

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 January 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested from the Department for Levelling Up, Housing and Communities ("the DLUHC") information relating to the proposed expansion of Stansted Airport. The DLUHC withheld the requested information under regulation 12(4)(e) (internal communications) and regulation 12(5)(b) (course of justice) of the EIR.
2. The Commissioner's decision is that the DLUHC was entitled to withhold the requested information under regulation 12(4)(e).
3. The Commissioner does not require the DLUHC to take any steps.

Request and response

4. On 21 September 2020, the complainant wrote to the DLUHC and requested information in the following terms:

This is a request under the FoI Act 2000 for copies of any and all exchanges of correspondence, including email exchanges, between MHCLG and

(a) the Department for Transport; and

(b) the Planning Inspectorate;

from 1st January 2020 to the present day, where such correspondence relates to proposals for the expansion of Stansted Airport, including any planning application.

5. The DLUHC responded on 19 October 2020. It stated that the information was withheld under regulation 12(4)(e).
6. Following an internal review, the DLUHC wrote to the complainant on 2 December 2020. It maintained its original response.

Scope of the case

7. The complainant contacted the Commissioner on 25 December 2020 to complain about the way their request for information had been handled, and specifically that the DLUHC was not entitled to withhold the requested information under regulation 12(4)(e).
8. During the course of investigation, the DLUHC revised its position and, in respect of a small amount of the withheld information, asserted that it would also fall under the exception provided by regulation 12(5)(b).
9. The Commissioner notes that the request was originally submitted to the Ministry of Housing, Communities, and Local Government. During the course of investigation, the public authority's name changed to DLUHC.
10. The scope of this case and of the following analysis is whether the DLUHC is entitled to withhold the information under regulation 12(4)(e)

Reasons for decision

Regulation 12(4)(e) – Internal communications

11. 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.

12. The Commissioner's public guidance on this exception¹ 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.

13. The EIR does not provide a definition of what is meant by 'internal'. However, the Commissioner's guidance provides clarification on the scenarios where communications can be defined as such. Such a scenario is where the communications have taken place between government departments, or between an executive agency and its parent department.

14. 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.

Does the information represent internal communications?

15. The DLUHC has stated that the information withheld under this exception are internal communications between officers within two government departments (the DLUHC and the Department for Transport, respectively), and an executive agency and the parent department (the Planning Inspectorate and DLUHC, respectively).

16. The subject matter of these communications is discussion around the commissioning, and subsequent receipt, of legal advice in respect of an inquiry by the Planning Inspectorate into the proposed expansion of

¹

https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf

Stansted Airport. This inquiry was initiated following the refusal of planning permission by Uttlesford District Council, and the subsequent appeal by Stansted Airport.

17. Having examined the withheld information, and considered the specific circumstances of its creation, the Commissioner is satisfied that it can be properly characterised as internal communications for the purpose of this exception. The Commissioner is therefore satisfied that regulation 12(4)(e) is engaged.

The public interest

18. As the exception is engaged for the information, the Commissioner has considered the associated public interest test required by regulation 12(1)(b). 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. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in regulation 12(2).

The public interest in the information being disclosed

19. The DLUHC has argued that there is an inherent public interest in the disclosure of information held by the public authorities. Disclosure of such information helps to promote accountability and transparency of government which, in turn, increases public trust and confidence in good governance.
20. The DLUHC considers that the primary public interest in this case lies in having an open and transparent process through which planning decisions are made. This is recognised by the provisions contained within the Town and Country Planning Act 1990, which requires significant public consultation in respect of planning matters.
21. The complainant argues that such transparency is particularly important in the circumstances of this case, as they allege that the Planning Inspectorate's inquiry will be biased due to pressure applied by the Department for Transport through the DLUHC. The complainant considers that the requested information will help demonstrate such pressure, and that the DLUHC has withheld the information on the basis that it will cause embarrassment to the involved authorities and open them to potential legal consequences.

The public interest in the exception being maintained

22. The DLUHC has stated that, at the time of the request, the matter was 'live' as it related to an ongoing inquiry by the Planning Inspectorate.

23. As such, the DLUHC argues that there is a significant public interest in ensuring the protection of officers' thinking space and ability to have full and frank discussions without concern that the information will be disclosed. Should this not be so, it would inhibit the frankness and candour with which officers can communicate, and this would undermine and degrade the decision-making process.
24. If internal correspondence relating to a live planning case is released before a formal decision is made, there is a risk that it will undermine the efficiency, transparency and impartiality of the planning process, and delay decision making. For example, it may lead to individuals making further representations based on the information they hold, but which others have not seen. To maintain fairness in circumstances such as those present in this case, the Secretary of State would then have to consider and possibly circulate that information to other interested parties to the planning application in order that they have an opportunity to respond, and for all parties to have a fair and equal hearing.
25. The DLUHC has argued that it has an approach of handling information requests on live planning cases that weighs the need to facilitate public debate and participation in planning decisions, against the public interest in ensuring that an efficient and effective planning system is implemented which allows decisions to be made within reasonable timescales.

The balance of the public interest

26. The Commissioner considers that the underlying rationale for the exception is to protect a public authority's need for a private thinking space. The Commissioner considers that the extent to which disclosure would have an impact on such processes is contingent upon the particular information in question and the specific circumstances of the request.
27. The Commissioner recognises that the need to provide a safe space for public authority decision making will be strongest when the issue under consideration is still live. However, recently made decisions may also need protection as authorities will need to explain and account for their actions.
28. In the circumstances of this case, it is recognised that the substantive issue was live when the request was made, and the inquiry by the Planning Inspectorate was ongoing. In such a situation, it is reasonable for the Commissioner to consider that there is an inherent public interest in ensuring that officers can discuss their position with candour in a safe

space, so as to enable effective decision making without undue external pressure.

29. In opposition to this, the Commissioner is mindful of the concern raised by the complainant that it may be possible for one authority to place pressure on another, and that there is a public interest in ensuring sufficient transparency in communications as a remedy to that. This is particularly in cases where a public authority's decision making may have significant impact at both a local and national level, as in this case. The proposed expansion of Stanstead Airport may represent a significant impact upon the environment, and public concern about this has been demonstrated through the earlier planning application refusal by Uttlesford District Council, as well as public groups lobbying against the proposed expansion.
30. However, whilst the Commissioner is sympathetic to the complainant's concerns, there is no compelling evidence that the Commissioner is aware of that suggests that the Planning Inspectorate's inquiry is deficient or improper, or which supports the complainant's allegation that undue pressure has been exerted by the Department for Transport. The Commissioner also understands that the outcome reached by the inquiry may itself be subject to appeal through the courts, and as such, there is a public interest in ensuring that the DLUHC is able to make and defend its decisions without being compelled to disclose the basis of these in advance. In such a context he must give weight to the precedent in the application of regulation 12(4)(e) which recognises that, whilst decision-making processes are live, the weighting in favour of protecting deliberations in internal communications is enhanced.
31. Having considered the arguments and the withheld information, the Commissioner considers that, in this case, it has been evidenced that disclosing the information - which relates to live decision-making processes - would damage the DLUHC's ability to make and defend its decisions. Whilst he acknowledges the complainant's purpose in seeking the information, he does not consider that the public interest in disclosing the information in this case outweighs the interest served by the application of the exception.
32. The Commissioner has therefore concluded that, in this case, the balance of the public interest favours maintaining the exception.
33. 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).

34. 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)(e) was applied correctly.

Right of appeal

35. 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

36. 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.
37. 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

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