

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

Decision notice

Date: 6 September 2023

Public Authority: Department of Health and Social Care
Address: 30 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested copies of advice provided to people with medical conditions in the event of so-called energy "blackouts". The above public authority ("the public authority") relied on regulations 12(4)(d) – material in the course of completion – and 12(4)(e) - internal communications – to withhold the information it had identified within the scope of part [1] of the request and denied holding information within the scope of part [2].
2. The Commissioner's decision is that the public authority has correctly relied on regulations 12(4)(d) and 12(4)(e) of the EIR and the aggregated balance of the public interest favours maintaining both exceptions. On the balance of probabilities, the Commissioner is satisfied that the public authority holds no information within the scope of part [2] of the request. The public authority breached regulation 14 of the EIR as it failed to consider part [1] of the request under the EIR.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 28 April 2023, the complainant wrote to the public authority and requested information in the following terms:
 "[1] Please provide a copy of the latest document that covered your plans for protecting people who rely on medical equipment at

home, such as ventilators or dialysis machines, in the event of winter blackouts.

"[2] Please provide a copy of any guidance that was sent out to NHS bodies by DHSC to help them prepare for the protection of people who rely on medical equipment at home, such as ventilators or dialysis machines, in the event of winter blackouts."

5. The public authority responded on 31 May 2023. It dealt with part [1] of the request under FOIA and relied on section 35 to withhold the information. It dealt with part [2] of the request under the EIR. It confirmed that it held some information but relied on regulation 12(4)(d) of the EIR to withhold it. It upheld this position following an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 15 June 2023 to complain about the way his request for information had been handled.
7. At the outset of the complaint, the Commissioner wrote to the public authority to seek a submission and a copy of the withheld information. The Commissioner asked the public authority to reconsider whether it should have dealt with the request under FOIA or the EIR. He noted that, given the nature of the request, it seemed likely that both parts would fall to be treated under the same regime – although, at that stage, he reserved his position as to which regime that should be.
8. On 10 August 2023, the public authority responded. It now argued that the whole request fell to be dealt with under FOIA. It maintained that section 35 applied to the information within the scope of part [1]. In respect of part [2], it now considered that the information it had previously withheld did not in fact fall within the scope of the request. Therefore whichever regime the request fell under, it did not hold any information within the scope of part [2].
9. Having viewed the two documents it had previously withheld, the Commissioner explained to the public authority that, in his view, the information fell within the scope of the EIR. He therefore asked the public authority to either disclose the information or issue a fresh refusal notice citing a valid EIR exception.
10. The public authority issued a fresh refusal notice on 29 August 2023. It relied on regulation 12(4)(d) and regulation 12(4)(e) of the EIR in order to withhold the information within the scope of part [1]. It denied holding information within the scope of part [2].

Reasons for decision

Is the requested information environmental?

11. The Commissioner considers that the information the public authority is withholding in respect of part [1] and the information that would fall within the scope of part [2] (if the public authority held any) would be environmental.
12. The supply and consumption of energy by domestic and industrial users is a measure that affects the elements of the environment - either directly (by the infrastructure need to bring that energy to the consumer) or indirectly, via the emissions that result from production of that energy.
13. The withheld information relates to a hypothetical situation in which that supply (and hence that consumption) is temporarily interrupted. The Commissioner is therefore of the view that, taking a purposive approach, this information is information "on" that measure - as it would assist the general public in understanding the government's planning and decision-making in the event of large-scale power outages (eg which parts of the country or which users would be most affected).
14. The information therefore fell to be dealt with under the EIR.

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

15. Regulation 12(4)(d) of the EIR allows a public authority to withhold information if it relates to material in the course of completion, to unfinished documents or to incomplete data.
16. The public authority referred to the information as being incomplete data, but its arguments appeared to relate more closely to unfinished documents. It explained to the Commissioner that the exception was engaged because:

“DHSC is still in the process of determining the department’s policy position on whether guidance should be issued specifically on the matter of the use of at-home medical devices during a power outage. The document is an internal scoping paper that is being used to record information gathered during the policy exercise and to identify options for potential action by the department and its arms-length bodies. This activity continues and the document remains in draft.

“The information requested relates to on-going planning activity and policy development. Given this work has not been concluded by officials it would not be in the public's interest to release a partially

formed response where clarity and consistency is needed. Furthermore, release of the information could inadvertently mislead the public due to its incomplete nature.”

17. Unless the final draft of a document has been produced, that document is, by definition, unfinished.
18. The document that the public authority provided to the Commissioner was labelled as “draft.” In themselves, labels are not determinative, but the Commissioner notes that the document is populated with comments from various officials suggesting ways in which it could be improved – indicating that the document had not been finalised. The body of the document itself also demonstrates that officials were anticipating further work before the document could be considered “final.”
19. The Commissioner therefore accepts that this information related to an unfinished document and so regulation 12(4)(d) is engaged.

Regulation 12(4)(e) – internal communications

20. Under the EIR, where two or more exceptions are found to apply to the same information, the public authority is entitled to consider the aggregated public interest in maintaining both exceptions. The Commissioner will therefore consider whether regulation 12(4)(e) of the EIR applies before turning to the public interest test.
21. Regulation 12(4)(e) of the EIR allows a public authority to withhold information if it would disclose internal communications.
22. A “communication” will cover any format that attempts to convey (or communicate) information from one person to another. The communication will be “internal” if it has only been shared within the organisation.
23. Regulation 12(8) of the EIR states that any communication between government departments can still be an internal communication.
24. The public authority explained to the Commissioner that the document had only been circulated between its own officials and officials at the Department for Energy Security and Net Zero.
25. The Commissioner has seen nothing to indicate that the document has been shared more widely than the two government departments. The document anticipates that it may eventually be shared with NHS England - which, as a non-departmental public body and separate public authority under FOIA, would be an external organisation – but there is no indication that that had happened at the point the request was responded to.

26. The Commissioner is therefore satisfied that regulation 12(4)(e) of the EIR is engaged.

Public interest test

27. Whilst the public authority is entitled to aggregate the public interest in maintaining both exceptions, the Commissioner does not consider that, in these circumstances, aggregation significantly increase the public interest in withholding the information.
28. Both the exceptions are designed to protect the public authority's internal thinking space in which it can develop and refine policy options before presenting them for a decision and for scrutiny. Therefore there is a considerable overlap between the two exceptions and, in this case, the public interest arguments against disclosure are largely the same. The Commissioner also notes that there is no need to demonstrate that disclosure would be harmful in order to engage either exception.
29. The public authority explained that:

"DHSC recognises the general public interest in making this information available for the sake of greater transparency and openness. In addition, DHSC accepts there is legitimate interest in how DHSC plans to assist those with health problems that rely on power to run specific health equipment and are vulnerable if there are power outages. However, DHSC takes the view that regulation 12(4)(d) and (e) is intended to ensure the possibility of public exposure does not deter from full, candid and proper exploration of all options.

"The release of this information would create a chilling effect and deter civil servants and subject experts from engaging in the free and frank discussion of all the options, to expose their merits and demerits and their possible implications as appropriate. Their candour in doing so will be affected by their assessment of whether the content of such discussion will be disclosed, which could damage the quality of advice given and lead to poorer decision making.

"Furthermore, being that the information is incomplete, and a final document could be significantly different, releasing information that was not conclusive could do more damage than harm as it would provide an inaccurate picture and perhaps set unreasonable expectations...

"...We feel that if the document were released it could mislead or confuse members of the public. This would be counter-productive to the ultimate object of the policy work, which is to provide clarity on action users of medical devices at home should take prior to and

during a power outage. It would inhibit and delay the attention required to progress this or other policy work in having to correct the publics [sic] thinking, or having to explain our position at that point, retrospectively or in the future for individual or collective queries.

30. The public authority also provided some more specific arguments to the Commissioner relating to particular parts of the withheld information. So as to avoid inadvertently revealing the withheld information, the Commissioner will not repeat those arguments here – but he is satisfied that the public authority has demonstrated the issues that could be caused by premature disclosure.
31. The Commissioner recognises that there is a considerable public interest in this matter. People who are medically dependent on an uninterrupted energy supply are, by definition, in a vulnerable position.
32. There is thus a strong public interest in disclosure of information that would allow such users to prepare themselves for a situation in which their mains gas, electricity, or both, was interrupted.
33. The Commissioner also notes that there was very little official advice in the public domain for such users. Most of the advice around came from charitable organisations.
34. However, the Commissioner considers that the public interest in disclosure is significantly reduced here by the incomplete nature of the information. He has to agree with the public authority that placing incomplete or inaccurate information in the public domain could be harmful to the very people the information is intended to protect.
35. The Commissioner also notes that the request was made in March and responded to in April – a time when energy consumption begins to drop off and the threat of widespread outages reduces. Whilst this does reduce the public interest in disclosure slightly it also reduces the public interest in maintaining the exception as, arguably, the public authority's thinking should have been at a more complete stage by that point (ie such guidance is most valuable before the winter – allowing people time to plan – than during or after it).
36. Had this request been dealt with during the beginning of the winter period, when the threat of blackouts was at its most immediate, the Commissioner might have taken a different view. However, the Commissioner is obliged to consider circumstances as they stood at the point the request was dealt with. At that point, the need for immediate advice or guidance was much lower than it might have been at other times of year and the information was not at a point at which it could have been released without the risk of causing confusion.

37. The Commissioner therefore concludes that the balance of the public interest favours maintaining both exceptions.

Part [2] – held/not held

38. Where there is a dispute over the extent of the information a public authority holds that falls within the scope of a request, the Commissioner determines whether it is more likely than not that further information is held.
39. The public authority explained to the complainant, in its response of 11 August 2023, that it had reconsidered the scope of the request. It had originally considered any guidance in relation to power outages, but now accepted that the request only covered guidance relating people who rely on power for medical equipment.
40. The public authority had therefore concluded that the guidance it had provided to NHS England – which it had originally withheld – did not actually fall within the scope of the request. Having viewed a copy of this document, the Commissioner agrees that it relates to power outages generally and contains no advice that might be useful to people in the situation covered by the request.
41. The public authority has stated that it holds no other information within the scope of the request. It informed the complainant, in its response of 11 August 2023, that:
- “DHSC did not send any guidance to NHS bodies that specifically covered those who rely on medical equipment at home, such as ventilators or dialysis machines. As such we do not hold the information you have requested.”
42. It is not the Commissioner’s role to determine whether the public authority, as the lead government body for public health, ought to have issued guidance to NHS bodies to help them advise users in vulnerable situations – only to determine whether or not it did so.
43. There is no evidence to suggest that the public authority did in fact issue such guidance. The whole purpose of such guidance would be to ensure that it reached the public. Therefore it seems extremely unlikely that the public authority could have issued guidance in secret.
44. On the balance of probabilities, the Commissioner is therefore persuaded that the public authority holds no information within the scope of part [2] of the request.

Procedural matters

45. As the public authority failed to consider part [1] of the request under the EIR within 20 working days, it breached regulation 14 of the EIR.

Right of appeal

46. 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

47. 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.
48. 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

Roger Cawthorne
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