

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

### **Decision notice**

**Date:** 6 December 2019

**Public Authority:** The 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 has requested copies of all the Waste Infrastructure Delivery Programme ("WIDP") Transactor's Monthly Reports ("TMRs") for Norfolk County Council's waste treatment private finance initiative. The Department for Environment, Food & Rural Affairs ("Defra") refused to provide the requested information, citing Regulation 12(4)(e) (internal communications) and Regulation 13(1)(third party personal data). Later, Defra also cited Regulations 12(5)(e)(confidentiality of commercial or industrial information) and 12(5)(f)(interests of the information provider).
2. The Commissioner's decision is that Defra failed to demonstrate that Regulations 12(5)(e) and 12(5)(f) are engaged. She finds that Regulation 12(4)(e) is engaged but that the public interest in disclosing the information overrides the public interest in maintaining the exception. She also finds that Defra is not entitled to rely on part of the information it withheld under Regulation 13(1).

The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose the requested information but withhold the names and contact details of junior officials, and all third party contact details.

3. 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

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4. On 18 January 2019 the complainant wrote to Defra and made a request for the following information under the EIR:

*"Please provide me with a copy of all the Waste Infrastructure Delivery programme (WIDP) Transactor's Monthly Reports (TMRs) for Norfolk County Council's Waste Treatment PFI."*

5. Defra responded on 13 February 2019 and refused the request in its entirety under Regulations 12(4)(e) and 13(1).
6. The complainant asked for a review on 17 February 2019, pointing out that three TMRs had already been disclosed.
7. Defra provided an internal review on 25 March 2019 in which it partly revised its position regarding Regulation 12(4)(e) and provided a redacted version of the TMRs that had already been disclosed. However, it maintained its position regarding the remaining TMRs and the withholding of personal data.
8. The Commissioner wrote to Defra on 9 September 2019 to ask for its submission. Having received that submission, she wrote again on 11 October 2019 questioning certain parts of Defra's response. When Defra wrote again it still maintained its citing of Regulations 12(4)(e) and 13(1) but additionally cited Regulations 12(5)(e) (commercial or industrial confidentiality) and 12(5)(f) (interests of the information provider).

## Scope of the case

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9. The complainant contacted the Commissioner on 6 May 2019 to complain about the way her request for information had been handled.
10. The Commissioner considers the scope of this case to be whether Defra is entitled to rely on the exceptions at Regulation 12(4)(e), 12(5)(e), 12(5)(f) and 13(1) as a basis for refusing to provide the withheld information.

## Reasons for decision

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### Is the information environmental?

11. Regulation 2(1) of the EIR provides the following definition of

environmental information:

*"...any information in written, visual, aural, electronic or any other material form on-*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"*

12. Requests for information need to be handled under the correct scheme. The reasons why information can be withheld under the FOIA are different from the reasons why information can be withheld under the EIR.

*Why is this information environmental?*

13. The Commissioner is satisfied that the information requested is environmental within the definition at regulation 2(1)(c) –

*"measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."*

14. The Commissioner is satisfied that Defra considered the request under the correct access regime as it relates to a planned waste infrastructure delivery programme likely to affect the elements and factors referred to in (a) and (b) above.

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

15. Regulation 12(4)(e) states:

*For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that..  
(e) the request involves the disclosure of internal communications.*

16. The EIR does not provide a definition of what is meant by 'internal'. The Commissioner's guidance on this exception<sup>1</sup> defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. The communications have to have taken place solely within a public authority.
17. Regulation 12(4)(e) is a class based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
18. The withheld information consists of TMRs dating from 2008 to 2013, therefore the newest was six years old at the time of the request and the oldest, 11 years old.
19. Defra has explained that the Transactors are seconded under a grant agreement into Defra's WIDP from Local Partnerships (an organisation jointly owned by the Treasury and the Local Government Association). Although the Transactors have different roles to Defra's WIDP they have complementary roles and work together to implement the programme. Transactors provide guidance to local authorities on the conduct of the procurement, review project documentation, assist with the analysis of commercial negotiating positions and general troubleshooting activities in support of the authority's efforts to progress and manage the PFI contract once it has been signed.
20. The public authority considers the Transactors to be working for and "embedded" within Defra to support departmental oversight of the waste management PFI projects sponsored by Defra. Whilst the Transactors

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

are seconded to Defra, they have Defra email addresses and utilise internal communication channels. The Commissioner accepts that the Transactor is not in the same position as a purely external professional brought in for their expertise but is, in effect, working together with Defra's team to implement the WIDP.

21. Defra adds that, had these reports been shared between the Transactors and any local authority/third party, they would no longer be internal communications. Despite the release of three TMRs which Defra explains was done in error, it considers that the reports have not been shared.
22. The complainant accepts that these are internal communications. However, she has highlighted the three TMRs disclosed in error and a TMR which she claims was shared by the Transactor with Norfolk County Council (see paragraph 33). The Commissioner has carefully considered whether the TMRs therefore remain internal communications. She has concluded that there are 60 monthly TMR reports that have been withheld for the requested period. Although three TMRs have been disclosed this was in error and it is unclear how or why the fourth was shared. On balance, they remain internal communications and the exception is engaged.

#### *Public interest test*

23. Despite the fact that the exception is engaged, the Commissioner must consider the public interest in maintaining this exception or disclosing the requested information.

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

#### **Defra's view**

24. Defra has argued that its officials and Transactors must be given the space to consider and discuss frankly the issues at hand. Defra manages a portfolio of 24 operational waste management PFI projects under the WIDP. It considers that Transactor insight and advice is paramount to the awarding and management of public funds. Defra believes that uncertainty over whether opinions will be released (current or historical) will inhibit open discussion and risk poorer decision-making.
25. Defra explains that the relationship of the Transactors is engendered by maintaining the trust of all local authorities in a programme and the government departments involved, aligning commercial objectives, adding clear value for money, communicating on a wide range of commercially sensitive matters and developing effective networking between authorities. This is in the knowledge that the information will remain within government.

26. Defra contends that Transactors need to be able to provide these frank assessments of projects without fear that these assessments will be disclosed to the local authority. This enables Defra to effectively oversee the operation of the PFI contracts using accurate and unbiased information. If the written feedback was disclosed, Transactors' roles would be compromised as they could no longer provide feedback that may identify risks or opportunities in the local authority or the projects. The TMR process is an important part of Defra's governance of its £3bn waste PFI grant programme and there would be ramifications for Defra's ability to monitor the programme fully if the information was disclosed. It describes these ramifications as budget management risk and reputational risk in the eyes of the National Audit Office and the Public Accounts Committee.
27. Defra highlighted a previous decision FER0516038<sup>2</sup> of the Commissioner as supporting its position on the release of this information. The Commissioner notes however, that although the request is similar it covers a different timeframe and the information related to what was, at that time, recent information.
28. In a further response to the Commissioner, Defra stressed the protection of internal deliberation and decision-making processes and that this goes beyond work that is 'live'.
29. Defra states that the role of the Transactor is to strengthen the public sector in its dealings with the private sector. Their role enables Defra and local authorities to have a wide overview of the Private Finance Initiative and Public Private Partnerships market. The idea is to share programme knowledge, experience and practice, along with market intelligence, within the public sector in order to improve value for money. They ensure effective communications and relationships across the public sector to encourage the effective delivery of policy and the effective management of a waste infrastructure grant. This delivers value for money for the public sector. Transactors maintain the trust of local authorities and government departments involved, aligning commercial objectives, adding clear value for money, communicating on commercially sensitive matters and networking between authorities in the knowledge that this information will remain within government.
30. If Transactors felt that their opinions could be disclosed then they would feel inhibited in future TMRs leading to poorer decision-making and a loss to the public purse. The safe space would be harmed and Defra

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2014/961826/fer\\_0516038.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2014/961826/fer_0516038.pdf)

believes that the public interest favours maintaining this exception. The Commissioner had raised with Defra how 'live' this information was and Defra suggested that the consideration should be extended to the entire working practice of governance in this area of departmental work and the consequences of release. Disclosure of TMRs would inhibit free and frank discussions in the future, damage the quality of advice and lead to poorer decision-making. In other words Defra argues that there would be a chilling effect.

### *Public interest arguments in favour of disclosing the information*

31. Defra accepts that there is a strong public interest in the disclosure of information surrounding waste policy and particularly where decisions are taken in central government that affect the award of contracts and funding provided to, local authorities. It acknowledges the great public interest in the transparency of government departments, both in ensuring that the work of civil servants is within statutory and policy boundaries and that decisions are based on clear evidence. Defra also recognises that it is important that the public are kept informed of the development and implementation of policies.

### **The complainant's view**

32. The complainant has provided the Commissioner with detailed arguments regarding the citing of Regulation 12(4)(e) as, apart from the exception for third party personal data, it was the only exception cited prior to November 2019.
33. She explains that, apart from the three TMRs that were provided by Defra because they had previously been released for the reasons explained earlier in this notice, she has another TMR which was sent to Norfolk County Council by the Transactor themselves, apparently for updating. The complainant suggests that the Transactor was "*not fettered by fear of disclosure to the local authority involved*" or that their ability to carry out their role would be compromised. She suggests that the view expressed in the internal review regarding the need for a safe space was not shared by the Local Partnerships Project Director nor the Transactor.
34. The complainant contends that it should be a fair expectation that public officials in these roles are impartial and robust in meeting the serious responsibilities that are inherent. If there are concerns about disclosing such historic reports she suggests that Defra is trying to conceal the assessments, decisions and advice that Norfolk County Council were or were not given in order to prevent public scrutiny.
35. The complainant provided the Commissioner with several quotations to support her arguments that it is in the public interest to release the requested information. She points out that the National Audit Office says



that it has viewed the Transactor reports. She therefore asks why a member of the taxpaying public should not be allowed the same opportunity, given their historic nature.

36. The complainant says that Defra's arguments are speculative. The current state of Norfolk County Council's waste management situation should bear no resemblance or significance to 6-11 year old reports. The TMRs are related to individual projects with individual councils and should be considered on their own merits and not generalised. Her view is that disclosure would potentially encourage more robust advice and, consequently, better decision-making in future.
37. The complainant suggests that Defra are confusing confidentiality with secrecy. She says that Defra had its safe space whilst the project was live and have had a further five years since then. Defra has maintained a culture of secrecy without any justifiable grounds for saying that there is no overriding public interest in disclosure, despite the public's need to understand how huge amounts of taxpayers' money was spent on a project that they were responsible for.
38. The complainant highlights the fact that Defra brought up the National Audit Office and the Public Accounts Committee in its arguments against disclosure. She claims that Defra revoked its PFI funding allocation for Norfolk County Council's contract in October 2013, two days after the National Audit Office announced that Norfolk was to be one of the three local authority PFI waste contracts projects it would be investigating, having received a large amount of correspondence from the public.
39. The Public Accounts Committee were, in the complainant's words, "scathing" of Defra's actions where Norfolk County Council was concerned and she quotes as follows:

*"The Department's handling of the Norfolk PFI waste project has been particularly poor with the Department failing to exercise good judgement by agreeing to give funding to the project and then failing to give sufficient consideration to the local impact of its decision to withdraw funding to that project. This contributed to the contract being cancelled which has left Norfolk taxpayers facing a bill of some £33.7 million."*<sup>3</sup>

Her own view is that this amount of compensation will affect every person across all age groups in Norfolk for years to come.

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<sup>3</sup> <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/report-pfi-waste-projects-defra/>

40. The complainant referred the Commissioner to the following - *Public Accounts Committee, Oral evidence: Defra's oversight of three PFI waste projects, HC 106-I, Wednesday 25 June 2014* in support of her argument that the disclosure of this information is in the public interest.
41. Her view is that it is of huge public concern that the role of the WIDP and their action and advice is geared towards ensuring that infrastructure is delivered to meet EU standards over value for money and taxpayers' interests. She contends that when government departments who are under the strong influence of corporate lobbyists are simply following government objectives, the public's suspicion of wrong-doing increases.
42. The complainant makes the point that the Public Accounts Committee called into question Defra's actions over Norfolk's PFI contract and that this means that it should not be beyond accountability for the high compensation payment and that transparency and openness was required. She states that one of the Committee's conclusions was that local authorities need better advice and support which she believes is of little likelihood when Defra's stance is to conceal this information.

### **The Commissioner's view**

43. The PFI contract was terminated in 2013 and the latest report is 2013 (the earliest 2008). The TMRs are historical and the safe space and chilling effect arguments are therefore less than compelling.
44. As discussed earlier, Defra has directed the Commissioner to a decision notice from 2014, see paragraph 27. However, the balance in that decision rested on the 'liveness' of the information and the safe space required at that time. The requested information cannot be construed as 'live' anymore, and the balance of the public interest is now weighted in favour of disclosing this particular information.

### **Regulation 12(5)(f) – interests of the information provider**

45. Regulation 12(5)(f) states:

*"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-*

*(f) the interests of the person who provided the information where that person—*

*(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*

*(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these*

*Regulations to disclose it; and  
(iii) has not consented to its disclosure...*

The term "person" is not restricted to an individual but can mean a legal person such as an organisation.

46. The Commissioner's public guidance on this exception<sup>4</sup> explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.
47. The exception can be broken down into a five-stage test, as recognised by the Information Rights Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)*<sup>5</sup>:
- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
  - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
  - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
  - Has the person supplying the information consented to its disclosure?
  - Does the public interest in maintaining the exception outweigh that in disclosure?
48. The exception can only apply where disclosure would result in an adverse effect on that person's interests. Generally, where the first four stages of the test are satisfied the disclosure of information would harm the interests of the person that provided it and a public authority will owe the person that supplied the information a duty of confidence. The

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1638/eir\\_voluntary\\_supply\\_of\\_information\\_regulation.pdf](https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf)

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[http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i750/2012\\_04\\_25%20Mr%20Kuschnir%20decision.pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf)

public interest test will then determine whether or not the information should be disclosed.

49. Where information is caught within the scope of the exception, refusal to disclose is only permitted to the extent of the adverse effect. The Information Tribunal illustrated how this applies in practice in the case of *Archer v the Information Commissioner and Salisbury District Council (EA/2006/0037, 9 May 2007)* concerning a request for the whole of a report. It found that the adverse effect only arose in respect of part of the report and that the cited refusal could not therefore be applied to the whole document.
50. The threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the harm. There is no requirement for the adverse effect to be significant but the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.

### **Defra's view**

51. Defra has concluded that the information in the TMRs relates to the interests of the person who provided the information to the public authority. The local authority (Norfolk County Council) was not under, and could not be put under a legal obligation to provide the information at the meetings and did not provide it in circumstances where Defra is entitled to disclose it.

### **The Commissioner's view**

52. In her guidance the Commissioner states that public authorities should be able to evidence the harm that will stem from direct consultation with the person who supplied that information. This is likely to be at the time it was provided but there are instances where it is necessary to consult at the time of the request.
53. The TMRs are written by the Transactor who, it has been established is, to all intents and purposes, working for Defra. The reports they write contain information provided by Norfolk County Council. Whilst the Commissioner is prepared to accept that the council was not obliged to provide the information that went into the TMRs, she does not accept that Defra has identified harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the

harm. Although Defra has argued with regard to its public interest test that disclosure would undermine a relationship of trust which adds value for the public sector and stated that it has not received consent from the council, it is not clear from this whether Defra asked the council, either at the time the information was provided or after it received the information request. Although it is not necessary to directly ascertain the harm from the council, the gap of time would suggest that it should have found out whether direct harm would be attached to disclosing such old information.

54. The Commissioner does not find the exception to be engaged and has therefore not gone on to consider the public interest.

### **Regulation 12(5)(e) – confidentiality of commercial or industrial information**

55. Regulation 12(5)(e) says

*For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—  
(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.*

56. The Commissioner's guidance<sup>6</sup> says that:

*The exception can be broken down into a four-stage test, which was adopted by the Information Rights Tribunal in Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010). All four elements are required in order for the exception to be engaged:*

- *The information is commercial or industrial in nature.*
- *Confidentiality is provided by law.*
- *The confidentiality is protecting a legitimate economic interest.*
- *The confidentiality would be adversely affected by disclosure.*

57. Even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). They can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)

Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.

*Is the information commercial or industrial in nature?*

58. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit.
59. Defra, having consulted with the Transactor network lead, has argued that the information contained in the TMRs is clearly commercial, as it relates to the detail of the contract and other contract-related matters including contract terms and financing considerations. The commercial activity is that of the council and the contractors.

*Is the information subject to confidentiality provided by law?*

60. The guidance makes it clear that it is not enough simply to argue that disclosure would adversely affect the commercial interests of the public authority or a third party. There must also be confidentiality provided by law.
61. This includes confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. Defra has stated that there is an expectation that the information is treated confidentially because it is provided solely for the WIDP internal reporting and monitoring of the project. Defra has not pointed to a binding confidentiality clause.
62. There is no need to consider whether there would be a public interest defence to any breach of confidence or establish if it would be an actionable breach.
63. Defra concludes that the information has the necessary quality of confidence as it is not trivial and has not been placed in the public domain.

*Is the confidentiality provided to protect a legitimate economic interest*

64. Defra's view is that the confidentiality is provided to protect the legitimate economic interest in value for money in the public sector, including ongoing and future programmes. The reporting information is used by WIDP to monitor progress through procurement, into the operational phase and onwards to the end of the individual contract period. This is normally 25 years. Defra underpins its argument by explaining that the commercial relevance continues long after an individual project has expired and it gives the example of funding terms

and negotiation. Release would damage future and ongoing programmes and harm local authorities' economic interests.

65. The Commissioner's view is that this argument is too generic and does not address itself to the specific information requested and that its logical conclusion would mean that no information could ever be released.

*Would confidentiality be adversely affected by disclosure?*

66. Defra states that some of the issues will be commercially sensitive to the contractors which may lead to legal action. The TMRs contain commercial information which, it suggests, has relevance in the current market eg pricing, waste flows, new commercial plans, impacts and mitigations for changing legislation. Release would be damaging to both local authority and contractor.
67. Defra is arguing that it is a third party's interests that are at stake. In this situation the public authority should consult with the third party unless it has prior knowledge of their views. It is not sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. It would appear that neither the council nor contractors have been consulted.
68. The Commissioner's guidance says that the public authority needs to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. If the confidentiality provision was intended to protect legitimate economic interests at the time it was provided but would not impact on those interests at the time of the request then it would not be sufficient.
69. A public authority needs to establish, on the balance of probabilities, that the harm in disclosing the requested information needs to be more probable than not. Despite Defra's argument that some of the contents of the requested information will have relevance today, in the absence of consultation with the relevant third parties and in consideration of the age of the commercial information, the Commissioner does not accept that disclosure would impact on legitimate economic interests and therefore the exception is not engaged. She has not therefore gone on to consider the public interest.

### **Regulations 12(3) and 13(1) – personal data**

70. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) of the Data Protection Act 2018 is satisfied.

71. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>7</sup> of the Data Protection Act 2018. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
72. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
73. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

74. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

75. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
76. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
77. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
78. In the circumstances of this case, having considered the withheld information the Commissioner is satisfied that some of the information relates to third party individuals as outlined by Defra. This information

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<sup>7</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.



contains the names and contact details of junior officials (in Defra's assessment, below the rank of Senior Civil Service grade or its external equivalent) and the names of the Transactors concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

79. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

80. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

81. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

82. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

*Lawful processing: Article 6(1)(f) of the GDPR*

83. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

84. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>8</sup>*

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<sup>8</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

85. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

86. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

87. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

88. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

89. Firstly, the complainant has not offered any argument as to any legitimate interest in the disclosure of the names and contact details of junior officials. She does however question if some of these individuals are junior. She also believes that she has a legitimate interest in seeing the names of the Transactors who have power and influence which, without scrutiny, she considers to be unaccountable.

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However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

*Is disclosure necessary?*

90. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
91. Defra's view is that the release of the names of junior officials poses a risk to the neutrality of the civil service. It argues that release is unnecessary and would add nothing to the public's understanding of this matter or the accountability of Defra.
92. Defra went on to consider if there was any lawful basis for processing this information and concluded that Article 6(1)(f) cannot be met because the public authority was performing a task. It is Defra's duty to carry out any such task in relation to WIDP thoroughly.
93. The Commissioner agrees with Defra that the release of the names and contact details of junior officials is unnecessary for the reasons provided in paragraph 92. She considers that the accountability of junior members of staff (internal and external) is to their employer.
94. The Commissioner has decided in this case that disclosure of the names and contact details of junior officials is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
95. However, the Commissioner has gone on to consider the personal data of the Transactors.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

96. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
97. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;

- whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
98. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
99. Defra's view is that the Transactors, despite working closely with Defra staff and having Defra email addresses, are not civil servants and are not public-facing. For this reason the public authority explains that disclosure of their names would be in breach of data protection legislation as it would be unlawful.
100. At the same time, Defra stresses that Transactors are senior professionals with significant commercial experience that assist public bodies with complex commercial matters on high value projects ranging from £700 million to £3.5 billion. They are responsible for the effective delivery of policy and an effective waste infrastructure grant.
101. Although it does appear to the Commissioner that there is some information concerning the names of Transactors in the public domain it is limited in nature, there has been publicity in local media. Nonetheless, the Commissioner's view is that it is unlikely that the Transactors would have expected their personal data to be disclosed at the time the information was provided. However, she sets against this the fact that these reports were written by senior professionals in their work capacity and that the passage of time is likely to have lessened their expectation that their names would not be considered for disclosure. On balance, she has reached the decision that the release of the Transactors' names would not be in breach of data protection legislation and that the complainant's legitimate interest in disclosure, in this instance, overrides any potential harm or distress to the Transactors, given their role, relative seniority and the amount of public money concerned.
102. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

*Fairness and transparency*

103. Even though it has been demonstrated that disclosure of the requested information under the EIR would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a).

104. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

105. The requirement for transparency is met because as a public authority, Defra is subject to the EIR.

**The Commissioner's view**

106. In this instance, the Commissioner has decided that Defra has failed to demonstrate that the exception at regulation 13(1) is engaged with regard to the Transactors' names.

## Right of appeal

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

108. 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.

109. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**