

Navigating conflicting regulatory requirements for historic environment information

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Data and information regulations often overlap and contradict, with specific considerations for the sector. This article outlines how some challenges can be addressed, with case studies from Historic England (HE).

Setting the scene

The Reuse of Public Sector Information Regulations (RPSIR) (<https://www.legislation.gov.uk/uksi/2015/1415/contents>) and the INSPIRE Regulations (<https://www.legislation.gov.uk/uksi/2018/1338>) require the publication of some public sector data under an open licence. There are similar requirements from funding organisations, eg UK Research and Innovation (UKRI). However, the Government's *The Rose Book: guidance on knowledge asset management in government* (<https://www.gov.uk/government/publications/knowledge-asset-management-in-government>), requires the public sector to consider monetising knowledge assets. The Freedom of Information Act (Fol) and Environmental Information Regulations (EIR) require the release of information in response to requests, but the release and publication are complicated by Intellectual Property Rights (IPR) and UK General Data Protection Regulations (GDPR).

There are also ethical considerations, including the FAIR (Findable, Accessible, Interoperable and Reusable) and CARE (Collective benefit, Authority to control, Responsibility and Ethics) principles. The most common forms of open licensing are Creative Commons (CC) and Open Government Licence (OGL), with the latter developed for the public sector by The National Archives and based on CC-BY, the most open of the CC licences that still reserve rights.

Some organisations look to lock down access, apply exemptions or cite copyright and GDPR as reasons for not publishing or for limiting usage. Compliance is often seen as a low priority because RPSIR and INSPIRE are not proactively enforced by the Information Commissioner.

However, open publication is an ethical as well as regulatory issue and such issues can be overcome by working with information rights and legal teams, as has been done at Historic England.

Publishing the NHLE under OGL

When the National Heritage List for England (NHLE) was first published in 2011 it was made open access, but requests to reproduce had to be made.

When Historic England launched its Open Data Hub, clarifying the licensing situation became important as the metadata was open, and linked to the descriptions. Within the NHLE, the Parks and Gardens and Battlefields Registers were owned by Historic England and DCMS owned the remainder. Old printed lists contained a range of copyright statements, some said 'Crown Copyright', others had a paragraph explaining when copying was permitted, and some had nothing. The DCMS-owned entries were Crown and Crown Copyright, which can be licensed under an OGL. Additionally, because Historic England

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combined datasets to create the NHLE and the list entries have been amended to such a degree since, Historic England could claim database right over the whole of the NHLE. *Database right* is an area of copyright concerning information held in databases. Here, the normal provisions of copyright law apply to the content of databases and remain with the authors; however, the creation of the database itself also earns copyright, even if the data includes third-party copyrighted sources. The Copyright and Rights in Databases Regulations 1997 (<https://www.legislation.gov.uk/uksi/1997/3032/contents>), states by 'reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation'. The author is the person who 'takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation'. For NHLE, the author is HE, whose staff provided the intellectual input representing substantial investment. This can include third-party IPR provided three criteria are met: it is not excessively long; it is directly relevant and it is referenced. The most cited non-Crown Copyright sources in list entries are Pevsner and VCH. A sample of these were checked and in all the cases the information met the three criteria. Direct quotes remained a concern; although no full paragraphs from other publications were found, there were texts of inscriptions on monuments included that came from sources such as poems. The risk of a complaint for breach of copyright was adjudged to be low, and mitigation was put in place through DCMS agreeing that the Minor Amendment procedure could be used to edit descriptions if a copyright complaint was made. Following this assessment and mitigation, DCMS agreed that the whole NHLE could be published under OGL.

Transferring the data from the former NMR dataset to local Historic HERs under OGL

Under Principles 1 and 2 of the Heritage Information Access Strategy 'HERs should be the ... primary trusted source of investigative research data' and Historic England 'should be the ... primary trusted source of national datasets, such as the NHLE'. To achieve this, a series of projects are incorporating the former NMR dataset into HERs under OGL. There were similar issues concerning third-party IPR. As this database had been published online for many years on the former PastScape website without complaints, the risk was adjudged to be low. There were GDPR concerns, as records contained the names of living people associated with the sites, such as excavators, and members of staff who wrote reports. It could be shown that this information is already in the public domain through published reports and the like. There must be lawful basis for processing that is reasonable and fair in

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List Entry Number	List Entry Name	Grade	Date first listed	Date of most recent amendment	Capture scale	NHLE link	Area (ha)	National Grid Reference	Easting	Northing
1021466	20 and 20A Whitbourne Springs	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/	0.012	ST8338544428	383389	144430
1021467	TENNIS CORNER FARMHOUSE ...	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 82839 50851	382839	150851
1021468	CHALCOT HOUSE	II*	9/11/1968, 1:00 AM		1:2500	https://historicengland.org.uk/		ST 84294 48824	384294	148824
1021469	FIVE LORDS FARMHOUSE	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 82772 50187	382772	150187
1021470	PENLEIGH MILL	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 85722 50467	385722	150467
1021471	PENLEIGH HOUSE	II	9/11/1968, 1:00 AM		1:2500	https://historicengland.org.uk/		ST 85622 50828	385622	150828
1021472	PENLEIGH FARMHOUSE	II	9/11/1968, 1:00 AM		1:2500	https://historicengland.org.uk/		ST 85641 50894	385641	150894
1021473	CHURCH OF HOLY TRINITY	II*	9/11/1968, 1:00 AM		1:2500	https://historicengland.org.uk/		ST 84949 49813	384949	149813
1021474	The Old Vicarage	II	11/5/1987, 12:00 AM	9/8/1988, 1:00 AM	1:2500	https://historicengland.org.uk/		ST 84943 49714	384943	149714
1021475	20, High Street	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 85304 49940	385304	149940
1021476	CHURCH OF ST MARY	I	9/11/1968, 1:00 AM		1:2500	https://historicengland.org.uk/		ST 85800 49039	385800	149039
1021477	UNIDENTIFIED MONUMENT IN ...	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 85852 49031	385852	149031
1021478	9 PETTICOAT LANE	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST8550449795	385504	149795
1021479	BRIDGE FARMHOUSE	II	9/11/1968, 1:00 AM	11/5/1987, 12:00 AM	1:2500	https://historicengland.org.uk/		ST 85854 49773	385854	149773
1021480	COULSTON HOUSE WITH OUT...	II	9/2/1980, 1:00 AM		1:2500	https://historicengland.org.uk/		ST 85185 54177	395185	154177
1021481	THE COTTAGE	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 95051 54352	395051	154352
1021482	BAYNTON HOUSE	II	9/11/1968, 1:00 AM		1:2500	https://historicengland.org.uk/		ST 95134 53859	395134	153859
1021483	THE HOUSE OF STEPS	II	9/11/1968, 1:00 AM	11/5/1987, 12:00 AM	1:2500	https://historicengland.org.uk/		ST 94929 53977	394929	153977
1021484	IVYMILL FARMHOUSE AND MILL	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 92229 54280	392229	154280
1021485	TWO ORAM MONUMENTS IN T...	II	11/5/1987, 12:00 AM		1:2500	https://historicengland.org.uk/		ST 92606 53280	392606	153280

Metadata for the listed buildings dataset on the Historic England Open Data Hub.

Credit: Historic England

terms of individuals' expectations; for staff names, it was viewed that they wrote reports knowing they would be made public, as they were for inclusion in a public archive. It was also important to identify authors, as the person's specialist areas of knowledge were important for evaluating their findings. It was also deemed low risk as there had never been any complaints.

Conclusions

- although the RPSIR is under review, it appears requirements to publish under an open licence won't change and these take precedence over guidance prioritising the commercialisation of knowledge assets
- when deciding whether you are required to publish open data, consider any funding agreements, and whether it is covered by your organisation's public task or one of the exemptions in the regulations. Recent guidance on this has been published by Government Office of Technology Transfer, including a decision-making flowchart (<https://www.gov.uk/government/publications/re-use-of-public-sector-information-regulations-2015-and-crown-copyright-in-knowledge-asset-commercialisation>)
- making data open does not prevent charging for services utilising it or products derived from it
- publishing under an open licence reduces overheads of managing FOI/EIR and licence requests
- inclusion of third-party IPR does not prevent an organisation claiming database right over a dataset
- GDPR does not prohibit the publication of information containing the names of people, provided you can show that those names are already public; it's reasonable to assume that they knew their name would be made public and why including names is important
- with copyright and GDPR, take a risk-based approach – how likely is it a complaint will be made?
- data ethics go further than regulation. We have a duty to publish the results of research, and open data is part of this and meeting the FAIR principles. With some data this will also include the CARE principles; these don't prevent open publication but do require the involvement of the communities who own the data.



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