

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

Date: 5 August 2021

Public Authority: Department for Infrastructure
Address: Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant requested information relating to the future direction of renewable energy.
2. The Department for Infrastructure (DfI) confirmed it held the requested report but refused to provide it, citing regulation 12(4)(d) (material in the course of completion) of the EIR.
3. The Commissioner's decision is that DfI correctly applied regulation 12(4)(d) of the EIR to the withheld information and that the public interest favours maintaining the exception.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 12 January 2020, following earlier correspondence in relation to research to inform the future direction of Renewable Energy, the complainant wrote to DfI and requested information in the following terms:

"Please provide me with a copy of your consultants report and recommendation referred to in your email below".

6. DfI responded on 28 January 2020. It refused to provide the requested information. It cited the following exception as its basis for doing so:

- regulation 12(4)(d) (material in the course of completion).
7. The complainant requested an internal review on 29 January 2020.
 8. Following an internal review, DfI wrote to the complainant on 17 August 2020. It revised its position, additionally citing regulation 12(4)(e) (internal communications) of the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 17 August 2020 to complain about the way his request for information had been handled.
10. He told the Commissioner:

"In 2015 the Minister for the Environment instructed his officials to carry out a review of planning policy for renewable energy applications. This review has not been completed. DfI obtained a report from consultants to inform its review of policy. DfI refuse to disclose the report".

11. During the course of the Commissioner's investigation, DfI confirmed its application of regulation 12(4)(d). However, it advised that it no longer considers regulation 12(4)(e) applies.
12. The analysis below considers DfI's application of regulation 12(4)(d) of the EIR to the withheld information. That information comprises the report provided to the Department by Element Consulting Ltd.

Reasons for decision

Regulation 12(4)(d) information in the course of completion

13. Regulation 12(4)(d) states that:

"... a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, unfinished documents, or to incomplete data."

14. The aims of the exception are to:

- protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and

- provide some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.
15. For regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories specified in the exception. It is not necessary to show that disclosure would have a particular adverse effect but any adverse effects of disclosure may be relevant to the public interest test.
 16. DfI applied the exception to the report in its entirety. It told the complainant:

"In this case the consultant's report was sought and received to inform the future direction of strategic planning policy for renewable energy development. While the consultant's report itself may be finished, it is part of material created as an element of the process of formulating and developing policy, and this process is not complete".
 17. In further correspondence with the complainant, DfI explained that the report:

"... was commissioned for the purposes of policy development in relation to planning applications for renewable energy installations. It was intended to provide both an overview of the existing position and to highlight possible future planning-related developments in the renewable energy industry".
 18. DfI also confirmed its view that the requested report is part of the process for the formulation of government policy.
 19. Similarly, it told the Commissioner:

"This report was commissioned to provide evidence and inform the future direction of strategic planning policy for renewable energy development in Northern Ireland".
 20. In its submission to the Commissioner, DfI acknowledged that the report in question:

"... was commissioned in January 2017 to inform a potential review of the strategic planning policy for renewable energy as contained in the SPPS [Strategic Planning Policy Statement]."
 21. However, it went on to explain that, following the commissioning of the report, the Northern Ireland devolved administration was suspended from January 2017 – January 2020. DfI told the Commissioner:

"In this period work on the policy development could not continue as normal, as the decision to progress a review, and the scope and nature of any review of the policy was a matter for an elected and accountable minister and subject to scrutiny in the Assembly and there was no Minister in post for that time period. This meant that when the report was received it was not possible for the Department to progress to a full review".

22. DfI advised that, on restoration of the Northern Ireland Executive the work on the policy consideration re-started. It told the Commissioner:

"This is currently progressing, with the report an integral part of the development process".

The Commissioner's view

23. In her guidance¹, the Commissioner recognises that regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data.

24. She defines those categories as follows:

"Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.

Draft documents are unfinished even if the final version has been produced.

Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later".

25. The Commissioner also acknowledges that the fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion.
26. The position of the policy review at the time the request was received is clearly relevant to the application of regulation 12(4)(d). In this case,

¹ <https://ico.org.uk/media/for-organisations/documents/1637/eir-material-in-the-course-of-completion.pdf>

DfI explained that, without an administration, it was not possible for the Department to progress to a full review.

27. The Commissioner has considered whether, as argued by DfI, the consultant's report comprises material in the course of completion. The ICO's published guidance on this exception provides the example of a public authority formulating and developing policy, which is relevant to this case.
28. The Commissioner accepts that the 'material' in question in this case relates to a policy that is still being developed. Although the requested information is contained in a document which is in itself complete, that document is intended to inform a policy process that is still ongoing and therefore the withheld information may engage the exception.
29. Having viewed the withheld information, and considered DfI's arguments, she is satisfied that the information relates to information in the course of completion, namely the strategic planning policy on renewable and low carbon energy. Accordingly, she finds the exception engaged in respect of the information withheld by virtue of regulation 12(4)(d).
30. She has next gone on to consider the public interest test.

Public interest test

31. Regulation 12(1)(b) of the EIR provides that where regulation 12(4)(d) is engaged then a public interest test is carried out. 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. Furthermore, under regulation 12(2), a public authority must provide a presumption towards the disclosure of the information.

Public interest arguments in favour of disclosure

32. The complainant argued that disclosure of the requested report is crucial to informing the public of the direction that the review of planning policy will take. In his view, disclosure was in the public interest as it enabled the public to participate in decision making.
33. DfI acknowledged the value of putting information in the public domain as part of the development of policy:

"... in particular environmental policy which affects every citizen in Northern Ireland".

Public interest arguments in favour of maintaining the exception

34. In correspondence with the complainant, DfI cited 'safe space' arguments, telling the complainant:

"...the public interest supports withholding this information by protecting a safe space for internal deliberation during the normal policy development process".

35. In favour of maintaining the exception, DfI also argued that, as planning policy has such a wide impact, it is strongly in the public interest to ensure that access to the information is available and publicised to all citizens at the same time. In that respect it told the Commissioner:

"This can only follow internal scrutiny, where the Minister is permitted time and space to fully debate matters with her officials and consider every option before moving the policy on to the next stage of the process".

36. Recognising the age of the report, DfI acknowledged that while the passage of time has an impact on public interest considerations, in the circumstances of this case, the report remains part of the current, live, policy review process. It re-iterated that this is a process that has only been able to be taken forward since January 2020.

37. With regard to the need for a safe space in which to formulate and develop policy, DfI told the complainant:

"I am confident that the report will be available at a later stage, when the need for a continuing safe space for policy formulation and development will have been significantly diminished, and the public interest will no longer support non-disclosure".

38. Similarly, it told the Commissioner:

"As part of the policy development process, the Department fully intends placing this report into the public domain for scrutiny and to allow public participation. However, the timing for that is when the Minister decides to instigate the public consultation".

Balance of the public interest arguments

39. There is always a general public interest in disclosing environmental information, derived from the purpose of the EIR.

40. The Commissioner recognises that, as the public interest can cover a wide range of values and principles relating to what is the public good, or what is in the best interests of society, there are always arguments to be made on both sides.

41. In reaching a decision in this case, the Commissioner has considered the arguments put forward by the complainant and by the public authority. She has also consulted her guidance '*How exceptions and the public interest test work in the Environmental Information Regulations*'².
42. In that guidance, she recognises:
- "The factors determining the weight of the arguments for and against disclosure can include: the likelihood and severity of any adverse effect; the age of the information; how far disclosing the information would serve the public interest; and what information is already in the public domain".*
43. In her guidance, she also states:
- "When dealing with a complaint that information has been wrongly withheld, the Commissioner will consider the situation at the time the authority dealt with the request or internal review".*
44. Notwithstanding slight discrepancies in the dates cited by the parties in relation to the report, the Commissioner accepts that at the time of the request, the report had been completed for some time. She also accepts that once appointed, the new Minister would require time and space to debate matters.
45. In determining where the balance of the public interest lies in this case, the Commissioner has given due weight to the presumption under regulation 12(2) in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions that may have widespread effects on the community.
46. She has taken into account the subject matter of the report and the potential for this policy area to have a widespread or significant impact on the public.
47. However, the Commissioner also recognises the strength of the public interest arguments in favour of maintaining the exception.
48. She acknowledges DfI's argument that public bodies need space and time to fully consider their policy options before moving to the next step in the process. In that respect, the Commissioner is mindful that DfI

² <https://ico.org.uk/media/for-organisations/documents/2021/2619013/exceptions-pi-test-eir.pdf>

confirmed that, at the time of the request, the policy review process was yet to be finalised. She has also taken into account the explanation that the ability to progress policy matters was affected by the absence of an accountable Minister.

49. The Commissioner recognises that DfI has explained to the complainant that consultant's reports, such as the one under consideration in this case, would normally be made publicly available at the same time as the public consultation on any new draft policy. She has also taken into account that DfI confirmed, in its submission to her, its intention to publish the requested report as part of a consultation process.
50. The Commissioner acknowledges the opportunities for public scrutiny within the consultation process itself, which provides transparency and openness and informs public debate and thus goes some way to satisfying the public interest that would otherwise be served by disclosure.
51. Having reviewed the withheld information, and considered the public interest arguments and their relative weight, it is the Commissioner's opinion that, in all the circumstances of this case, the disclosure of information relating to material in the course of completion would frustrate the process of reviewing and developing policy options and inhibit DfI's ability to carry out this work. This is the very activity which the exception is formulated to protect.
52. Accordingly, while recognising the complainant's concerns, the Commissioner gives more weight to the need for 'safe space' in which to develop policy.
53. In light of the above, and mindful of the timing of the request, the Commissioner is satisfied that regulation 12(4)(d) was applied appropriately and that the public interest in maintaining the exception outweighs the public interest in disclosure.

Right of appeal

54. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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