

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 8 July 2014

**Public Authority:** Department for Environment, Food & Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

### **Decision (including any steps ordered)**

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1. The complainant made a request for information to the Department for Environment, Food & Rural Affairs (Defra) for details of landfill diversion projects which formed part of Defra's waste management Delivery Programme (WIDP). Defra disclosed most of the requested information but withheld some information by relying on the regulation 12(5)(e) (commercial confidentiality) exception. Defra also introduced the regulation 12(4)(e) (internal communications) exception during the course of the Commissioner's investigation.
2. The Commissioner has considered the complaint and found that both regulation 12(4)(e) and regulation 12(5)(e) are engaged. Whilst he found that for regulation 12(5)(e) the public interest favoured disclosure, he found that the public interest in maintaining regulation 12(4)(e) outweighed the public interest in disclosure and therefore the information was correctly withheld. The Commissioner requires no steps to be taken.

### **Request and response**

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3. On 7 October 2013 the complainant made a request for information to Defra for a copy of the latest version of the landfill diversion capacity

information held by Defra on local authority and merchant landfill diversion projects and their associated Delivery Adjustment Rates.

4. Defra responded to the request on 1 November 2013 when it disclosed most of the information requested. However, information relating to the "Red-Amber-Green Ratings" and the "associated Delivery Adjustment Rates" were redacted under the exception in regulation 12(5)(e) of the EIR to protect the legitimate economic interests of the infrastructure projects, and because disclosure would be likely to damage the interests of the projects involved.
5. On 4 November 2013 the complainant asked Defra to carry out an internal review of its handling of the request. In particular the complainant queried the decision to redact information because he argued that similar information had already been placed in the public domain, including the Delivery Adjustment rates which he said had already been published by Defra.
6. Defra presented the findings of its internal review on 2 December 2013 when it confirmed that it was upholding the initial decision to withhold the information under the regulation 12(5)(e) exception.

### **Scope of the case**

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7. On 10 December 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner agreed that the scope of his investigation would be to consider whether Defra was correct to redact some of the information falling within the scope of his request.
8. During the course of the Commissioner's investigation Defra also sought to rely on the regulation 12(4)(e) exception to withhold the redacted information. Therefore the Commissioner has considered whether both regulations 12(4)(e) and 12(5)(e) have been applied correctly.

### **Reasons for decision**

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9. The requested information in this case is a list of projects proposed by local authorities and developers to develop plants to divert waste from landfill. Defra has disclosed the list but redacted the RAG ratings and

Delivery Adjustment rates for each project under the exception in regulation 12(5)(e) of the EIR. The RAG ratings are assessments made by Defra on whether a project is 'red', 'amber' or 'green' based on the likelihood of the project proceeding by 2020.

10. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
11. Defra has said that regulation 12(5)(e) is being applied because the RAG ratings and Delivery Adjustment Rates are commercially sensitive. If project developers (in the public or private sector) became aware of Defra's assessment of the status of their project they may take a negative view on their further involvement or development of the project which in some cases, it says, could terminate the development of the project at considerable cost to the public/private sector.
12. In considering the application of regulation 12(5)(e) the Commissioner considers that the following four criteria have to be met:
  - (i) The information has to be commercial or industrial in nature;
  - (ii) The information has to be subject to a duty of confidence provided by law;
  - (iii) The confidentiality has to be required to protect an economic interest; and
  - (iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.
13. In this case Defra has argued that the withheld information is commercial or industrial because it relates to infrastructure projects being developed by Councils and private sector developers (bidders, sub-contractors, funders) which could destabilise the projects and wider market if released. For information to be commercial it will need to relate to a commercial activity, either of the public authority or a third party. Here, the Commissioner is satisfied that the information can be said to be commercial in nature given that the projects involve partners from the private sector and are commercial enterprises.
14. With regard to point (ii) Defra argues that this information is subject to the common law duty of confidence. The test for a common law duty of confidence requires that information has the necessary quality of confidence and that it was provided under an obligation of confidence. On the first point, information will have the necessary quality of confidence if it has been held in confidence and is not trivial. In this case the Commissioner is satisfied that, with the one exception referred to at

paragraph 22, the information has not previously been disclosed, is not trivial and therefore this element of the test is met.

15. As to whether the information was provided in circumstances importing an obligation of confidence, Defra explained that the RAG ratings are decided on by their experts using their professional judgement but are based on information supplied by local authorities. This information is covered by a Memorandum of Understanding (MoU) confirming that the information will be held as confidential. Therefore an obligation of confidence is owed to the local authorities. However, it also said that not only is there an explicit obligation of confidence in the MoU, there is an implied obligation of confidence as the local authorities have an expectation that information they supply will solely be used for Defra's internal reporting and monitoring of the project. In light of this the Commissioner is satisfied that the withheld information can be said to be subject to a duty of confidence provided by law.
16. Parts ii) and iv) of the test are closely linked and the Commissioner has dealt with these together. Defra argues that where it has assessed that a project is at risk of running behind schedule or not going ahead (based on information given to, or gathered by, Defra in confidence), this could, if known damage the reputation of the project or make it difficult to attract finance. Therefore, Defra considers that the confidentiality is necessary to protect the economic interests of the local authorities which would be threatened by disclosure.
17. Defra further explained how disclosure would adversely affect the success of the projects and thereby the economic interests of the local authorities. It stressed that the RAG ratings were highly commercially sensitive because if made public, the wider market which it described as "local authorities, private sector contractors and suppliers, funders, advisors, etc." may make critical decisions on the project based on the ratings Defra has given it, possibly destabilising on-going projects. In particular it said that if project developers became aware of the RAG rating or Delivery Adjustment rate status of their project, they may take a negative view on their further involvement in or development of the project.
18. Defra also suggested that the ratings could be misunderstood when taken out of context, for instance they could be taken as a ranking of projects that are 'good' or 'bad' thereby damaging the reputation of projects with a lower rating.
19. The Commissioner has considered the arguments advanced by Defra and accepts that for any projects with a lower rating, disclosure would lead to some negative publicity which could affect the reputation of the

projects concerned. This in itself amounts to an adverse effect which is sufficient to engage the exception although the Commissioner is not convinced that disclosure would actually jeopardise the success of any of the projects in the way Defra suggests. The Commissioner has considered this point in more detail when considering the public interest test.

20. The Commissioner is satisfied that the regulation 12(5)(e) exception is engaged and therefore he now goes on to consider the public interest test.

### **Public Interest Test**

21. A public authority may only refuse to disclose information if an exception applies and in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. However under EIR there is a general presumption in favour of disclosure provided by regulation 12(2) of the EIR.

### **Arguments in favour of disclosure**

22. The complainant argued that information on the status of projects is already in the public domain and that when combined with information disclosed by Defra it was possible to determine the likelihood of a project being successful by 2020 and the ratings assigned by Defra. In particular, he highlighted the fact that Defra had already released information on the status of some projects in its report forecasting the likelihood of the UK meeting the 2020 targets on reducing the amount of waste sent to landfill.

*"Of the three projects yet to reach financial close, two have a RAG rating of 'amber red' at the time of this analysis and one has a RAG rating of 'red'. The North Yorkshire and York project is the one to have been assessed as 'red'. The principal reason is that the securing of a satisfactory planning permission is likely to be problematic given the controversial nature of the development. Recent experience of such projects would suggest that securing planning may take three to four years. The time to financially close the project and the subsequent build period pushes the delivery period to around 2020. Given this uncertainty, the project has been deemed unlikely to go live by 2020."*<sup>1</sup>

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<sup>1</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/251567/pb13883-forecasting-2020-waste-arising-131017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251567/pb13883-forecasting-2020-waste-arising-131017.pdf)

23. The complainant suggested that it was unlikely Defra would have published this information if it had been highly sensitive. He argued that disclosure of the withheld information would not significantly damage the interests of the projects involved but would allow the public to understand whether the latest version of the government's database accurately reflects reality.

24. For its part, Defra acknowledged the following factors in favour of disclosure:

*"There is a strong public interest in the disclosure of information used to inform the decision to withdraw the provisional allocation of funding from waste infrastructure projects. It is important that members of the public are able to understand why decisions are taken, and to be reassured that the decisions taken follow fair and open procedures. It is also important that members of the public can trust that Defra is an open and transparent department."* (Some of the projects included on the list had government funding withdrawn).

25. The information in question concerns waste management. This is an important issue impacting both on the environment and on consumers in terms of the cost of developing the most appropriate sites and methods.

### **Arguments in favour of maintaining the exemption**

26. Defra argues that the public interest favours maintaining the exemption because disclosure would damage the projects which have been given a low RAG rating. It suggests that disclosure could cause the projects to fall behind schedule with the ultimate potential to stop projects going ahead at all. The adverse effect on the economic interests would be significant as individual projects are multi-million pound investments.

27. In response to the complainant's point that the RAG ratings for some of the projects had already been released, Defra responded by saying that it had received feedback from one of the projects that confirmed that confidence in the project had been severely affected.

### **Balance of the public interest**

28. The Commissioner has first considered the arguments put forward by Defra for maintaining the exception and as indicated above, he has reached the view that the adverse effect of disclosure is limited. Whilst he accepts that there could be some negative publicity if it was revealed that Defra had assigned a particular project a low RAG rating, he does not accept that this would be sufficient to actually threaten the success of any of the projects. On this point the Commissioner has taken into

account the argument made by the complainant that stakeholders such as potential investors would already be able to make their own judgement on the prospects of a project proceeding based on information already in the public domain.

29. Defra explained that in deciding on RAG ratings its Waste Infrastructure Delivery Programme (WIDP) team contacts the local authority for each project and gathers information on the planning status, procurement status (the prospects for concluding contracts in time) and the financing status. Based on this information, and by applying the professional judgement of their team, a RAG rating is assigned to the project. It explained that in the first instance the RAG rating is determined by reference to the type of project (Private Finance Initiative (PFI), Public Private Partnership (PPP) or Merchant) and its status with respect to its development (in procurement, seeking approvals, in construction etc.) as set out in the table below.
30. Finally, the RAG rating is reviewed by an expert from the WIDP programme who applies a professional judgement that can downgrade the derived RAG rating if in their judgement the rating is overly optimistic or is unlikely to occur as proposed, which it said was usually down to reasons of planning and/or financing.

	<b>PFI</b>	<b>PPP</b>	<b>Merchant</b>	<b>Project Status</b>
<b>Blue</b>	100%	100%	100%	Fully operational
<b>Green</b>	90%	90%	90%	Commissioning
<b>Amber-Green</b>	80%	80%	80%	Financial close with planning
<b>Amber</b>	70%	70%	40%	Financial close, no planning
<b>Amber-Red</b>	60%	60%	20%	In procurement, no planning
<b>Red</b>	20%	20%	3%	Unlikely to go live by 2020
<b>n/a</b>	0%	0%	0%	Cancelled project

31. In light of this, the Commissioner takes the view that potential investors are unlikely to be deterred from investing in a project solely because it has been given a low RAG rating by Defra on the likelihood of it being operational by 2020. This is because the circumstances that determine whether a project is likely to meet the 2020 deadline will be known to interested parties. For instance it will be in the public domain whether a project has been granted planning permission and those with knowledge of the industry and the planning system would also be able to anticipate which projects are more likely to have greater difficulty attracting

planning permission. Furthermore, any potential investors or other stakeholders such as developers would be expected to do their own form of due diligence or checks to ensure the likelihood of a particular project being successful and as such would have a better understanding of which projects would have greater difficulty in meeting the 2020 deadline. Moreover, the RAG ratings only relate to whether a project will go live by 2020, not whether the project is viable or whether it will become operational after 2020. Therefore, potential investors would not necessarily be deterred from becoming involved in a particular project due to disclosure of the RAG ratings.

32. That said, the Commissioner has given some weight to the arguments in favour of maintaining the exception because he accepts that disclosure could lead to some negative publicity for those projects with a low RAG rating because this would inevitably cause some disruption and would likely involve the local authorities and developers having to do some damage limitation exercise or briefings to respond to any media speculation which would otherwise not be necessary. However, as he has explained the Commissioner considers that this would not fundamentally affect the success of any of the projects and therefore the public interest in maintaining the exception is limited.
33. As regards the public interest in disclosure, the Commissioner considers that releasing the redacted information would inform the general public of the status of local projects which affect them. It would also, as the complainant suggested, allow for a better understanding of whether Defra's monitoring of projects is up to date and an accurate reflection of the current situation. It is important that Defra has an accurate picture of which projects are expected to be operational by 2020 and their expected capacity so that it can forecast whether the UK will meet its targets on reducing the amount of waste sent to landfill. However, the Commissioner also recognises that Defra has already disclosed a certain amount of information on landfill diversion capacity and so the public interest in greater transparency is somewhat reduced.
34. There are arguments on both sides and to some extent the public interest test is finely balanced, but the Commissioner has decided, bearing in mind the EIR's presumption in favour of disclosure, that the public interest in maintaining the regulation 12(5)(e) exception does not outweigh the public interest in disclosure.

#### **12(4)(e) – Internal communications**

35. During the course of the Commissioner's investigation Defra also said that it wished to rely on the section 12(4)(e) exception which provides



that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

36. The Commissioner has recently published guidance on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.' The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance on the exception, the Commissioner acknowledged that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.
37. The Commissioner considers that communications within one public authority will constitute internal communications for the purpose of this exception. All central government departments (including executive agencies) are deemed to be one public authority. However, communications between a public authority and a third party will not constitute internal communications except in very limited circumstances.
38. In this case Defra explained that the RAG ratings are created by 'transactors' based in its WIDP team. The transactors are members of 'Local Partnerships' an organisation jointly owned by HM Treasury and the Local Government Association but who work in partnership with Defra to help progress the projects. The Commissioner considers that these members of staff are effectively embedded within Defra and therefore information they produce to be shared within Defra can be considered to be an internal communication. Defra explained that the RAG ratings are solely for internal use and are not shared with anyone outside of Defra. They are shared across the WIDP team and are used as a basis to judge the progress of the different projects. Consequently, the Commissioner is satisfied that the RAG ratings and the associated delivery adjustment rates can be considered to be internal communications and that therefore the regulation 12(4)(e) exception is engaged. Again, the Commissioner has gone on to consider the public interest test, balancing the public interest in maintaining the exception against the public interest in disclosure.

### **Public interest test**

#### **Public interest in disclosure**

39. The Commissioner considers that the arguments in favour of disclosure relating to regulation 12(5)(e) are equally relevant to regulation 12(4)(e) and are as discussed at paragraph 22-25 above.

## **Public interest in maintaining the exception**

40. Defra argues that the Waste Infrastructure Delivery Programme includes a portfolio of waste management projects that are supported by Defra through private finance initiative or public private partnership. The projects are either under development (at various phases from planning determination, construction, commissioning to 'post financial close') or they are operational. Therefore, Defra considers that this programme is a live issue and that the public interest in maintaining the exception is stronger.
41. It argues that in order for policies to be developed and implemented effectively, civil servants must be given the space to consider and discuss issues in private. It said that it was important that policy officials are able to consider and produce advice without fear that every step of the process will be open to scrutiny before decisions have been finalised.
42. Defra also suggests that staff would be inhibited when considering the projects in the future and so may feel that they cannot allocate a 'red' RAG rating for fear that it would affect the projects involved if disclosed. This could, it suggests, lead to poorer decision making and implementation of policy because the decisions would no longer be based on accurate information or unbiased judgements of the projects concerned.

## **Balance of the public interest arguments**

43. Again, the Commissioner accepts that there is a strong public interest in disclosure for the reasons he has already discussed. However, he considers that the public interest is balanced differently under the regulation 12(4)(e) exception and that in particular the arguments surrounding Defra needing a safe space to manage the Waste Infrastructure Delivery Programme carry significant weight.
44. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. The need for a safe space is greatest when an issue or policy is still live – that is to say a matter that is still on-going and where a definitive decision has not been made. In this case Defra explained that whilst some projects are operational, many are still under development. The WIDP will continue to work with the different projects and monitor their progress.
45. In the circumstances, the Commissioner considers that the information can be said to relate to an issue that was still live at the time of the request. Therefore, there was a public interest in allowing Defra a safe

space to debate and reach decisions without the threat or media involvement and external comment or scrutiny that would have resulted from disclosure. Defra's ability to manage the WIDP programme would be inhibited if the information was disclosed.

46. Whilst the Commissioner is satisfied that there was a public interest in allowing Defra a safe space to manage the projects involved in the WIDP programme, he does not accept that Defra staff would feel that they could not allocate a red RAG rating in future, as Defra suggests. This would be counterproductive and would essentially undermine the purpose of the RAG ratings altogether. It is hard to believe that civil servants would knowingly underestimate a RAG rating of a multi-million pound project for fear that it might be disclosed at some point in the future. In the Commissioner's view the public rightly expects high standards of professionalism and integrity from its civil servants and therefore he considers that the scenario suggested by Defra is very unlikely. In any event, the Commissioner would expect that this kind of unprofessional behaviour would be addressed through effective management and there should be adequate safeguards in place to ensure this does not occur.
47. That said, the Commissioner has decided that the importance of allowing Defra a safe space to manage the WIDP programme without outside interference of negative publicity and media speculation is enough to tip the balance in favour of maintaining the exception.
48. The Commissioner has decided that in all the circumstances of the case the public interest in maintaining the regulation 12(4)(e) exception outweighs the public interest in disclosure.

## Right of appeal

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49. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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 .....**

**Pamela Clements**  
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