

Environmental Information Regulations (2004)

Decision notice

Date: 19 December 2022

Public Authority: Department for the Economy

Address: Netherleigh
Massey Avenue
Belfast BT4 2JP

Decision

1. The complainant requested information relating to the Northern Ireland Non-Domestic Renewable Heat Incentive Scheme. The Department for the Economy ("DfE") withheld the information under the exceptions for material in the course of completion – regulation 12(4)(d) of the EIR and internal communications (regulation 12(4)(e)).
2. The Commissioner's decision is that DfE correctly withheld the requested information under regulation 12(4)(d). He does not require DfE to take any steps.

Request and response

3. On 8 May 2022 the complainant made the following information request to The Department of the Economy ("DfE"):

"The Department conducted a consultation with the title "Northern Ireland Non-Domestic Renewable Heat Incentive Scheme – Future of the Scheme," a consultation which ended on 9 Apr 21. Best practice is the publication of the Consultation Report within 12 weeks of conclusion.... Kindly supply the Consultation Report within the statutory period."

4. DfE's final position is that the requested information is subject to the exceptions for information in the course of completion (regulation 12(4)(d)) and internal communications (regulation 12(4)(e)).

Reasons for decision

Regulation 12(4)(d) – material in the course of completion

5. Regulation 12(4)(d) of EIR provides 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, to unfinished documents, or to incomplete data.
6. 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
 - to provide some protection from having to spend time and resources explaining or justifying ideas that are not and may never be, final.
7. 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.
8. The Commissioner considers that the fact that the exception refers to both material in the course of completion and unfinished documents confirms that these terms are not necessarily synonymous. 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.

9. DfE has explained that the subject of the request is the report of the 2021 public consultation¹ (the "Report") on the future of the Non-Domestic RHI Scheme (Renewable Heat Incentive Scheme – the "Scheme"). It has confirmed that the Report remains unfinished and in the course of completion while policy development work—in which consultation responses are one of several key factors—is live, ongoing, and requiring a policy decision by the Northern Ireland Executive.
10. DfE has confirmed that the final Report will set out in detail the results of the consultation, including quantitative analysis of responses received to each question and qualitative reporting of associated commentary, as well as providing a government response to the consultation advising of the way forward and indicating how the responses have been taken into account in the policy decision, providing reasons and justification for any final policy decision.
11. In their request for internal review, the complainant indicated that they believed that preparation of the consultation report and the decision on policy direction would be two separate processes, with the first preceding the second, based on information communicated by DfE. DfE clarified in its internal review response that this is not the case and that, rather, the incomplete Report forms part of the material directly relating to the continuing development of policy and the process of making decisions in relation to the Scheme.
12. In short, DfE considers that the Report is an unfinished document which remains in the course of completion and that it forms part of the material that is being used to develop and formulate policy.
13. In light of the above, it is clear to the Commissioner that the requested information falls within the scope of the exception and that, therefore, regulation 12(4)(d) is engaged.
14. As the regulations under the EIR are all subject to the public interest test, the Commissioner has considered whether, in all the circumstances

¹ <https://www.economy-ni.gov.uk/consultations/northern-ireland-non-domestic-renewable-heat-incentive-scheme-future-scheme>

of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public Interest Test

15. The complainant has argued that there is a significant public interest in knowing that the Report will be an impartial record comprising factual quantitative and qualitative data provided in the consultee responses.
16. DfE has acknowledged the presumption in favour of disclosure provided by regulation 12(2) and the strong public interest in authorities being transparent and accountable. DfE has confirmed that it is also aware of keen public interest in this subject matter and recognises that, as members of the public have taken the time to submit their views through the consultation process, they have an expectation to see the results and outcome.
17. In relation to the public interest in maintaining the exception, DfE has argued that the unfinished nature of the draft Report, if placed into the public domain, would have significant negative impacts for public understanding of the information received in the consultation, the decision making processes and the potential next steps. It has submitted that, given the high profile and political sensitivity of the Scheme, such incomplete and potentially misleading information entering the public domain might be expected to attract significant attention, distracting from the key issues under consideration, and potentially causing significant harm to the policy development and decision making processes.
18. DfE has argued that the Scheme has a complex history and decisions relating to it are of significant interest to participants, the public, elected representatives and the media, with information released about the Scheme receiving extensive scrutiny. DfE considers that the release of the incomplete report would create a misleading or inaccurate impression and due to the press attention and political sensitivities around the RHI Scheme, it would be difficult or require a disproportionate effort to correct this impression which could have significant adverse impacts, potentially undermining the policy development and decision making processes.
19. DfE has further argued that release of the incomplete Report, without information relating to next steps or when a decision on the future of the Scheme has not yet been made, would shed little light on the outcome, i.e. the eventual policy position to be pursued. It considers

that, given the incomplete status of the Report, it would also not fully and fairly illuminate the detailed views submitted by respondents.

20. In determining where the balance of the public interest lies the Commissioner has considered the arguments submitted by the complainant and DfE. He is mindful that the subject of the request is something which attracts a high degree of attention and he notes the rather complex and controversial history of the issues involved.
21. The Commissioner accepts that there is a significant public interest in information regarding this matter being placed in the public domain to provide reassurance that the consultation process has been properly followed and that the decision making process has been robust.
22. The Commissioner is mindful that the purpose of the exception is to provide authorities with a safe space within which decisions can be made without this process being frustrated or hindered. He accepts that putting information in the public domain about speculative proposals which might never actually come to fruition may result in the effectiveness of decision making being challenged as DfE may be forced to field enquiries about hypotheticals.
23. The Commissioner also notes that, in relation to the complainant's specific concerns about the content of the Report, disclosure of the incomplete version of the Report would not satisfy this public interest as the information disclosed would not represent the final analysis or representation of consultee submissions.
24. In setting out its position in relation to the application of regulation 12(4)(d) in this case, DfE directed the Commissioner to previous decision notices issued in comparable cases². The Commissioner has referred to these decision notices and he accepts that the conclusions reached in those cases, which highlight the damaging effects of disclosing information which does not reflect an authority's final position in relation to decisions, are relevant to this matter. He considers that his conclusions regarding the public interest in these previously issued decision notices are transposable to this case.
25. Whilst the Commissioner recognises the complainant's interest and the broader public interest in disclosure, he considers that the public interest

² See: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022871/ic-180541-c0r8.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021513/ic-139941-l6q0.pdf>

in these matters is better served by the incomplete Report being withheld. He considers that the public interest will be better served by the publication of the final Report when the process is complete.

26. The Commissioner has concluded that DfE has correctly applied regulation 12(4)(d) and that the public interest favours maintaining the exception.
27. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).
28. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(d) was applied correctly.
29. As he has concluded that regulation 12(4)(d) applies to the information the Commissioner has not gone on to consider DfE’s application of regulation 12(4)(e).

Right of appeal

30. 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

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

31. 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.
32. 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

Christopher Williams
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