

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 February 2024

Public Authority: Nexus

Address: St James Boulevard
Newcastle upon Tyne
NE1 4AX

Decision (including any steps ordered)

1. The complainant has requested specific information relating to works carried out as part of the Metro Flow Project undertaken by Buckingham Group Contracting Limited on behalf of Nexus. Nexus stated it did not hold the requested information.
2. The Commissioner's decision is that the requested information is held by Nexus as per section 3(2) of EIR – information held on behalf of.
3. The Commissioner requires Nexus to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant's request either providing the requested information or issuing a valid refusal notice under the EIR.
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. Nexus is a publicly-funded body providing transport to Tyne and Wear. Buckingham Group Contracting Ltd (BGCL) were carrying out work on behalf of Nexus relating to improvements to the Metro, including track work.
6. On 12 February 2023, the complainant wrote to Nexus and requested information in the following terms:
 - 1) "The readings from the various checks conducted at the time of the works being carried out. We know there to have been several over several days of the works including the vibration works.
 - 2) The planned vs actual works carried out, times/dates with details of what took place eg welding, drilling, ramming the piles into the ground, laying the track/stones etc
 - 3) My last request is for the specifications of the piles themselves. Depth (below ground level) in particular."
7. Nexus responded on 9 March 2023 stating it did not hold the requested information.
8. The complainant challenged the statement made by Nexus and BGCL (the contractor) about who held the requested information. Nexus sent an internal review response on 11 August 2023 upholding its position.

Scope of the case

9. The complainant contacted the Commissioner on 11 August 2023 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine if Nexus holds information in scope of the request.

Reasons for decision

11. Regulation 3(2) of the EIR states that:
 - (2) For the purposes of these Regulations, environmental information is held by a public authority if the information –
 - (a) is in the authority's possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the public authority.

12. ICO guidance¹ sets out the circumstances in which public authorities hold information for the purposes of the EIR. Regulation 3(2) sets out two scenarios in which the information is considered to be 'held' for the purposes of the EIR. The first scenario (regulation 3(2)(a)) is when an authority is in possession of the information and it produced or received it. The second scenario is when a third party holds the information on an authority's behalf. 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.
13. ICO guidance says that unlike FOIA, the definition of information held for the purposes of the EIR does not explicitly exclude information a public authority holds solely on behalf of another body or person. However, this does not mean that this type of information falls within the scope of the EIR, unless the authority is holding it to any extent for its own purposes.
14. The leading authority on the interpretation of regulation 3(2)(a) is the Upper Tribunal's decision in *Holland vs Information Commissioner and University of Cambridge* [2016] UKUT 260 (AAC)8 . This case states that when seeking to establish if an authority holds environmental information under regulation 3(2)(a), it needs to consider whether it holds it either physically or digitally - and the extent to which the authority holds it for its purposes.
15. In this case it is not in dispute that Nexus do not physically hold the information themselves. The question is whether its third party contractor, BGCL, holds the information on behalf of Nexus.
16. Nexus had explained in its internal review response that it had previously provided the complainant with a copy of a 'Construction Noise and Vibration Assessment' document it had received from BGCL but in terms of the information that is the subject of this request, the information was not and never had been held by Nexus. It explained BGCL were a third party contracted by Nexus to undertake works known as the Metro Flow Project, converting a previously owned stretch of Network Rail infrastructure to ensure its suitability to carry Metro's Light rail trains. Nexus explained that BGCL would have gathered information as part of this project but this would not have been passed to Nexus at such a granular level. Nexus further argued that it has no control over this information, who can access it or how it can be accessed. Nexus stated it had no input into the information's creation or alteration.

¹ [Information you hold for the purposes of the EIR | ICO](#)

17. At the outset of the investigation the Commissioner wrote to Nexus with a series of questions focused on the relationship with BGCL to determine if BGCL holds the information on behalf of Nexus.
18. The Commissioner asked Nexus to focus on several key points - what information it is entitled to receive/request from BGCL (not just information it has requested but what it can request), what the contract with BGCL states about information that can be received/requested, and details of any consultation with BGCL about this request.
19. When responding Nexus highlighted that administrators had been appointed for BGCL. Irrespective of this Nexus had reviewed the contract conditions between itself and BGCL.
20. Nexus stressed as this project related to ageing infrastructure and the contract specifically included a condition providing no warranty in relation to side conditions, placing the risk on BGCL. The contract stated:

"The Client gives no warranty or representation as to the condition of the Site ... The Contractor has been afforded the opportunity to inspect the physical and other conditions of the Site .. and is deemed to have obtained all necessary information concerning any associated risks, contingencies and other circumstances that may influence or affect the execution of the works.

The Contractor may at his own risk and expense rely upon and use any survey, report or other document prepared by or on behalf of the Client regarding any such matter as is referred to in this Clause 25.4, but the *Client* makes no representation or warranty as to the accuracy or completeness of any such survey, report or document or any representation or statement contained therein."

21. Nexus argued that this did not mean that it would be entitled to hold any such information or that it was held on its behalf.
22. Nexus further pointed to the section of the contract that defined the contractor's documents as "all drawing, plans, designs, diagrams, details and specifications of materials, goods, and workmanship, technical data, models, CAD materials, bills of quantities, reports, calculations and other related documents and recorded information, of any nature whatsoever, which have been or will be written, prepared and/or produced by or on behalf of the *Contractor* in connection with the design and/or construction of the *works*."
23. It argues that this shows that contractor's documents are given a wide definition and the information requested would fall within this definition and, as Nexus provided no warranty in relation to the site, BGCL would reasonably undertake surveys to minimise any risks that fell to them.

Nexus considers this shows the information would not be held by, or on behalf of, Nexus.

24. Having considered this information the Commissioner was not persuaded this explanation precluded the information being held by BGCL on Nexus' behalf. The Commissioner appreciates Nexus is of the view that as BGCL had to undertake surveys to minimise risk as any warranty fell on them entirely, this information was not created at the request of Nexus and is therefore held by BGCL for its own purposes and not by, or on behalf of, Nexus.
25. However, the Commissioner had concerns over the section of the contract which states the contractor may at their own risk rely on the surveys etc prepared "**by or on behalf of the Client**". This clause in the contract seems to exempt Nexus from being responsible for the accuracy of the surveys and whether or not BGCL should use them as a reliable indicator of risk/warranty but it implies that any survey/report/document is still prepared by or on behalf of the Client (Nexus).
26. The Commissioner therefore asked Nexus what information BGCL was required to provided, either proactively or on request, regardless of whether or not this information was provided or requested and what the contract stated about sharing information. The Commissioner also emphasised that his understanding what that, depending on the precise terms of the contract, if the contractor enters administration, Nexus (as the client) may be entitled to recover contractor documents relating to the contacted works being carried out. The Commissioner asked Nexus to comment further on this point.
27. Nexus confirmed the contract it had with BGCL was an Engineering and Construction Contract with some adaptations for the particular project. The disclosure clause in the contract stated that:

"29.2 The *Contractor* does not without the prior written authority of the *Client*, either during its employment under this contract (except in the proper course of its duties) or at any time after the expiry or termination of this contract (for any reason), disclose to any person or otherwise make use of any confidential information relating to the *Client*, the *works* or otherwise including (but without limitation) any information relating to the methods and techniques of construction for Providing the Works proposed by the *Client*, all financial information relating to the *works*, the content of any documents (including any legal agreements prepared by or on behalf of the *Client* and copies or drafts of which the *Contractor* receives or obtains in the course of its employment under this contract) or disclose to any person (except its insurers or professional advisers) anything contained in this contract. The restrictions in this Clause will continue to apply, without

limitation in point of time, unless and until such information comes properly into the public domain through no fault of the *Contractor*.

29.3 Neither Party breaches this Clause 29 if it discloses information solely and to the extent necessary to comply with laws. The Party making such disclosure makes the other Party aware of the disclosure and (save in the case of disclosures required to be made by the *Client* pursuant to the requirements of the Freedom of Information Act 2000 or the Environmental Information Regulations 2004) ensures that the recipient of the information is made aware of and respects its confidentiality.

29.5 The *Contractor*:

- acknowledges that the *Client* is subject to the requirements of the Freedom of Information Act 2000 and the Environmental Information Regulations 2004;
- assists and co-operates with the *Client* to enable the *Client* to comply with its disclosure obligations under that legislation; and
- acknowledges that the *Client* may, acting in accordance with the codes of practice issued and revised from time to time under both section 45 of the Freedom of Information Act 2000 and regulation 16 of the Environmental Information Regulations, be obliged by that legislation to disclose information without consulting with the *Contractor* or its Subcontractors.

76.3 The *Contractor* understands that under the Freedom of Information Act 2000 the *Client* may have obligations which may mean that certain parts of this contract may be disclosed to third parties. The *Contractor* assists the *Client* at no additional charge in meeting reasonable requests for information which are made in connection with the Freedom of Information Act 2000."

28. Nexus states outside of these clauses and other information already provided to the Commissioner, because of the nature of the type of contract, the content of the contract focuses on construction.

29. The contract itself was terminated by Nexus on 24 August 2023 and formal administrators appointed on 4 September 2023. The templated termination clauses relate mostly to matters not of relevance here but Nexus explained it added some additional wording at clause 92.1:

"... and the *Contractor* delivers to the *Client* all *Contractor's* Documents (whether or not in the course of preparation or production) and, in accordance with any *Client's* instruction, protects the *works* and any

Plant and Materials to which the *Client* has title and ensures the Site and the *works* are left in a neat and tidy condition."

30. Nexus accepted that this additional inserted clause allowed it to ask that 'contractors documents' be provided to it by the administrator appointed to oversee the affairs of BGCL.
31. Nexus maintains its position that it does not hold the requested information and it was not held on its behalf by BGCL but Nexus has made attempts to obtain the requested information from the administrator but at the date of this notice has not received this.
32. The Commissioner has reviewed Nexus' position and its original contract with BGCL which relates to the work it was undertaking on the Metro Flow Project. BGCL were directly contracted by Nexus to carry out this work and it is difficult to see how information gathered by BGCL would not be accessible to Nexus if they requested it. The Commissioner accepts that Nexus had not asked for information at this granular level from BGCL and most likely would not find themselves in a circumstance where they would have any need to ask for it as the contract makes it clear surveys and associated documents are carried out by BGCL to mitigate against liability.
33. The issue is not whether the information was requested or ever would be likely to be requested, but whether Nexus would be entitled to request/receive this should it want to. The Commissioner has seen no evidence in the clauses of the contract that would preclude Nexus from asking for and receiving information created/generated by BGCL in relation to the project as it was directly contracted by Nexus. The contract makes it clear the contractor relies on surveys prepared by or on behalf of the client at their own risk – the Commissioner considers this is a clear indicator that the client (Nexus) still retains control over any information in relation to the project even if it does not necessarily need to see it.
34. The Commissioner's view is that, on the balance of probabilities, BGCL held the requested information on behalf of Nexus. As administrators are now involved it is not possible for Nexus to obtain this information from BGCL. However, it is clear that the additional termination clause in the contract allows for all contractor documents to be passed to the client. As such Nexus can obtain this information from the administrator and the Commissioner now requires Nexus to respond as set out in paragraph 3 of this notice.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

**Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**