (ii) *If it does not, what action will be taken and when will it be completed?"*
3. NRW responded on 29 October 2018 and explained that it had only recently received the as-built (post-scheme) hydraulic model from its consultant. The document was being reviewed by its Flood Risk Analysis Team and it was hoped that the final version would be available by mid-November. In light of this, NRW stated that information relating to parts 1 to 4 of the request was considered exempt under regulation 12(4)(d) of the EIR. NRW provided information relating to parts 5 and 6 of the request.
4. The complainant wrote back to NRW on 13 November 2018 advising that he looked forward to receiving the information relating to parts 1, 2 and 3 of his request of 1 October 2018 by the end of 2018 without any further action on his part. He also submitted a new request for information in the following terms:

*"In the meantime, would it be possible to provide the following:*

- 1.1 *The minimum area available for the flow of the river beneath the main bridge (high Street) as measured across from the top of the improved defences on each bank in meters squared. If there is a difference in the heights of the improved defences.*
  - 2.1 *The minimum area available for the flow of the river beneath the 'Pont Begard' Bridge (behind the library) as measured across from the top of the improved defences on each bank in meters squared. If there is a difference in the heights of the improved defences please use the lowest and indicate the bank.*
  - 3.1 *The minimum area available for the flow of the river beneath the Spring Gardens bridge as measured across from the top of the improved defences on each bank in meters squared. If there is a difference in the heights of the improved defences please use the lowest and indicate the bank".*
5. On 15 November 2018 the complainant forwarded his email of 13 November 2018 direct to an officer of NRW.
6. On 26 November 2018 the complainant wrote to NRW regarding the lack of response to his email of 13 November 2018. He stated that the information requested on 13 November 2018 should, in his opinion, have been provided in response to parts 1, 2 and 3 of his request of 1 October 2018. He therefore indicated that he considered regulation 12(4)(d) had been applied incorrectly and asked NRW to conduct an internal review of its decision to withhold the information.
7. The complainant contacted the Commissioner on 16 January 2019 regarding NRW's handling of his request. The Commissioner stated that the time limit under regulation 11 for internal reviews under the EIR had not elapsed at that time. The Commissioner advised the complainant to make further contact if he had still not received the internal review response after the prescribed timeframe.
8. The complainant duly contacted the Commissioner again, on 18 February 2019, to confirm that he had still not received the outcome of the internal review.
9. Following correspondence from the Commissioner, NRW provided the outcome of its internal review on 17 July 2019 and provided information relating to parts 1, 2 and 3 of the requests of 1 October and 13 November 2018.

## Scope of the case

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10. The complainant contacted the Commissioner initially on 16 January and again on 18 February 2019 regarding delays experienced obtaining the outcome of NRW's internal review.
11. Following receipt of the internal review response the complainant contacted the Commissioner again on 25 July 2019 to confirm he remained dissatisfied with NRW's handling of his requests. He provided the Commissioner with a copy of a further email he had sent to NRW outlining the nature of his continued dissatisfaction with its response to parts 2 and 2.1 of his requests for information relating to Pont Begard Bridge. Specifically, the complainant is unhappy with NRW's position that it did not hold information relating specifically to the Pont Begard bridge.
12. In light of the above, the Commissioner's investigation into this complaint is to determine whether any NRW holds any additional information relating to parts 2 and 2.1 of the requests of 1 October and 13 November 2018.

## Reasons for decision

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### **Regulation 5 – Duty to make environmental information available on request**

13. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner considers the actions taken by the authority to check that the information is not held and any other reasons offered by the authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held, along with any representations submitted by the complainant. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
15. NRW confirmed that information relevant to the request is only held within its electronic Hydraulic Model for certain points along the River Elwy. Full searches were conducted of the Hydraulic Model and no information was found specifically for the Pont Begard bridge site.

Information was identified for a site which is 50 metres upstream of the bridge, which has been disclosed to the complainant. NRW also confirmed that no information of the type requested has ever been recorded for the site in question.

16. The complainant in this case submitted a number of specific representations in support of his view that NRW holds the information requested, which the Commissioner raised with NRW. These points are summarised below.
17. The complainant suggested that, as NRW has a statutory responsibility to manage flood risk, it is required to hold certain information and be able to interpret it, which would include the information he requested. NRW confirmed to the Commissioner that it has statutory powers under the Water Resources Act 1991 to manage the risk of flood from the sea and main rivers. However, there is no statutory responsibility or duty that requires NRW to 'hold certain information'. This includes the information requested ie specific measurements for Pont Begard bridge. The Flood and Water Management Act 2010 ('FWMA 2010') confers a supervisory role on NRW in respect of overseeing flood risk in Wales. However, again, this duty does not extend to requiring NRW to hold the information that the complainant has requested about Pont Begard bridge.
18. The complainant suggested that as bridges present a higher level of risk in terms of reducing the flow of water, perhaps through debris becoming attached to the structure, it is reasonable to expect the hydraulic model to include information about **all** bridges, including Pont Begard bridge. He pointed out that the information requested ie *"the maximum area below the Pont Begard bridge available for the flow of water before overtopping can be expected, is derived from the measurement of the physical characteristics of the area beneath the bridge (eg span of bridge and height of defences). It is then mathematically calculated. This maximum area is not necessarily an output of the referenced Hydraulic model"*. The complainant also suggested that the information in question may be held elsewhere within NRW, ie other than within the Hydraulic model.
19. In response to the above NRW explained that, in order to derive the area beneath Pont Begard bridge it *"would require a topographic cross section at the bridge, as well as bridge structure details"*. NRW advised that the cross section is located approximately 50 metres upstream and it holds limited measurements of the bridge (span, underside and deck level only) following its 2014 pre-scheme topographic survey. NRW explained that *"because the cross section and bridge are not coincident it would not be possible to calculate a cross sectional area at this location"*.

20. NRW confirmed that it was satisfied with the scheme design at Pont Begard Bridge because:

- *"It is designed to cope with the 1 in 200 chance of happening in one year flood event.*
- *The design water level in this vicinity is 15.1m Above Ordnance Datum (AOD), as taken 50m upstream and therefore would be lower by Pont Begard.*
- *The underside of Pont Begard ranges from 15.2m AOD to 15.4 AOD (2014 survey). This is above the design water level.*
- *The left and right embankment levels are approximately 5.3m AOD. This is above the design water level"*

21. NRW stated that a full survey of Pont Begard bridge and its topography directly beneath and across the channel, has never been measured, or used within the hydraulic modelling scheme. The reason for this is that, prior to construction of the flood alleviation scheme in 2018<sup>1</sup>, *"Pont Begard was built higher than the embankments, and therefore was deemed not hydraulically important. Within the new construction, where the embankments have been raised, Pont Begard remains above the design water levels"*.

22. The complainant suggested that as information is held about the other two bridges referred to in his request, he considered it unlikely that information was not held about Pont Begard bridge. NRW explained that it obtained information on hydraulically important structures along the River Elwy to inform its flood modelling and the design of the scheme. It advised that Pont Begard bridge has been *considered* in each hydraulic model iteration since 2011. However, it has been deemed to be above embankment (pre-scheme) or design water level (post scheme/ currently). As such, no information falling within the scope of the request is held about the bridge.

23. NRW explained that Pont Begard bridge is owned and constructed by the Local Authority. Section 21 of the FWMA 2010 requires lead local flood authorities to maintain a register of structures or features which they consider are likely to have a significant effect on a flood risk in its area.

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<sup>1</sup> <https://gov.wales/ps6m-st-asaph-flood-protection-scheme-officially-opened-environment-minister>



NRW suggested that the local authority (Denbighshire County Council) may hold information of the type requested by the complainant.

24. The complainant pointed out that Pont Begard bridge was built in 2007. He suggested that, in line with its statutory obligations, NRW would have been provided with information about the physical characteristics of the designed, and then installed bridge (eg technical drawings etc) in order for it to effectively participate in the planning process and to ensure that the bridge met with planning conditions to have no negative impact on the effectiveness of the upstream flood defences. NRW confirmed that one of its predecessor organisations, the Environment Agency Wales would have been a statutory consultee to the planning application for the bridge. Relevant information provided by the local authority about the planning application would have been held. However, NRW explained that even if the information in question was held as part of the planning process, it is outside its retention schedule of 6 years for such information and as such it is no longer held.
25. The complainant advised that Pont Begard bridge is located next to the homes of some of the most vulnerable residents in St Asaph, including a care home and sheltered accommodation. In addition, he explained that the topography of the area forms a 'bowl' which means that, in the event of over topping of the river, flood waters will reach relatively high levels. The complainant pointed out that the flood defence scheme, implemented last year, cost around £6m. He advised that he requested the information in order to ensure that, following completion of the scheme, the three bridges in question were now "*balanced*" in terms of the available area beneath them and were sufficient to accommodate the volumes of water experienced during previous floods, for example the flooding in 2012.
26. NRW acknowledged that the location of Pont Begard bridge is near the site of a care home and sheltered accommodation. Following the flooding in 2012 NRW considered the possibility of the situation re-occurring post completion of the flood scheme. As a result NRW designed and installed a control structure which allows flood water to re-enter the main channel to assist with increased waterflows. NRW explained that although flood alleviation schemes are designed to reduce the likelihood of flooding to people and property they cannot completely prevent any future flooding.
27. While appreciating the complainant's frustration that NRW does not hold further information within the scope of the request, the Commissioner is

mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)<sup>2</sup> which explained that the FOIA:

*"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold"*.

28. Based on the representations and evidence provided by NRW the Commissioner is satisfied that it has carried out adequate searches of where relevant information would be held. The Commissioner has not seen any evidence of any inadequate search or grounds for believing there is any motive to withhold information relevant to the request. Having considered the NRW's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the civil standard of the balance of probabilities, NRW did not hold further information within the scope of the request.
29. Regulation 5(2) of the EIR states that information shall be made available *"as soon as possible and no later than 20 working days after the date of the request"*.
30. In this case the request was submitted on 1 October 2018 and NRW provided some information on 29 October 2018. During the course of the Commissioner's investigation NRW disclosed additional information held relevant to the request.
31. In failing to provide all of the information held relevant to the request within 20 working days after the date of receipt, the Commissioner finds that NRW breached regulation 5(2) of the EIR.

### **Regulation 11 - Representations and reconsideration**

32. Regulation 11(1) provides the right for an applicant to request an internal review from a public authority if he or she is not satisfied with its response to a request for information.
33. Regulation 11(4) says that the public authority must provide the applicant with the outcome of its review as soon as possible, and no

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<sup>2</sup> <http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>



later than 40 working days after the date of receipt of the request for a review.

34. In this case, the complainant requested a review on 26 November 2018 and NRW provided its internal review response on 17 July 2019. The Commissioner therefore finds that by failing to carry out an internal review within the statutory time limit of 40 working days, NRW breached regulation 11(4) of the EIR.

## Right of appeal

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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: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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