

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

Decision notice

Date: 8 November 2018

Public Authority: Ministry for Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant asked the Department for Communities and Local Government ("the DCLG") – now the Ministry for Housing, Communities and Local Government ("the MHCLG"), for an electronic copy of all the information contained in the Department's file associated with his PROD / Right to Contest application, referenced NPCU/PROD/N5090/7637. The MHCLG provided the complainant with some of the contents of that file, but redacted certain pieces of information in reliance on Regulations 13 and 12(4)(e) of the EIR. The complainant has not contested the MHCLG's application of Regulation 13 in respect of the personal data of the Department's and Barnet Council's junior officers: He has complained about the MHCLG's application of Regulation 12(4)(e) to withhold certain pieces of information and also about documents which are apparently missing from the information which was disclosed to him.
2. The Commissioner's decision is that the MHCLG has complied with the provisions of Regulation 5(1) of the EIR by providing the complainant with all of the information it holds, other than the information which is subject to the exceptions provided by Regulations 13 and 12(4)(e).
3. The Commissioner has decided that the MHCLG has correctly applied Regulation 12(4)(e) to three pieces of information it has withheld from the complainant and also that the Department has contravened Regulation 5(2) by failing to provide the information it disclosed to the complainant within the twenty day compliance period required by the EIR.

4. The Commissioner requires the public authority to take no further steps in this matter.

Request and response

5. On 15 September 2017, the complainant submitted a subject access request to the DCLG for the following information:

"I request an electronic copy of all non-exempt information held by DCLG in connection with the PROD¹ / Right to Contest application: NPCU/PROD/N5090/7637".

- a. The wording of my request limits the scope of this request to any information relevant PROD Case: NPCU/PROD/N5090/7637.
 - b. I am seeking access to the complete case file. This includes:
 - i. any input information provided by any organisation (particularly LBB) relevant to the outcome of the decision,
 - ii. any legislation applied by the DCLG when making the final PROD decision
 - iii. any departmental guidelines used by DCLG to guide the "public interest" test decision
 - iv. the detailed analysis that formed the basis of the public interest on which the outcome of the decision was based"
6. The DCLG acknowledged receipt of the complainant's request on 18 September 2017, giving the request the reference 3489171.
 7. On 26 October, in an email headed 'Subject Access Request', the DCLG wrote to the complainant and asked him to provide documents which confirmed his identification.
 8. The DCLG responded to the complainants request by providing him with information under the subject access provisions of section 7 of the DPA.
 9. The information which the DCLG disclosed led to the complainant submitting a complaint to the Information Commissioner and to her making an assessment under section 42 of the DPA². The Commissioner's assessment of 7 February 2018 advised the complainant

¹ PROD: Public Request to Order Disposal

² Assessment made under ICO case reference RFA0709554

that "...it appears likely that DCLG has complied with the DPA and we do not therefore anticipate taking any further action in this case".

10. Having received the Commissioner's assessment, the complainant wrote to the Commissioners and explained that he wished "to understand whether the information being withheld under a Subject Access Request would also be withheld under a FOI / EIR request". He confirmed that the information disclosed to him by the DCLG was also provided as part of his original submission to the ICO, and therefore he asserted that the ICO should already be dealing with this as a Hybrid DPA/FOI Case.
11. The complainant provided the Commissioner with the following clarification:

"I originally made a simple SAR request to DCLG (with no reference to FOI). When it became clear that certain key information had been redacted I raised an Internal Review with DGLG to obtain at least some of the redacted information. This is the email number 4 [...] and that is relevant to the FOI component of this case.

In my request for a DCLG internal review, I made specific reference to FOI under the heading "Overlap between DPA (SAR) and FOI/EIR request". Therefore, from my perspective, I have already informed both DCLG and also the ICO that this a "hybrid" SAR / FOI request (even though I did not use the term "hybrid", it was clear from the words used in the Internal Review request).

I do not know if DCLG recognised this as a Hybrid SAR / FOI, all I know is that the DCLG has refused any request to un-redact key information.

For clarity, I am not asking for names to be released, just substantive elements of the decision that the DCLG claim is not my personal data (but I would argue ARE my personal data because the information being withheld impacts a PROD decision and that PROD decision impacts me). I do not mind whether the redacted information is released based on an FOI consideration or a SAR consideration. I just want the information unredacted and released. I hope this clears up any confusion.

12. On 10 April, following further correspondence between the Commissioner, the complainant and the DCLG, the Commissioner advised the complainant to submit a new request for information that has been withheld from his SAR and which appears not to be your personal data. The Commissioner also advised the Commissioner that she considered the correct information access regime for any new request would be the Environmental Information Regulations.

13. The complainant responded to the Commissioner's advice and acknowledged that "it is possible that by "cleanly" submitting a new FOI request this may yet avoid some unseen/unknown hurdles". The complainant added that, from his perspective, the way his request had been handled gives the impression of some level of administrative unwillingness to respond to the spirit and letter of both DPA & FOI legislation.

14. 15 April 2018, the complainant wrote to the Ministry for Housing, Communities and Local Government "the MHCLG") and requested information in the following terms:

"I request an electronic copy of all non-exempt information held by the DCLG in connection with my PROD / Right to Contest application (NPCU/PROD/N5090/7637) that was rejected on 25/01/2017).

I am seeking access to the complete file. This includes:

1. Any input information provided by any organisation (particularly LBB) relevant to the outcome of the decision
2. Any legislation applied by the DCLG when making the final PROD decision
3. Any departmental guidelines used by the DCLG to guide the 'public interest' test decision
4. The detailed analysis that formed the basis of the public interest on which the outcome of the decision was based."

15. The MHCLG acknowledged its receipt of the complainant's request on 16 May 2018 and advised the complainant that a response would be made by 11 June 2018 under the provisions of the EIR. The complainant's new request was give the reference 3767423.

16. The MHCLG responded to the complainant's request in a letter dated 13 June 2018. The MHCLG provided the complainant with a redacted version of a PROD file, comprising of 24 pages of reports, emails and letters. The Department advised the complainant that some of the information had been redacted in reliance on Regulations 12(3) (personal data) and 12(4)(e) (internal communications).

17. The complainant wrote to the MHCLG on 22 June and requested an internal review. The complainant noted that the information provided to him under this EIR request was the same as the information, with the exception of one additional item, which was disclosed to him under the terms of his previously submitted SAR.

18. The complainant identified 4 specific items which had not been disclosed to him under his SAR, which the complainant required the MHCLG to make 'dedicated responses'.
19. The complainant made representations in rebuttal of the MHCLG's reliance on the two exceptions to disclosure which it had cited and he drew the Department's attention to, what appeared to be, missing pages from the PDF document which made up the Department's disclosure.
20. Having completed its internal review, the MHCLG wrote to the complainant to advise him of its final decision. In reviewing its response to the complainant's request, the MHCLG upheld its decision to redact the names of third party individuals in reliance on Regulation 12(3). It also upheld its decision to redact a document, referred to as covering advice to Ministers or those who have delegated authority to act on their behalf, on the grounds that the document falls within the ICO's definition of internal communications.
21. Turing its attention to the alleged missing pages, the MHCLG identified information which had been 'inadvertently missed'. That information was disclosed to the complainant as an attachment to the Department's internal review, and the complainant was advised that the redactions of information were made in reliance on Regulation 12(3). The MHCLG went on to provide further explanations to the complainant in respect to the four parts of his request:
 1. "Any input information provided by any organisation (particularly LBB) relevant to the outcome of the decision. Information contained within the PROD file that you already hold is the entirety of the file minus the exempted material.
 2. Any legislation applied by the DCLG when making the final PROD decision. Links to the relevant legislation and guidelines have been attached below for your information:

Local Government Planning and Land Act 1980:

<http://www.legislation.gov.uk/ukpga/1980/65/contents>

Community Right to Reclaim Land:

<https://www.gov.uk/government/publications/2010-to-2015-government-policy-localism/2010-to-2015-government-policy-localism#appendix-5-community-right-to-reclaim-land>

<https://www.gov.uk/government/publications/the-public-request-to-order-disposal-process--2>

3. Any departmental guidelines used by DCLG to guide the 'public interest' test decision. Any guidance the Department has in relation to PROD, does not specifically mention the public interest test.
4. The detailed analysis that formed the basis of the public interest on which the outcome of the decision was based. This information is exempt under regulation 12(4)(e) as explained above."

Scope of the case

22. The complainant contacted the Commissioner on 25 July 2018 to complain about the way his request for information had been handled.
23. In respect of the personal data redacted by the MHCLG in reliance on Regulation 13, the complainant advised the Commissioner that, "In the context of this specific information request [...] I agree that, based on the information available to me, that there is insufficient grounds to request that specific names be un-redacted. I therefore withdraw this aspect of my appeal. However, if as a result of subsequent investigations by (i) RICS (breach of Red Book Guidelines) or (ii) FTT (EA/2018/0044 and EA/2018/0045), or (iii) as a result of any Decision Notice by the ICO related to this case, it becomes apparent that LBB staff provided misleading or incomplete information to DCLG, and on which the then DCLG relied when making their original PROD decision, then I will revisit the PIT that currently favours maintaining the redactions of personal data".
24. In respect of the arguments advanced by the MHCLG in support of its application of Regulation 12(4)(e), the complainant said that, "I reject the 'chilling effect' argument implied in [the Department's] response as justification for withholding information. I am aware that this is the subject of case law and I do not believe that the [MHCLG] position is tenable". The complainant noted that the MHCLG had still not provided any additional explanation as to why this exception is valid, merely asserting that it is.
25. Where he has pointed to missing pieces of information, the complainant referred to the wording of his request where he stated he seeks to obtain my complete case file. He said, "It is self-obvious where pages appear to be missing just from a review of the flow of the documents".
26. The complainant noted that the MHCLG has not included details of its final public interest test or any statement as to whether the information he had requested is held or not held.
27. The Commissioner initially advised the complainant that her investigation would be focussed on whether the MHCLG is entitled to

withhold information in reliance on Regulations 13 and 12(4)(e) of the EIR. However, on the grounds that the complainant has withdrawn his complaint about the application of Regulation 13, the Commissioner has limited her investigation and decision to the MHCLG's application of Regulation 12(4)(e) and the issue of pages missing from the information which the Department disclosed to the complainant.

Reasons for decision

Regulation 12(4)(e) – Internal communications

28. 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.
29. The MHCLG has provided the Commissioner with all of the information it has withheld in reliance on Regulation 12(4)(e). That information is contained in unredacted copies of two PDF documents containing the information disclosed to the complainant. The MHCLG clearly marked the information it has withheld from the complainant, which is comprised of the following:
 - A handwritten annotation at the head of a document entitled 'Public Request to Order Disposal'
 - The first paragraph of the above document under the section heading 'Conclusion and Recommendation'
 - The final sentence of the second paragraph under the section heading 'Conclusion and Recommendation'
30. The MHCLG has explained why it considers the withheld information to engage the Regulation 12(4)(e) exception. It says: "The document in question was a report which was produced by a Planning Casework Officer and which contained advice and recommendations on whether or not the Secretary of State should use his powers to order the disposal of the land in question". The Department asserts that: "There is no doubt that this document was a purely internal communication as it was not shared or distributed outside of MHCLG and was intended purely as internal advice".
31. The MHCLG emphasised that the document was written by a casework officer within the Department and signed by her supervisor, a Senior Planning Casework Officer.

32. The first question for the Commissioner to consider is whether the withheld information is a 'communication' for the purposes of the EIR.
33. 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.
34. Having examined the withheld information and considered the position of the MHCLG, the Commissioner is satisfied that the withheld information can properly be characterised as a communication for the purpose of this exception.
35. There is no definition of what is meant by 'internal' contained in the EIR. In this case the Commissioner agrees with the MHCLG that the information the MHCLG has withheld constitutes an internal communication and therefore the Commissioner is satisfied that Regulation 12(4)(e) is engaged.
36. 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.
37. 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

38. In this case, the Commissioner agrees with the MHCLG that the public interest in the withheld information being disclosed relates to retaining the openness and transparency of decisions around underused and/or neglected public sector land in local communities.
39. The Commissioner considers that disclosure of the withheld information would provide the public with information used by the MHCLG which concerns whether or not the Secretary of State orders disposal of land. It would also provide insight into the decision making process which leads to those decisions, which can assist the public's understanding and help keep the public informed so that they can participate in debate. This is particularly important where the public authority's decisions affect local communities.
40. Against the public interest arguments for disclosing the withheld information is the need for public authorities to have a necessary 'thinking space' in order to consider and discuss matters fully and frankly without fear that the information will be disclosed.

41. In this case the concerns of the MHCLG were that disclosing information provided internally to Ministers for advice and guidance would affect the frankness with which officials would provide future advice. It says that, "Knowledge that their internal advice would be releasable into the public domain would serve to inhibit discussions and deliberations", and this would, "have a negative and restrictive effect on the decision making process".
42. The Department assert that it is essential that the Secretary of State is able to rely on the provision of free and frank advice in order to form his view and make a decision regarding disposal.
43. Additionally, the MHCLG considered that if it released private advice about any live case, this would set a precedent for future requests. In turn, this could lead to requestors expecting a disclosure of information on the basis that it would constitute a consistent approach.
44. The result of disclosing the withheld information would potentially lead to more challenges being made and this would create significant pressure to release information. This would have a huge impact on the volume and degree of openness of any advice provided and it would negatively impact on the decision making process.
45. The MHCLG points out that the Public Request to Order Disposal – PROD, is a scheme whereby anyone can ask the Secretary of State to use his power to order the disposal of underused or vacant public sector land or properties. This requires the Secretary of State to consider the facts of the case and the advice of his staff before making a decision on whether to issue an order to dispose.
46. The Secretary of State's decision in this case was released to the person who made the PROD request and was also provided to the complainant as part of the disclosure of information made under the EIR request.
47. It is the Secretary of State who is ultimately responsible and accountable for the decision rather than his junior officials and therefore the advice and considerations of his officials does not carry the same weight when considering the public interest test, as does the Secretary of State's decision itself.
48. That said, the MHCLG points out that the factual details contained in the report made to the Secretary of State formed the basis for his decision around disposal. There is clearly a public interest in those factual details being disclosed and the Department asserts that its disclosure of those details meets the public interest.
49. Releasing the factual details of the internal report, together with the Secretary of State's final decision was, in the MHCLG's opinion, sufficient

to meet the public interest in having a transparent decision making process. The MHCLG considers that the public interest is also met in knowing that the Secretary of State was provided with full and frank advice by an appropriate official through its release of the redacted report.

The Commissioner's considerations

50. The Commissioner recognises the merit of those arguments favouring disclosure as well as those favouring continued reliance on Regulation 12(4)(e).
51. The Commissioner considers that the disclosure of the withheld internal communications is likely to have resulted in the reduction of thinking space available to officials within the MHCLG. In the Commissioner's opinion, disclosure is likely to have a detrimental effect on the Department's decision making process and consequently it could result in its officers providing decision makers with advice which is neither full nor frank.
52. On balance, the Commissioner has decided that greater weight has to be given to withholding the internal communications. She is particularly persuaded by the need for MHCLG's officers to operate in a 'safe space' where they can deliberate potentially controversial issues and provide advice with necessary candour. The Commissioner recognises the real danger of a 'chilling effect' caused by the disclosure of internal communications and the negative potential of this in respect of future PROD decisions.
53. The Commissioner recognises that the disclosure of information already made by the MHCLG provides a degree of transparency and accountability which satisfies the general interests of the public. She also recognises the public interest inherent in the disclosure to the public of decisions and how they were made. Here, the only information withheld from the complainant is those sections that conveyed the advice and opinions of staff within the Department.
54. The disclosure of the factual information considered by the Secretary of State, together with his final decision, needs to be coupled with the Department's need to maintain a 'safe space' for the deliberations of its staff. These factors should be given appropriate and necessary weight and it is the combination of these factors which leads the Commissioner to decided that the public interest lies in maintaining the exception provided by Regulation 12(4)(e).

Additional redactions of information

55. The MHCLG has drawn the Commissioner's attention to 3 emails supplied to the complainant which contain redaction of content made by virtue of the information falling outside the scope of the complainant's request. The MGCLG has made clear to the Commissioner that this information does not relate to the PROD application.
56. The MHCLG has apologised to the Commissioner, in place of the complainant, for not making clear the basis of these redactions in its original response to the complainant or in the Department's internal review.
57. Rather than relating directly to the PROD application, the MHCLG asserts that the redacted information concerns ideas for alternative plans should the residents not decide to go ahead with the purchase and to make arrangements for the land to be cleared by a third party.
58. The Commissioner accepts that the additional redacted information falls outside the scope of the complainant's request. Notwithstanding this, the Commissioner acknowledges the MHCLG's alternative position regarding these redactions, namely its reliance on Regulation 12(5)(f) – where disclosure would prejudice the interests of the person who provided the information and on Regulation 13 – where the information constitutes the personal data of a third party.

Missing pages

59. The MHCLG has provided the Commissioner with an explanation of the pages missing from its original response made to the complainant. The Department says it supplied the complainant with a PDF file entitled 'Prod.pdf'. When the complainant asked for internal review he complained about missing pages.
60. On review, the MHCLG found that 8 pages which were not included in the original response. These pages were then provided to the complainant in a PDF file entitled 'Pages.pdf'.
61. When the complainant asserted there were still missing pages, the MHCLG conducted a comprehensive review of the PROD file and checked it against all the information which had been provided to the complainant. The Department found a further 3 pages of the file had been missed.
62. The Commissioner understands that these pages have now been sent to the complainant, albeit with redactions of personal data made in reliance on Regulation 13.
63. The MHCLG acknowledges that some of the pages sent to the complainant may appear to be incomplete. The Department has

explained why this appears to be the case. It has told the Commissioner that, "the file includes lots of print outs of emails which contain long chains of emails. Inevitably some of these emails have been duplicated in the file and so although they are cut off on one page they are reproduced on the following page/s".

64. The MHCLG has identified where this duplication and cut off has occurred, namely: page 6 the final email is reproduced on page 7; page 9 the final email is reproduced on page 10; page 11 the final email is reproduce on page 12; Page 13 the final email is reproduced on pages 14, 15 and 16; and page 26 the final email is reproduced on page 27.
65. Additionally, the MHCLG has advised the Commissioner that there was an occasion where it looked as though there were missing pages because an email was cut off part way through. This apparently occurred where there were 2 emails on a page and only the first email needed to be provided to the complainant and because the second, partly cut off email, was an email which had already been sent to the complainant.
66. In addition to providing the foregoing explanation, the MHCLG has confirmed to the Commissioner that the complainant is now in possession of everything in the PROD file as a result of his various requests. The MHCLG has assured the Commissioner that the only information which has not been provided to the complainant is the personal data and internal communications which have been redacted and information which is not within scope of his request.
67. In view of the foregoing explanation and assurance, the Commissioner has decided that, on the balance of probability, the MHCLG has now complied with the provisions of Regulation 5(1) of the EIR. She is accepts that the MHCLG is likely to have provided the complainant with all of the contents of the PROD file, other than the information which is subject to the exceptions provided by Regulations 13 and 12(4)(e).
68. It is clear to the Commissioner that the MHCLG has contravened Regulation 5(2) in its handling this information request by failing to provide the complainant with the information he was entitled to receive within the time for complying with his request – twenty working days

Other matters

Regulation 13

69. The Commissioner acknowledges the complainant's qualified withdrawal of his complaint in respect of the MHCLG's redaction of third party personal data.
70. In view of this withdrawal, the Commissioner makes no decision in respect of the MHCLG's reliance on the exception provided by Regulation.
71. She does however acknowledge that the MHCLG has only redacted the names and telephone numbers of junior members of its staff and junior members Barnet Council's staff.
72. The redacted personal data relates to a MHCLG Planning Casework Officer involved in this case, a MHCLG Senior Planning Casework Officer and a surveyor for Barnet Council as well as others working at Barnet Council.
73. All of the persons whose data has been withheld hold positions below Senior Civil Service level and the Council has assured the Commissioner that they have a reasonable expectation that their personal information will not be released into the public domain.
74. The Council accepts that a legitimate interest exists in the public knowing that planning casework, and the provision of advice to Ministers is being undertaken by the appropriate staff. Nevertheless, that this need can be adequately met by making available the job titles of the officials in question.
75. In the Commissioner's opinion, the release of the job titles is sufficient to establish the credentials of staff whilst protecting their privacy.
76. The Commissioner notes that the Council has disclosed the name of Peter Openshaw to the complainant. Mr Openshaw's position is at Director Level and therefore there is a greater expectation of transparency and accountability for such senior members of staff. The Commissioner acknowledges and supports the MHCLG's policy in that regard.

Two observations for future practice

77. The fact that the MHCLG identified information within the scope of the request at the time of conducting its internal review and even later, illustrates poor practices in the Department's handling of information requests. The Commissioner expects the MHCLG to read requests objectively and to identify all of the information within their scope before

determining how it should respond to those requests. Here, it appears the MHCLG's primary concern was the withholding of environmental information rather than its purposeful disclosure.

78. In respect of the 'missing pages' described above, the Commissioner considers that the MHCLG should have explained to the complainant why it was not including duplicated pages. This would have prevented or reduced the confusion caused to the complainant.

Right of appeal

79. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

80. 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.
81. 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
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