

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

### **Decision notice**

**Date:** 22 November 2022

**Public Authority:** Department for Levelling Up, Housing and Communities

**Address:** Fry Building  
2 Marsham Street  
London  
SW1P 4DF

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

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1. The complainant has requested information with regards to a housing development. The Department for Levelling Up, Housing and Communities (the Department) provided some information, redacting some information under regulation 12(3) of the EIR – personal data, and refused the remaining under regulation 12(4)(e) of the EIR – Internal Communications. The complainant has disputed the application of regulation 12(4)(e) of the EIR.
2. The Commissioner's decision is that regulation 12(4)(e) of the EIR is engaged but finds the public interest test favours disclosure of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with the information withheld under regulation 12(4)(e) of the EIR making any appropriate personal data redactions.
4. 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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. On 25 January 2022 the complainant made the following information request to the Department:

“Please provide copies of correspondence (including emails, texts etc) and notes and/or minutes to, from or involving any ministers, private offices and internal staff at the Department for Levelling Up, Housing and Communities (formerly the Ministry of Housing, Communities and Local Government) associated with or making reference to the housing development site appeal at Peel Hall, Warrington. This should relate to the period 2017 - March 2019.”
6. On 23 March 2022 the Department responding providing a redacted copy of the Ministerial submission and withheld the remaining information was being withheld under regulation 12(4)(e) of the EIR – Internal Communications, and 12(3) of the EIR - Personal Data of junior officials.
7. The complainant requested an internal review on 5 April 2022 disputing the application of regulation 12(4)(e) of the EIR.
8. The Department provided its internal review on 18 July 2022 upholding its initial response.

## **Scope of the case**

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9. The complainant contacted the Commissioner to complain about the withholding of the Internal Communications. He has not disputed the personal data redactions of junior officials.
10. The scope of the case is for the Commissioner to determine whether the Department is able to rely on regulation 12(4)(e) of the EIR to withhold the information.

## Reasons for decision

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### Regulation 12(4)(e) - Internal Communications

11. 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.
12. The Commissioner has published guidance<sup>1</sup> on regulation 12(4)(e) which includes a description of the types of information that may be classified as 'internal communications'.
13. The complainant has stated that the information required is the same information that was requested in a decision notice FER0555744<sup>2</sup> issued on 24 November 2020. The decision notice at the time upheld the application of 12(4)(e) of the EIR. That decision notice also provides background information to this particular request.
14. As this information has already been determined as Internal Communications in the previous decision notice, the Commissioner is satisfied that the exception at regulation 12(4)(e) of the EIR is engaged.

### Public Interest Test

15. Although regulation 12(4)(e) has been found to be engaged in this case, the exception is subject to the public interest test as required by regulation 12(1) of the EIR.
16. The public interest test is to determine whether in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
17. What the Commissioner must take into account, when carrying out the public interest test, is a presumption towards disclosure of the information as required by regulation 12(2) of the EIR.

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618718/fer0854630.pdf>

### **Public Interest in favour of disclosure**

18. The Department acknowledges that there is public interest in making information available as it can increase public participation in decision making and aids the transparency and accountability of government which in turn may serve to increase public trust and confidence in the policy decisions made by Ministers and in good governance.
19. The complainant has highlighted that the Secretary of State has issued his decision letter and that the 6 week legal challenge period has expired, so his view is that the need for 'safe space' has diminished.
20. The complainant has also referred to a decision notice IC-76802-C8V1<sup>3</sup> which concerned HS2 Ltd's decision to withhold information that it considered to be exempt from disclosure under regulation 12(4)(e). In applying the public interest test in this case, the Commissioner concluded at paragraphs 36-38 of the decision notice that the balance of the public interest favoured disclosure because "arguments about the need for a "safe space" in which to deliberate will only generally be relevant when the public authority is in the process of arriving at its decision" and it was "clear that a decision had already been made at the point the request was responded to and therefore the Commissioner consider[ed] there was no longer a need to maintain a safe space."
21. In this case, the decision for the Planning Appeal was issued nearly 3 months prior to the request being made, so the complainant considers that the disclosure of the information relating to the Planning Appeal would not inhibit any internal-decision making and that there is a greater public interest in applying the presumption in favour of disclosure.

### **Public Interest in maintaining the exception**

22. The Department has argued that there is a strong public interest in ensuring an appropriate degree of "safe space" in which advice is put to Ministers without impediment, and free from distraction that such information will be made public. Such "safe space", it is widely accepted, is needed where it is appropriate in order to safeguard the effectiveness of the decision-making process.

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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4018480/ic-76802-c8v1.pdf>

23. It is also of the view that disclosure of this information would affect the frankness with which officials can have discussions with each other and provide advice to Ministers, inhibiting discussions and deliberation. This would consequently undermine and degrade the decision making process, and as such regulation 12(4) (e) would apply. While it is certainly true to say that the decision has been issued in this case, a precedent that internal correspondence could be disclosed once the six-week legal challenge period had passed would have a chilling effect on the thinking space for all future planning casework decisions.
24. The Department also considers that some degree of transparency has been met by the decision-making process that was followed which is clearly set out by the Decision Letter and the Inspector's Report, both of which were sent to the complainant and are in the public domain.

### **The Commissioner's position**

25. The Commissioner has given consideration to the above. In his view, civil servants and other public officials are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure. It is possible that the expectation of future disclosure could actually lead to better quality advice.
26. The Commissioner accepts a safe space is needed to develop ideas, debate live issues and reach decisions away from external interference and distraction. This may carry significant weight in some cases.
27. He accepts some transparency would be met from the release of the Decision Letter and Inspector's report.
28. However, the need for a safe space is strongest when the issue is still live. Once a decision is made, the argument will carry little weight. The timing of the request is therefore an important factor.
29. On this basis, the Commissioner finds in this case, that the public interest in disclosure outweighs the public interest in maintaining the exception.
30. The Commissioner requires the Department to provide the complainant with the withheld information making any appropriate personal data redactions.

## Right of appeal

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31. 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)

32. 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.
33. 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 .....**

**Dan Perry**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**