

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

Decision notice

Date: 1 September 2023

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information about a decision to allow playing fields to be sold. The above public authority ("the public authority") relied on regulation 12(4)(b) of the EIR (manifestly unreasonable) to refuse the request.
2. The Commissioner's decision is that the public authority has correctly relied on regulation 12(4)(b) of the EIR and the public interest favours maintaining the exception.
3. The Commissioner does not require further steps to be taken.

Background

4. The request relates to a decision to dispose of playing field land in Tenterden. Such land can only be disposed of with the permission of the Secretary of State for Education.
5. In this case the Secretary of State decided to grant permission. The complainant believes that the process followed was flawed and that officials failed to present the relevant evidence objectively.

Request and response

6. On 22 June 2023, the complainant wrote to the public authority and requested information in the following terms:
- “1. Who provided the Plan in Annex A? Why was this plan not made available earlier in the process and not revealed until the consent was published? This was despite FOI requests.
 2. What professional mapping software and what plan was used to provide information on playing field area?
 3. Why does the plan not break down the areas of Playing Field areas as called for in the Guidance? Soft Outdoor PE Area Hard Outdoor Play Area Soft Informal and Social Areas Hard Informal and Social Areas Habitat Areas
 4. Please supply a copy of all correspondence between Simon Foster or other DfE Officials and LocatED regarding the sale of the Homewood School Land.
 5. Was there any discussion with LocatED regarding the impact of the Promotion Agreement with Wates Developments and in particular the Pre-emption Agreement within the document
 6. LLPG made detailed references to the Promotion Agreement in our submission. Why was this not included in your analysis of our objections?
 7. In particular the equalisation agreement with the adjacent land would potentially disadvantage the school in terms of value. Why was this point deemed not relevant? The Agreement fee accepted alongside the Promotion Agreement and the pre-emption would create a relationship between TST and the buyer Wates. In 2)k of the application form the Trust confirmed that TST and Wates were not related parties. Can you please comment? Your statement claims that Wates are obliged to match bids. This is incorrect. Under the Pre-emption clause TST must offer to sell the property to the Promoter at the best offer from a third party within the Pre-emption period.
 8. Half of the site has been used for grazing school farm animals. Alternative sites are likely to cost money which has not been factored in. Why?
 9. The football pitch had the potential for leasing to the Tenterden Town Council for Community Use. This was lost when the Trust signed the Agreement with Wates. This was a mitigating factor which was not

believed to be relevant. Why was this omitted from the LLPG representations?

10. Officials claim the Homewood School has good sports facilities. This statement is not qualified in terms of meeting the requirements of existing pupils in the school. This is subjective and is not relevant to the guideline requirements on Playing Field area. The Trust should seek other funding streams for Sixth Form Facilities. Loss of Sports pitches should be replaced with other sport facilities. These could be elsewhere within the Trust Estate

11. Accessibility. Why was no reference made to the mitigation factor of the availability of school minibuses to transport pupils to Appledore Road site?."

7. The public authority responded on 4 July 2023. It refused the request as manifestly unreasonable – a stance it upheld following an internal review.

Scope of the case

8. The Commissioner wrote to the complainant on 25 August 2023 to explain that, based on the available evidence, it seemed likely that regulation 12(4)(b) of the EIR would apply and that, even if it didn't, the amount of information to be disclosed would be minimal. On that basis he suggested to the complainant that the complaint would not be worth pursuing.
9. The complainant did not dispute the Commissioner's assessment of his complaint, but asked for a decision notice.

Reasons for decision

10. Although he has not seen the requested information, the Commissioner considers that it will be information about a decision, the consequence of which will be to remove open space from public use. It is therefore on a measure affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.
11. Regulation 12(4)(b) of the EIR allows a public authority to refuse a request for information that is manifestly unreasonable. A manifestly unreasonable request is one that is either excessively burdensome or one which is unfounded, unjustified or an inappropriate use of a formal procedure.

12. In his letter of 25 August 2023, the Commissioner explained that many of the elements of the request did not seek recorded information and so the public authority would not be obliged to respond even if the request were found not to be manifestly unreasonable. He also explained why, in his view, those parts of the request that did seek recorded information were manifestly unreasonable:

"The DfE has pointed out to you that it has already provided a great deal of information about the decision it has taken. You have challenged this assertion, but you have also indicated in your correspondence that the information you have received demonstrates that officials in the DfE did not follow a fair process – which would suggest that you have received (or been able to access) sufficient information to reach this view. It's not clear what the additional recorded information within the scope of the request would add to public understanding."

"The DfE has also argued that your request represents a series of arguments against its decision, rather than an attempt to seek recorded information. For the reasons set out above, we would be inclined to agree.

"Finally, the DfE has pointed out to you that the decision has been taken and can only be challenged by way of judicial review. Whilst this is not necessarily a clinching argument on its own, there would be a much lower public value to your request if there was no realistic prospect of the decision being challenged."

13. It is evident that the complainant wishes to use this request as a means of challenging a process he believes to have been flawed. It is not the Commissioner's role to comment on the public authority's decision or the process that led to it. He is only required to consider the effect of requiring the public authority to respond to this request.
14. The Commissioner recognises that a decision to remove open space from public use is a decision of consequence and that, all other things being equal, there will be a significant public value in requests that seek recorded information showing how that decision was made.
15. However, in this case, that value is reduced substantially by the quantity of information in the public domain, the relatively little recorded information that this request would produce even if it were answered and by the lack of options to have the decision changed. The EIR are not a mechanism for preventing a decision from being taken or implemented.

16. For that reason, the Commissioner is satisfied that the request was manifestly unreasonable.

Public interest test

17. Even where a request is found to be manifestly unreasonable, the public authority must still respond unless the balance of the public interest favours maintaining the exception.
18. In this case the Commissioner recognises once again that the request relates to a decision of consequence. The effect of that decision may be concentrated in a relatively small geographical area, but that does not mean that those living in that area would not be significantly impacted. He therefore accepts that there is a reasonably strong public interest in disclosure. He also acknowledges the strength of feeling, from the complainant and others, that the decision of the secretary of State was flawed.
19. However, the Commissioner considers that there is a stronger public interest in protecting public authorities from having to respond to requests that are manifestly unreasonable. As he has noted above, in this case there are several factors which reduce the value of the request and these consequently decrease the public interest in disclosure.
20. The Commissioner has also considered the EIR's presumption in favour of disclosure but, as he does not consider the public interest to be evenly balanced in this case, the presumption in favour of disclosure does not override the public authority's reliance on the exception.
21. The Commissioner is therefore satisfied that regulation 12(4)(b) of the EIR applies and that the balance of the public interest favours maintaining the exception.

Right of appeal

22. 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

23. 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.
24. 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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Wycliffe House
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Wilmslow
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