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24 January 2023

The Information Commissioner's Office (ICO)
For the attention of [REDACTED], Senior Case Officer

By email to icocasework@ico.org.uk

ICO reference: IC-173007-K0T5

Concern about accessing or re-using information from a public body – request to re-use building energy performance information disclosed by the Department for Levelling Up, Housing and Communities (DLUHC)

Dear [REDACTED],

Thank you for your letter dated 18 January 2023, in response to my complaint.

My request to DLUHC in May 2022 sought the public sector body's permission to re-use the Energy Performance of Buildings Data (excluding the address and postcode fields in the data which are subject to Royal Mail copyright) "for the purpose of combining it with data from other open public datasets and making the outputs available to others in a re-usable electronic form under an open licence."

My complaint to the ICO is that DLUHC has failed to comply with the Re-use of Public Sector Information Regulations 2015, because in response to my re-use request it has neither made the Energy Performance of Buildings Data available to me for re-use, refused my request for re-use, nor offered conditions on which re-use will be permitted.

Regulation 12 of the RPSI does not require the public sector body to impose conditions on re-use, as you point out. However, that is not the source of my complaint. My particular concern is that DLUHC has failed to comply with Regulation 7 of the RPSI, because it has not permitted my re-use of the information.

Ostensibly, according to the [copyright page](#)¹ on its EPC website, DLUHC has permitted re-use of the non-address data under the terms of the [Open Government Licence v3](#).²

However, according to the [data protection page](#)³ on the same website, DLUHC considers that “[a]ddress level data concerning the energy performance of buildings constitute personal data.”

As all of the published EPC data is at address level, the plain meaning of that statement is that DLUHC regards all of the data (both the address data and the non-address data) as personal data.

The Open Government Licence v3 contains an exemption: the licence does not cover personal data in the information.

Consequently, by my interpretation, DLUHC’s application of the OGL is not effective to permit re-use of any of the non-address data. This problem arises irrespective of whether the non-address data is actually personal data. Either the information is not covered by the OGL because it is personal data, or application of the OGL cannot be construed as permission to use the information (within the meaning of RPSI) because DLUHC maintains that the information is personal data.

I was surprised to see in your letter that you consider the building energy performance information publicly disclosed by DLUHC to be personal data. That stance conflicts with advice that the ICO gave to the Scottish Government's Heat Networks & Investment Unit in 2013 and 2015.

I have attached a zip file containing correspondence that the Scottish Government released to me last year, and you may be interested in my [blog post](#)⁴ summarising the ICO advice. On the strength of that advice, [EPC data for Scotland](#)⁵ is currently published with a statement that it is not personal data. The EPC data for Scotland is substantively the same as that published by DLUHC for England and Wales.

For the avoidance of doubt, I am not seeking guidance either from DLUHC or the ICO on how to comply with my own data protection obligations (if any) when processing the information. I am only seeking permission to re-use the “non-address data” as intellectual property. IP and data protection are separate legal regimes – regardless of whether the information contains personal data, I cannot legally re-use the information for my purposes without effective permission from DLUHC.

Even if the non-address data is personal data, or contains personal data, I argue that the information is still in scope of the RPSI regulations. As you have highlighted, Regulation 5(7) states that the Regulations do not apply to “a document where access is excluded or

¹ <https://epc.opendatacommunities.org/docs/copyright>

² <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>

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

⁴ <https://www.owenboswarva.com/blog/post-hou5.htm>

⁵ <https://www.scottishepcregister.org.uk/>

restricted under information access legislation including on the grounds of protection of personal data ...” However, even if non-address data is or contains personal data, DLUHC has not excluded or restricted access – the data is accessible to any member of the public who registers on the EPC website. While DLUHC may be able to argue that the Regulations do not apply to the extent that my re-use (or re-use by others) “would be incompatible with the law concerning the protection of individuals with regard to the processing of personal data”, that cannot justify a blanket refusal to permit re-use – particularly given that, by publishing the data online, DLUHC seems content to allow users to make that judgement themselves.

In my request to DLUHC, I proposed use of the [Creative Commons Attribution License 4.0](https://creativecommons.org/licenses/by/4.0/) (CC-BY)⁶ as an acceptable approach that would permit my re-use of the non-address data. CC-BY is a widely-used open data licence, compatible with the Open Government Licence, that does not exclude personal data. I do not understand your description of CC-BY as a “form of copyright reuse protection”. However, for the purposes of handling my complaint, I do not think it is necessary for the ICO to take a view on the suitability of that licence. If it wished, DLUHC could comply with RPSI by simply confirming permission for me to re-use the non-address data without a specific licence or conditions (other than my statutory obligations under data protection law, if applicable).

I hope you will review your position in light of my arguments in this letter. Either way, I would be grateful for a decision notice in this case, as I may wish to appeal the outcome of my complaint. Thank you.

Yours sincerely,

Owen Boswarva

⁶ <https://creativecommons.org/licenses/by/4.0/>