

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

Decision notice

Date: 19 August 2013

Public Authority: Department of Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested correspondence between the Department for Communities and Local Government (DCLG) and the Office for Nuclear Regulation (ONR) since 1 March 2012. The Complainant also requested communications made since 1 March 2012 with any other party relating to the proposed expansion of Lydd Airport and the nuclear safety issues associated with that expansion, together with any internal communications on the same subject.
2. The DCLG provided some information but withheld other information under the exceptions provided by regulations 12(4)(e) – internal communications, 12(4)(d) – material still in the course of completion, 12(5)(b) – course of justice, and 12(3) – personal data. The complainant has only contested the application of, and public interest in maintaining regulation 12(4)(e).
3. The Commissioner's decision is that the majority of the information withheld under regulation 12(4)(e) either does not qualify as an internal communication or, where the regulation has been correctly applied to an internal communication, the public interest in favour of maintaining the exception does not outweigh the public interest in disclosure. However there are some internal communications that should be withheld in the public interest.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the documents identified in the confidential annex to this decision, having first removed personal data that is necessary to avoid any breach of the Data Protection Act 1998.
5. 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

6. On 2 August 2012, the complainant wrote to the DCLG and requested information in the following terms:
 - 1) All communications between DCLG and the office of nuclear regulation (ONR), including the regulator, Mr Mike Weightman, since 1st March 2012 whether that be in letter, email or other formats.
 - 2) All internal communications within DCLG from 1 March 2012 relating to nuclear issues associated with the proposal to expand Lydd Airport that includes, but is not limited to, all internal communications on the subject of evidence written by Dr Trotta from Imperial College, all evidence presented by myself, Trudy Auty, (including the birdstrike report,) and the evidence written by Mr John Large.
 - 3) All external communications between DCLG and third parties from 1st March 2012 relating to nuclear matters associated with the proposed expansion of Lydd Airport. Including, but not limited to, all external communications on the subject of evidence written by Dr Trotta from Imperial college, all evidence presented by myself, Trudy Auty, (including the birdstrike report), and the evidence written by Mr John Large."
7. The DCLG responded on 4 September 2012. It confirmed it held information falling within the scope of the request and provided a limited amount of information. However it withheld other information under the exceptions provided by regulations 12(4)(e) – internal communications, 12(4)(d) – material still in the course of completion, 12(5)(b) – course of justice, and 12(3) – personal data.
8. The complainant accepted the application of regulation 12(5)(b) in respect of information which attracted legal professional privilege and

the need to redact personal data under regulation 12(3). However she requested an internal review of remaining exceptions, i.e. regulation 12(4)(e) – internal communications, and 12(4)(d) – incomplete works. Following an internal review the DCLG wrote to the complainant on 13 November 2012. It upheld its decision to withhold this information under regulations 12(4)(e) and (d).

Scope of the case

9. The complainant contacted the Commissioner on 20 November 2012 to complain about the way her request for information had been handled. During the course of the Commissioner's investigation the DCLG advised him that the only information being withheld under regulation 12(4)(d) – incomplete works, was the planning inspector's report. This had now been published and although the DCLG still considered it was correct to apply the exception at the time of the request, it informed the Commissioner that it no longer wished to rely on that exception. In light of this the complainant agreed to withdraw her complaint over the application of regulation 12(4)(d).
10. The Commissioner considers that the scope of his investigation is whether the exception provided by regulation 12(4)(e) – internal communications is engaged and, if so, whether the public interest favours maintaining those exceptions.

Background

11. The request relates to planning applications for the expansion of Lydd Airport in Kent. The airport is close to the Dungeness Nuclear Power Station as well as a number of wetland sites which provide habitats for wildfowl. The application generated both support and opposition locally.
12. The planning applications were decided jointly by the Secretary of State for Communities and Local Government and the Secretary of State for Transport. The applications were called in for decision by the Secretaries of State in June 2010. A planning inspector was appointed who carried out a public inquiry into the proposal between February and September 2011. Following that inquiry further submissions were sought from interested parties.
13. The decision of the Secretaries of State was issued on 10 April 2013. That decision granted planning permission for the expansion subject to conditions.

Reasons for decision

Regulation 12(4)(e) internal communications

14. Regulation 12(4)(e) EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
15. This exception was applied to the majority of the information that was originally withheld. It has been applied to a range of email communications including:
 - those sent purely within the DCLG,
 - those between itself and other government departments,
 - those between itself and another public body,
 - those between itself and members of the public including those parties contributing to the consultation process
 - as well as chains of emails which often include combinations of the above.
16. A number of the emails contain attachments.
17. The first thing the Commissioner has done is to consider the extent these emails can be classified as internal communications.
18. Regulation 12(8) makes it clear that internal communications include communications between government departments. This is of particular significance to this request as there are two government departments involved in planning the process for Lydd Airport, the DCLG, to which the request had been made to, and the Department for Transport (DfT). Communications between these two departments are covered by the exception.
19. However other emails have been sent to or from the Office for Nuclear Regulation (ONR). The ONR is an agency of the Health and Safety Executive (HSE) which is not a government department. The HSE is non-departmental public body. It follows that communications between the DCLG and ONR are not internal communications and so cannot be protected by this exception.
20. The Commissioner finds that the DCLG was wrong to apply regulation 12(4)(e) to communications between itself and the ONR.

21. Many of the documents withheld under the exception for internal communications consist of emails chains. Often these email chains are initiated by an email from an external party. Those emails, or the responses to those emails, are then forwarded within the department or between departments.
22. An email from an external party does not become an internal communication simply because it has been circulated in this way. The Commissioner has therefore gone through the email chains and identified the external emails within those chains, including any from the ONR, and other parties to the consultation process. These external emails cannot be withheld under regulation 12(4)(e).
23. Those emails which the Commissioner finds are not internal communications are identified in the confidential annexe to this notice. They should be disclosed subject to any redactions necessary to avoid a breach of the Data Protection Act 1998. When redacting personal data the DCLG should take account of any information that is already in the public domain as a result of the consultation exercise. Even where it is necessary to redact names, the DCLG should ensure that, where appropriate, the identity of the organisation represented by that individual is disclosed.
24. However the final email, or emails, within those chains are internal communications in that they are between the DCLG's own staff or the DCLG staff and officers from another government department. These emails are covered by the exception.
25. The Commissioner is therefore satisfied that within the disputed information there are;
 - emails exchanges purely between officers of DCLG,
 - email exchanges purely between the DCLG and other government departments,
 - emails between DCLG officers or DCLG officers and officers from other government departments which form the head of chains of emails.
26. The Commissioner is satisfied that the exception provided by regulation 12(4)(e) does apply to such emails. However regulation 12(4)(e) is subject to the public interest test.

Public interest test

27. The public interest test is set out at regulation 12(1)(b) and states that where information is covered by an exception that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
28. The DCLG has argued that to disclose the information withheld under regulation 12(4)(e) would have a number of effects. The first is that the disclosure would erode the safe space required when dealing with, and making decisions on planning applications such as the proposed expansion of Lydd Airport.
29. Safe space describes the private thinking space which a body needs when considering issues and making decisions. It is accepted that decision makers benefit from having time to focus on the issues under consideration. There is a value in it being free to explore all the various options available, to receive full and frank advice on those options and to do so out of the glare of the public eye. It is accepted that this is more likely to lead to all relevant issues being fully considered and the most robust decision making.
30. The need for safe space is obviously strongest at the time an issue is actually being considered. At the time of the request no decision had yet been taken on whether to approve the planning application. The application had been called in and had been the subject of a public inquiry. The planning inspector's report was sent to the Secretaries of State in March 2012. At the time of the request, August 2012, no decision had been made. It is understood that following the public inquiry interested parties had been invited to provide further representation to the two government departments. These were then shared with the other interested parties so that they had a final opportunity to comment on each other's submissions. This referring back to the interested parties is known as a 'reffing' back exercise. This 'reffing' back exercise was drawing to a conclusion at the time the request was made.
31. The Commissioner recognises that a planning decision on whether to allow the expansion of an airport is a very complex one. He appreciates the need to take account of competing demands such as national and local economic growth, wildlife conservation, issues of nuclear safety and the many arguments presented by campaigners both for and against the expansion.
32. The DCLG's public interest arguments stress the importance of safe space, both for officials and ministers when considering these

matters. If the disputed information had directly addressed these issues then the safe space arguments would carry significant weight.

33. However the majority of disputed information does not contain advice from officials or provide any analysis of the complex issues under consideration and that would determine the outcome of the planning application. Instead the Commissioner would characterise the communications as relating to the management of the consultation process and in particular the 'reffing' back exercise. Many of the emails simply deal with the mechanics of this exercise, for example organising the sending out of letters. Naturally, with two government departments involved, it was necessary for the officials from each department to keep each other informed of developments and co-ordinate their efforts.
34. The vast majority of the communications created during this management process do not contain deliberations, nor do they express views or provide advice on the issues at the heart of the planning decision. Most of them are brief, to the point and predictable. In light of this the Commissioner has given very little, if any weight to the DCLG's arguments about the need for safe space.
35. There are a small number emails which do report on on-going deliberations, in one case by ministers. However the issues under consideration are again more to do with the mechanics of the consultation exercise rather than relating to the main factors on which the planning decision will depend. Furthermore by the time of the request these deliberations had already been concluded and the outcome would be apparent to the parties involved.
36. The Commissioner also recognises the need for planning decisions to be made in a timely manner. This can only be achieved if the consultation exercise that feeds in to that decision is managed efficiently and brought to a conclusion within a reasonable time. However in managing the consultation exercise the departments need to make sure that the process is fair, otherwise there could be an argument that the planning decision based on that process was flawed.
37. The DCLG has explained that a planning decision of this complexity has to be robust as otherwise it would be vulnerable to legal challenge. If a decision is quashed the planning decision is referred back to the Secretaries of State for reconsideration. This obviously has resource implications. However the focus of the DCLG's arguments are on the need to allow proper consideration of the actual factors that would determine a planning application rather than the management of the consultation exercise.

38. Nevertheless the Commissioner can understand the need to ensure that all elements of the planning process are robust, including the consultation exercise. Therefore the Commissioner would accept that there is a public interest in withholding information if its disclosure, at the time of the request, would erode the safe space necessary to manage to the 'reffing' back process in a fair, yet timely manner.
39. The Commissioner is satisfied that none of the information withheld solely under regulation 12(4)(e) - internal communications, deals directly with issues of fairness. Nor can the Commissioner see how its disclosure, at the time of the request, would hinder the DCLG's ability to bring the 'reffing' exercise to a conclusion.
40. In light of this the Commissioner has given little if any weight to arguments that disclosing the information withheld under regulation 12(4)(e) would undermine the robustness of the ultimate decision on the planning applications.
41. The DCLG has also argued that disclosing the requested information would have a chilling effect and so hinder the consideration of similar issues in future planning cases. The chilling effect describes the risk that disclosing information will make officials more cautious of airing their views in the future for fear that at some later date that information may also be disclosed.
42. At the time of the request the DCLG was still in the process of drawing the 'reffing' exercise to a conclusion and the planning decision had not been made. Therefore at the time of the request there was a strong possibility that the management of the consultation exercise would be discussed again as would wider issues relating to the planning application for Lydd airport.
43. It is generally accepted that disclosing information will have more of a chilling effect on the discussion of issues which are closely related to that information. Furthermore the more recent the disclosure, the greater the chilling effect will be. This would suggest that disclosing information on matters that were still on going at the time of the request would have a significant chilling effect.
44. However, having studied the withheld information the Commissioner is satisfied that the majority of the communications are simply about the mechanics of the consultation exercise and so it is hard to see what scope there would be to have any chilling effect. Even where the emails focus more on the need to control the 'reffing' exercise they are quite succinct and do not discuss matters in any great detail. Therefore the Commissioner does not accept that if these emails were to be disclosed officials would automatically interpret their disclosure

as signalling that any detailed discussions of related issues would be disclosed in the future. He therefore attaches little, if any weight, to the argument that disclosing these emails would have a chilling effect.

45. The complainant was a party to the 'reffering' exercise. The DCLG have also argued that it would be inappropriate to disclose the requested information to the complainant and not to others who had been involved in the consultation process. The argument seems to be that this would create an unlevel playing field. However a disclosure under the EIR is considered a disclosure to the world at large and so in theory if the information was disclosed to the complainant it could also be made available to the other parties. Furthermore, having studied the disputed information, the Commissioner does not accept that the actual information in dispute would aid anyone either in their support or opposition of the planning proposal. This is because the internal communications do not discuss the actual merits of the planning application. In light of this the Commissioner has given no weight to this argument.
46. There is a very small number of emails which refer to issues on which legal advice has been sought or provides the gist of that advice, but which have not been withheld under regulation 12(5)(b), the exception that protects the course of justice, including legal professional privilege. The Commissioner understands the importance in public authorities being able to seek frank, professional advice when deciding how to deal with a potentially difficult problem. Furthermore it is important that public authorities can, where necessary, share that advice with partners, such as officials from another government department. Considering the proximity of the event to which the advice refers to the date of the request, the Commissioner does accept the need for safe space in respect to these emails. The Commissioner also accepts that there could be a chilling effect in that disclosure would make officials more cautious of seeking legal advice and sharing that advice with partner departments in the future. In light of this the Commissioner does accept that there are weighty public interest factors in favour of withholding these emails.
47. Apart from the communications referred to at paragraphs 46 above the Commissioner finds that the public interest in withholding the information is very limited. However there is some, and this needs to be weighed against the public interest in disclosing the information. If the public interest in favour of disclosure does not at least equal the public interest in withholding the information, the information will not be released.
48. There is a public interest in public authorities being seen to be transparent and open in how they conduct their business. Openness

promotes accountability and importantly increases public understanding of how public authorities perform their functions.

49. In this particular case the information relates to the conduct of a consultation exercise which was undertaken to provide people with the opportunity to contribute to two major planning decisions. The decision whether or not to grant planning permission would have important effects on the local economy and the environment. It is important that the public have confidence in the way such consultations are carried out and that they provide a fair opportunity for competing views to be aired and considered.
50. The Commissioner considers that there is a public interest in disclosing information which would throw light on how a consultation exercise of this nature is conducted. Disclosing such information would help the public understand how to make best use of the opportunity provided by these consultation exercises and therefore encourage their participation.
51. Disclosing the information would also reassure people that the system was fair and increase confidence in the process and the Department's competence at managing planning consultations.
52. When balancing the public interest the Commissioner considers that, at the time of request there would be very little adverse affect to the planning process if the majority of the disputed information was disclosed. Therefore the Commissioner finds that in relation to the majority of the information which engages the exception, the public interest in openness and transparency is greater than the public interest in maintaining the exception. This information is identified in the confidential annexe to this notice and should be disclosed subject to any redactions necessary to avoid breaching the Data Protection Act 1998. As before, when redacting personal data the DCLG should take account of any information that is already in the public domain as a result of the consultation exercise. Even where it is necessary to redact names, the DCLG should ensure that, where appropriate, the identity of the organisation represented by that individual is disclosed.
53. However there is a limited amount of information which the Commissioner considers would be harmful to disclose. This information comprises of the communications relating to legal advice as discussed in paragraph 46. In respect of this information the Commissioner considers the adverse affect that would be caused by disclosing it does outweigh the public interest in openness and transparency. This information is identified in the confidential annexe and should be withheld.

54. There is one attachment to an internal communication which contains a very brief summary of the planning inspector's report. Although the inspector's report is now in the public domain, at the time of the request it was not available. Having studied the DCLG's final submissions it appears that no exception has been applied to this attachment or the accompanying email. In light of this the information must be disclosed. However the Commissioner does recognise that at the time of the request this information was sensitive and that there would have been a significant public interest in withholding it in order to prevent the erosion of the safe space at that time.

Other Matters

55. Although not forming part of this decision the Commissioner feels the need to express his concern over the following matter. The DCLG was given 20 working days to respond to the Commissioner's enquiries. However it failed to provide its full and final response until 41 working days after that deadline. This seriously delayed the Commissioner's investigation.

Right of appeal

56. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

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