

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
The Re-use of Public Sector Information Regulations 2015
(‘RPSI’)**

Decision notice

Date: 21 October 2020

Public Authority: Environment Agency
Address: Horizon House
Bristol
BS1 5AH

Decision (including any steps ordered)

1. The complainant made a request to the Environment Agency under the Re-use of Public Sector information Regulations 2015 (RPSI) to reuse information in a particular dataset (AfA134) relating to large raised reservoirs. The EA made the dataset available under a Conditional Licence with restrictions.
2. The Commissioner’s decision is that the EA breached regulation 12(2) by placing unnecessarily restrictive conditions on re-use. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation:
 - The Environment Agency shall permit re-use under the Open Government Licence.
3. 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

4. On 9 August 2019 the complainant made a request to the Environment Agency ("the EA") in the following terms:

"I would like to request access to some information held by the Environment Agency about Large Raised Reservoirs in England, and also permission to re-use that information under the Open Government Licence.

Please provide the latest version of information contained in the following two unpublished EA datasets:

Large Raised Reservoirs (AfA134)

<https://data.gov.uk/dataset/aa916e73-f575-4752-ad4c-590029d3641c/>

Reservoir Flood Map Maximum Flood Outline (Extent) (AfA113)

<https://data.gov.uk/dataset/4d3cc201-01ee-4ad9-a1cb-4777a8c55a00/>

or the equivalent latest information if the above datasets are no longer maintained.

My understanding is that this information should include, at a minimum, for each reservoir:

- *reservoir name*
- *status (e.g. in operation)*
- *a national grid reference*
- *undertaker name*
- *undertaker address*

And for each maximum flood outline:

- *a polygon*
- *an EA unique reference number for the reservoir*
- *reservoir name*

Please provide any data on maximum flood depth and maximum flood speed (for risk of inundation from large raised reservoirs) that the EA holds for areas within the maximum flood outlines. I gather this data may be held as an ASCII grid and/or as part of an additional data product. At minimum I am requesting this data at a level of detail equivalent to the spatial data underlying the "flood depth" and "flood

speed" layers described under the "flood risk from reservoirs" on this EA interactive map:

<https://flood-warning-information.service.gov.uk/long-term-flood-risk/map>

Please provide all of the above information to me in re-usable formats.

I am aware that some of the above information is available to view via the EA's long term flood risk information maps and via WMS. However, I do not consider that those services make the data reasonably accessible to me within the meaning of access to information laws."

5. The EA responded on 30 August 2019. The EA explained that it may be able to licence the Large Raised Reservoir dataset to the complainant and provided a link. The EA did not make any reference to the other dataset (AfA113). The EA also stated that information on flood depth and maximum flood speed was being withheld under the regulation 12(5)(a) exception.
6. The complainant requested an internal review of this decision on 30 August 2019. He firstly raised the fact that part of this request for datasets on maximum flood outline polygons had been ignored. Secondly, he questioned the reasoning behind the EA's suggestion that information in the datasets could not be provided. Thirdly, the complainant asked the EA to be more specific about the idea it "may be able" to licence the information to him. The complainant also pointed out the EA had sent him an invalid link.
7. Finally, the complainant wrote about his concerns with the conditions the EA intended to place on the information and how restrictive these were.
8. The EA conducted an internal review and responded on 24 October 2019. The EA considered and addressed each of the complainant's points. With regard to the decision to withhold the flood depth and maximum flood speed information; the EA maintained this should be withheld as it would adversely affect national security and public safety and was therefore excepted from disclosure under regulation 12(5)(a) of the EIR.
9. The EA accepted the link provided was incorrect and explained they were working to fix this. In terms of the conditions for datasets AfA134 and AfA112 the EA explained it could provide these in response to an information request but they are not published on data.gov.uk due to issues around public safety and national security and therefore re-use of the data would be restricted via the Conditional Licence.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. In particular he raised concerns that:
 - the EA's response was unclear on access and re-use of the requested information;
 - For the Large Raised Reservoirs dataset (AfA134) and the maximum flood outline polygons dataset (AfA113) the information had not been disclosed or any basis for withholding given; and
 - The Conditional licence terms referred to by the EA include conditions that are not compatible with his intended purpose and there is no reasoning to overcome the requirement in section 12 of the Reuse of Public Sector Information Regulations (RPSI) that the conditions imposed must not unnecessarily restrict the way in which the document can be reused.
12. During the course of the Commissioner's investigation the EA attempted to clarify its position in relation to the datasets referred to in the request. With regard to AfA134 (the dataset relating to Large Raised Reservoirs) the EA stated this was provided to the complainant in August 2019 as it is under a legislative requirement to make this information available. The EA stated that this dataset is a public register and is provided in an excel spreadsheet format but although it is a public register it is not held where it can be accessed freely due to restrictions. The EA stated it provides this dataset under a Conditional Licence.
13. With regard to dataset AfA113 (Reservoir Flood Map Maximum Flood Outline); the EA confirmed this had been withheld and it withheld information on the maximum flood depth and maximum flood speed that the EA holds within the maximum flood outlines but clarified this is actually held in a separate dataset (AfA180). This information was withheld under regulation 12(5)(a) and the link that was provided to the complainant was to a simplified version of the information available on gov.uk¹.

¹ <https://flood-warning-information.service.gov.uk/long-term-flood-risk/map?easting=292274.7&northing=90399.44&address=10023117048&map=Reservoirs>

14. The Commissioner therefore considers the scope of her investigation to be to determine if the EA has complied with the RPSI in the restrictions it has imposed on dataset AfA134.
15. The decision to withhold the dataset AfA113 and the maximum flood outlines and speed from dataset AfA180 under regulation 12(5)(a) of the EIR has been dealt with separately in decision notice IC-48075-B0D4.

Reasons for decision

The Re-use of Public Sector Information Regulations – regulation 12

16. In terms of dataset AfA134 which relates to Large Raised Reservoirs; the EA states this could be provided under a Conditional Licence.
17. The complainant argues that the terms imposed under the Conditional Licence are not compatible with his intended purpose and the EA has not provided any reasoning to overcome the requirement in section 12 of the RPSI that the conditions it imposes must not unnecessarily restrict the way in which the document can be used.
18. Regulation 12 of the RPSI states the following:
“(1) A public sector body may impose condition on re-use, where appropriate through a licence,
(2) Where conditions are imposed they must not unnecessarily restrict –
(a) the way in which a document can be re-used; or
(b) competition.”
19. The complainant argues the conditions are overly restrictive, particularly the bar on publication of the information as he requires the information to map environmental risk and has previously obtained information from the EA and Defra under the RPSI without issue.
20. The complainant had made it clear to the EA that under Regulation 6 of the RPSI he was seeking permission to re-use all information provided in response to the access request “for the purposes of combining that information with data from existing open public datasets and making the outputs available to others in a re-usable electronic form under an open licence.” The complainant had requested permission to re-use the information under the terms of the Open Government Licence (OGL) and argues that any restrictive licencing terms would ‘unnecessarily restrict’ the way in which the information can be re-used which would be contrary to Regulation 12 of the RPSI.

21. The Commissioner's guide to RPSI states that a public sector body may impose conditions on re-use but the conditions must be as open and non-restrictive as possible and that the easiest way to do this is to use the OGL which allows re-use of public sector information without charge for any purpose, commercial or otherwise, with minimal conditions. It also states that other licences may be appropriate in particular situations, including where there is a charge for re-use and that the UK Government Licensing Framework includes other types of standard licences.
22. The EA has confirmed the dataset has been provided under a Conditional Licence with conditions. These conditions were agreed by a panel comprising technical experts, lawyers and EA staff and they assessed the dataset attribute by attribute to determine how the dataset could be shared by balancing legal risks, guidance set out in the National Protocol, confidentiality and the EA's requirements to provide data and information in accordance with legislation.
23. The panel determined that the data should be shared in response to a request under the EIR but with certain conditions attached. This approach was taken to balance the need to disclose the data in AfA134 under the EA's Public Register and legislative duties whilst protecting National Security as identified in the National Protocol for the Handling, Transmission and Storage of Reservoir Information and Flood Maps.
24. The EA has confirmed the conditions imposed on the licensing of the information and these can be viewed online². Whilst these appear to allow for the information to be copied, published and transmitted, section 3 of the conditions states that where any of these activities are done (copying, publishing etc) the user *must* identify if an abstract is available for the data. For online data this is the metadata record on data.gov.uk but for other data it will be the record on the Register of Licence Abstracts.
25. In this case the complainant believes the EA has placed unnecessary restriction on the way the information in the dataset can be re-used. The complainant pointed to the EA's Register of Licence Abstracts which specifies conditions for use of several large reservoir datasets, including AfA134. The conditions include the following:

² <https://www.gov.uk/government/publications/environment-agency-conditional-licence/environment-agency-conditional-licence>

"1. You may use the Information for your internal or personal purposes and may only sublicense others to use it if you do so under a written licence which includes the terms of these conditions and the agreement and in particular may not allow any period of use longer than the period licensed to you.

2. Notwithstanding the permission in condition 1 you must not publish the Information in any way

4. We have restricted use of the Information as a result of legal restrictions placed upon us to protect the rights or confidentiality of others. <In this instance it is because National Security concerns. If you contact us in writing (this includes email) we will, as far as confidentiality rules allow, provide you with details including, if available, how you might seek permission from a third party to extend your use rights.

6.1 This Information must be treated as confidential information in accordance with this condition.

6.2 You may only disclose it (and only such part as is necessary) to such of your employees, agents and contractors who need to access to it to enable them to perform their obligations or permitted uses under or in connection with this agreement and you must, before allowing them access to it, unless they are already bound by alternative equivalent obligations, warn them of the duty of confidentiality under this condition and instruct them not to disclose it to anyone else.

26. The EA argues that it has to use a Conditional Licence in this case as an OGL is not possible as the special conditions must be applied to protect the use of national security information.
27. The Commissioner has viewed the National Protocol document which the EA states forms the basis for the decision to attach conditions to the reuse of the dataset. She notes from this that reservoir legislation requires that registers of certain information about regulated reservoirs are made available to the public. The information contained in these registers is prescribed in legislation. Any information requested that is not included within a public register should be considered for disclosure under the EIR (as is the case with the other datasets requested by the complainant).

28. The Commissioner has also reviewed the Reservoirs Act 1975³, particularly section 2 which refers to the registration of large raised reservoirs. This section makes clear that each relevant authority must establish and maintain a register for their area showing the large raised reservoirs and giving prescribed information about them. The registers must be maintained and any copy available for inspection at all reasonable times by an person. There is a caveat stating the Secretary of State can intervene if it appears any information in the register maintained by the EA would be contrary to the interests of national security. The Secretary of State can direct the EA not to include that information in the register. However, the Commissioner is not aware this is something that has been done.
29. The Commissioner has considered the competing arguments and is satisfied the complainant made a valid request for reuse and that his intended reuse is distinct from the initial purpose for which the information existed for. In the Commissioner's view the information will be able to be used in a number of different ways rather than simply serving a register of large raised reservoirs with grid references and details of size, depth and undertakers.
30. The conditions placed upon the reuse of the information appear to the Commissioner to be overly restrictive, particularly as the register is a legislative requirement – not just to exist but to be available for inspection. The conditions also appear to be contrary to the intention of the EU Directive, which the RPSI implement, to encourage the implementation of public sector information resources.
31. Taking all of the above into consideration, the Commissioner has decided that the EA has breached regulation 12(2) of RPSI by unnecessarily restricting the way in which the dataset can be re-used.

³ <https://www.legislation.gov.uk/ukpga/1975/23>

Right of appeal

32. 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

33. 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.
34. 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
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