

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

Date: 15 January 2024

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

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information from the Department for Levelling Up, Housing and Communities ("the DLUHC") relating to a specific planning application. The DLUHC withheld the information under regulation 12(4)(e) (Internal communications).
2. The Commissioner's decision is that the DLUHC was entitled to rely upon regulation 12(4)(e) to withhold the information.
3. The Commissioner does not require the DLUHC to take any steps.

Request and response

4. On 10 July 2023, the complainant wrote to the DLUHC and requested information in the following terms:

"This is an EIRs request about the SoS Michael Gove's decision to grant planning permission to a new coal mine in Whitehaven, Cumbria in December 2022. I write to request:

1. A full copy of the ministerial submission which was drafted for the SoS. I expect this submission to include, but not necessarily be limited

to, the summary, options appraisal and recommendations sections as well as any annexes and/or addendums.

2. A full copy of SoS Michael Gove's reply to the submission.

3. Correspondence - including letters, emails and attachments between SoS Michael Gove and the SoS for Business, Energy and Industrial Strategy during the month of December 2022.

I would prefer to receive all information in electronic format and in machine-readable formats where applicable. I would be grateful if you could acknowledge receipt of this request."

5. The DLUHC responded on 9 August 2023. It stated that the information sought by parts 1 and 2 of the request was withheld under regulation 12(4)(e), and that the information sought by part 3 was not held.
6. On 9 August 2023, the complainant asked for an internal review in respect of part 1 and 2 of the request.
7. Following an internal review, the DLUHC wrote to the complainant on 16 October 2023. It upheld the application of regulation 12(4)(e) to part 1 and 2 of the request.

Scope of the case

8. The complainant contacted the Commissioner on 8 November 2023 to complain about the way their request for information had been handled, and specifically that the DLUHC was not entitled to withhold the information under regulation 12(4)(e).
9. The Commissioner considers the scope of this case to be whether the DLUHC is entitled to withhold the information under regulation 12(4)(e).
10. During the course of investigation, the DLUHC advised the Commissioner that it also sought to rely upon the exceptions provided by regulation 12(5)(b) (Course of justice) and regulation 13 (Personal information). However, for the reasons given in this decision notice, the Commissioner has not needed to consider these additional exceptions.

Reasons for decision

Regulation 12(4)(e) – Internal communications

11. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
12. The DLUHC has applied regulation 12(4)(e) to internal advice from its Planning Casework Unit to the Department's ministers, and the subsequent response from the Secretary of State.
13. Part of this information (the internal advice) has been considered by the Commissioner in an earlier decision notice (IC-217947-M8W3¹) issued on 15 May 2023. In this the Commissioner was satisfied that the information represented internal communications.
14. In respect of the Secretary of State's response to this internal advice, the Commissioner understands that it was provided as a reply to this advice and has not been provided to external parties. The Commissioner is therefore satisfied that it also represents internal communications.
15. Therefore, the Commissioner finds that all of the withheld information represents internal communications. Regulation 12(4)(e) is therefore engaged, and the Commissioner will now go on to consider the public interest test.

Public interest test

16. As noted in paragraph 12, the Commissioner has recently considered the majority of the withheld information in an earlier decision notice. In that case, the Commissioner considered the context of the information, and found the public interest test to support the maintenance of the exception, based on the circumstances present at the time of the request (13 December 2022).
17. In that earlier decision notice, the Commissioner identified that that there had been significant transparency about the matter through the disclosure of wider information, and that the planning application represented a 'live' matter that could still be (and had been) appealed

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025261/ic-217947-m8w3.pdf>

and subject to litigation in the High Court. On this basis the Commissioner found that there was a greater public interest in maintaining the exception, and the public interest test therefore supported the maintenance of the exception.

18. The Commissioner must therefore consider whether the circumstances present at the time of the request in this case (10 July 2023) are substantially different so as to change the outcome of the public interest test.
19. Having considered the circumstances present at the time of the request in this case (10 July 2023), the Commissioner does not consider that they are substantially different. The planning application has been subject to significant transparency – as previously noted, and the application continues to represent a live matter by an appeal to the High Court. The Commissioner therefore considers it reasonable to apply the findings of that earlier case here, and specifically that the public interest test supports the maintenance of the exception.
20. 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).
21. In this case the Commissioner’s view is that the balance of the public interest 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.
22. As the Commissioner has found regulation 12(4)(e) to have been correctly applied to all of the withheld information, he has not gone on to consider the Council’s application of regulation 12(5)(b) or regulation 13.

Other matters

23. The Commissioner reminds the DLUHC that, where a request is received for information that has been previously considered by the

Commissioner and is the subject of a public decision notice, it is likely to be beneficial to direct the requester to this for their awareness. Doing so may also reduce the likelihood of a request for internal review, or a subsequent complaint to the Commissioner.

Right of appeal

24. 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

25. 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.
26. 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