

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

### **Decision notice**

**Date:** 16 October 2014

**Public Authority:** Department for Communities and Local Government

**Address:** Eland House  
Bressenden Place  
London  
SW1E 5DU

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

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1. The complainant has requested recorded information associated with an application for Planning Permission under reference S/13/0809/RM. The application relates to the installation of ground mounted photovoltaic solar arrays and other works at the Science Museum in Swindon.
2. The Commissioner's decision is that the Department for Communities and Local Government has correctly withheld information from the complainant in reliance of Regulations 12(4)(e) and 13 of the EIR.
3. The Commissioner does not require the public authority to take any further action in this matter.

#### **Request and response**

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4. On 9 April 2014, the complainant wrote to the Department for Communities and Local Government ("the DCLG") and requested information in the following terms:
  1. "What documentation was received from Swindon Borough Council in December 2013 in relation to the 'Application for Planning Permission for installation of ground mounted photovoltaic solar arrays together with transformer stations, internal access track, landscaping, fencing, security measures and ancillary

infrastructures all at the Science Museum, Orbital Road, Wroughton, Swindon (lpa app: s/13/0809/RM?)

2. What recommendation was proffered by the case work officer?
  3. Why did the decision take more than 21 days?
  4. When was the case officer's recommendation sent to the planning minister?
  5. What correspondence did the planning minister receive directly from the objector bodies i.e. Defra, DCMS, English Heritage and Natural England?
  6. What correspondence (objections, support and no opinions) was received by National Planning Casework Unit / DCLG by any third parties / other organisations?
  7. In addition to the LPA and applicant which other organisations / bodies were notified of the Secretary of State decision to 'call in' the application?"
5. On 12 May 2014 the National Planning Casework Unit of the DCLG made its response to the complainant's request for information. The DCLG advised him that it held some of the information he seeks and that it fell to be considered under the EIR. The DCLG sent the complainant some of the information it holds, but withheld other pieces of information in reliance of the exceptions to disclosure provided by Regulation 13 – personal data and Regulation 12(4)(e) – internal communications. The DCLG responded to the individual elements of the complainant's request as follows:

"In relation to 1. the documentation is publically available on the Swindon Council website. For your convenience a copy of the covering letter referring the case to the Secretary of State is included. This lists the documentation concerned.

In relation to 2. a copy of the relevant report is included. However parts of the information including the recommendation are withheld...[in reliance of the Regulation 13].

In relation to 3. this information is not held.

In relation to 4. as per the explanation above it falls within the description of exemptions (sic) provided.

In relation to 5. copies are provided.

In relation to 6. copies are provided. I have included a letter of support from the Science Museum for your information, although it should be noted that they are the joint applicant rather than a supporting organisation/body.

In relation to 7. the bodies and organisation are as per 5 and 6, with the addition of Wiltshire Wildlife Trust who did not make representations to the Secretary of State but did request a copy of the decision."

6. On 13 May 2014 the complainant wrote to the DCLG to complain about the way it had handled his request for information. The complainant stated his concern about the DCLG's decision to redact 'most of the officer's report' and therefore asked the DCLG to reconsider its response.
7. The DCLG wrote to the complainant again on 3 June 2014 having completed its internal review. The DCLG review stated that it was satisfied that the response to his request for information contains all the information that the DCLG holds, and confirmed that the recommendation and the consideration in the ministerial submission to Nick Boles [Parliamentary Under-Secretary of State] was properly redacted under Regulation 12(4)(e).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 5 June 2014 to complain about the way his request for information had been handled. The complainant was particularly concerned about the DCLG's redaction of the 'officer's report' and of the identity of the officer responsible for that report.
9. The Commissioner's investigation of this complaint has been to determine whether the DCLG is entitled to rely on Regulations 12(4)(e) and 13 to withhold information relevant to the complainant's request.

### **Reasons for decision**

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### **Is the information 'Environmental Information'?**

10. The DCLG is relying on provisions of the Environmental Information Regulations to withhold information relevant to the complainant's request.
11. Information is 'environmental information' if it meets the definition set out in Regulation 2 of the EIR. If the information satisfies the definition in Regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
12. Under Regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in Regulation 2 will be environmental information. One of the elements listed is land.
13. The Commissioner has considered the nature of the information sought by the complainant. He is satisfied that the information can be properly characterised as environmental information. The Commissioner therefore considers that the request should be dealt with under the EIR.

#### **Regulation 12(4)(e) – internal communications**

14. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

#### **Does the information constitute 'internal communications'?**

15. The first question to consider is whether the information is a 'communication' for the purposes of the Regulations. The Commissioner considers that a communication will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
16. In this case the withheld information, falling within parts 2 and 4 of the complainant's request, consists of advice to Ministers to determine whether the Secretary of State should 'call-in' the joint planning application made by Swindon Borough Council and the Science Museum.
17. Having examined the withheld information, the Commissioner is satisfied that where the DCLG has applied Regulation 12(4)(e), the information can be properly characterised an internal communication for the purpose of the this exception.
18. Where Regulation 12(4)(e) is engaged, it is subject to a public interest test required by Regulation 12(1). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

19. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

### **The public interest test**

#### **The public interest favouring disclosure of the information**

20. The primary public interest in this case favouring disclosure of the withheld information lies in having an open and transparent process through which planning decisions are made. This is recognised by provisions in the town and country planning legislation which has significant public consultation elements.
21. Opportunity for further public scrutiny of the planning application would be afforded when the decision is made following the calling-in of the planning application, when a public inquiry would need to be arranged.

#### **The public interest in maintaining the exception**

22. In essence the public interest considerations relating to the Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
23. The specific concern in this case is that a disclosure of the information would affect the frankness with which officials can provide advice to Ministers. The argument is that disclosure would inhibit discussions and deliberation and consequently undermine and degrade the decision making process where the matter is still live.
24. At the time the complainant made his request a public inquiry had not commenced.
25. The Commissioner understands that the inquiry is only now about to conclude and there is no firm date for the decision to be made by the Secretary of State. Furthermore, the DCLG has advised the Commissioner that the Secretary of State's ultimate decision may be subject to future legal challenges.
26. The DCLG asserts that, being an on-going or live matter, and one which may be subject to future appeal, there is a continued need for a 'safe space' in which Ministers can consider the advice given by officials and make further decisions. Ministers should be able to consider the withheld information and discuss it frankly and with candour, without the 'chilling effect' or inhibition that would be caused if disclosure was made at this time.

27. In general, once a decision has been taken the private thinking space required by Ministers is diminished and the sensitivity of the information is reduced. In this case no decision has been taken in respect of the planning application. The DCLG therefore considers that to reveal elements of the withheld information would have the potential to adversely affect the planning process, at least until this matter has been concluded.
28. The DCLG has pointed out that the reasons for the Secretary of State's decision to call-in the planning application have been set out in the call-in letter which is publically available. That letter sets out the Secretary of State's opinion on each of the issues which he considers relevant to his decision to call-in and it explains why he took that decision.
29. The DCLG argues that it is the decision to call-in that is relevant to the public interest and not the advice he received from officials: It is the Secretary of State who is responsible and accountable for the decision and not his officials. Similarly, it is the Secretary of State's decision that may be appealed rather than the internal considerations which carry no legal weight.
30. The DCLG also argues that the public interest is satisfied by the issue of the decision letter and by the information already disclosed into the public domain.

## **Conclusions**

31. The Commissioner considers that there is clearly a public interest in allowing officials to fully advise Ministers of the circumstances of a case prior to the Secretary of State reaching his decision on an application. If that information was to be disclosed too early in the planning process, the advice could be used as a means to challenge the decision via judicial review, or could be used as a means of challenging the planning decision.
32. In the Commissioner's opinion, if Ministers and their advisors were not confident of the privacy of their advice, and there was any potential for disclosure, there would likely be more challenges to decisions and greater pressure exerted by the media and public.
33. Delays in the planning process would be more likely and would be costly to the public purse.
34. Future discussions would likely be fettered to a degree which would reduce the necessary thinking space currently available to Ministers and their officials and result in a diminution of the decision making process.

35. The Commissioner must have regard to the on-going status of this planning application. He has therefore given weight to the reduction in the thinking space currently available to Ministers and officials, which disclosure of the withheld information would bring about. In view of this, the Commissioner considers that disclosure of the withheld information would likely be detrimental to the Secretary of State's final decision by reducing the thinking space which the DCLG currently has. This could detrimentally affect decision making in the future and/or potentially lead to less full and frank advice being provided to Ministers in the future.
36. The Commissioner has noted that the reasons behind the Secretary of State's decision to call-in the application is already in the public domain. He considers that the availability of this information has diminished the public interest which favours disclosure of the withheld information.
37. On balance the Commissioner considers that the weight of the public interest lies in maintaining the exception in this instance and therefore he finds that the DCLG has correctly applied Regulation 12(4)(e).

### **Regulation 13 – Personal information.**

38. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.
39. In order to engage regulation 13 the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1990 ("the DPA").
40. Section 1(1) of the DPA defines personal data as:  
  
"data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."
41. The Commissioner notes that the withheld information subject to Regulation 13 consists of the identity of the officer responsible for the report associated with this planning application.
42. In the Commissioner's opinion the withheld information clearly has biographical significance to a living individual and must therefore be treated as that person's personal data. He therefore finds that the information engages regulation 13 of the EIR.
43. In order to determine whether a public authority may disclose personal data under the regulation 13 of EIR, the public authority must determine

whether such disclosure would not contravene the first data protection principle.

44. The first data protection principle states:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

45. In order to satisfy the first data protection principle the public authority must conclude that the processing is fair to the data subjects and also would satisfy at least one condition from Schedule 2 of the DPA, and, where the requested information is sensitive personal data, at least one condition from Schedule 3 of the DPA.

46. In this case the Commissioner has determined that the Council is correct to withhold the withheld information. The Commissioner considers that the disclosure of this information would be unfair the author of the report.

47. He notes that the report's author is a relatively junior post holder and he considers that disclosure of his/her identity would be unfair for the following reason: The report's author is not responsible for the decision to call-in this planning application. That decision is for the Secretary of State, acting on the advice of his officials. The secretary of State and his officials would clearly have an expectation that their decisions would be scrutinised and that they would be held accountable for those decisions. However, an official working at the junior level of the report's author would not have that reasonable expectation.

48. In view of his determination that disclosure of the report author's identity would be unfair, the Commissioner has not gone on to consider any of the conditions for processing in Schedule 2 of the Data Protection Act.



## 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: 0870 739 5836

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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**