

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

Date: 28 May 2024

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

Decision (including any steps ordered)

1. The complainant has requested copies of reports held by the Department for Education on reinforced autoclaved aerated concrete ('RAAC') at Cockermonth School. The Department for Education ('DfE') refused to provide the requested information, citing regulation 12(5)(d) of the EIR – confidentiality of proceedings.
2. The Commissioner's decision is that DfE is entitled to refuse to disclose the requested information in accordance with regulation 12(5)(d) of the EIR.
3. The Commissioner does not require further steps.

Request and response

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

"Last month I sent a FOI request to Cockermonth School requesting a copy of their RAAC surveys. Whilst a school led survey was revealed, it was brought to my attention that the DfE commissioned their own visual survey into RAAC within Cockermonth School which your department remains the data controller for.

I would like to request a copy of all reports that the Department for Education holds on RAAC within Cockermonth School's building.”

5. DfE responded on 4 January 2024. It stated that it was withholding the information under the exception for the confidentiality of proceedings (regulation 12(5)(d)).
6. Following an internal review DfE wrote to the complainant on 31 January 2024. It stated that it was maintaining its position.

Scope of the case

7. The complainant contacted the Commissioner on 31 January 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to establish whether DfE is entitled to withhold the requested information under regulation 12(5)(d) of the EIR.

Reasons for decision

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;

- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
10. The Commissioner acknowledges that the requested information relates to inspection reports to determine the presence of a particular type of concrete and associated potential risks to health and safety. He is therefore satisfied that the information can be considered to be a measure as defined in regulation 2(1)(c) and 2(1)(f). He has, therefore, assessed the request under the EIR.

Regulation 12(5)(d) – confidentiality of proceedings

11. Regulation 12(5)(d) of EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
12. The engagement of the exception rests on three conditions being met.
13. First, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance 'Confidentiality of proceedings (regulation 12(5)(d))', the Commissioner interprets 'proceedings' as possessing a certain level of formality. They will include but are not limited to formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings¹.
14. The information withheld under this exception relates to reports commissioned by DfE to determine the presence of RAAC on school premises. RAAC is a lightweight form of concrete that was used from the 1950s-mid 1990s. RAAC is weaker than traditional concrete and has a lifespan of around 30 years. In 2022, DfE carried out a RAAC Identification programme and all schools or colleges that

¹ [Regulation 12\(5\)\(d\) – confidentiality of proceedings \(Environmental Information Regulations\) | ICO](#)

suspected they might have RAAC have had a survey to confirm if RAAC is present.

15. DfE has explained that commissioning the reports is a formal step undertaken by DfE where Responsible Bodies (RBs) have responded to a DfE questionnaire, which asked them to identify whether they suspected that their buildings had RAAC. Surveys were carried out to verify if RAAC was present, by engaging a structural engineering company to undertake this work.
16. DfE has pointed to previous decisions made by the Commissioner where pre-application planning advice processes used by local authorities have been considered as formal proceedings. DfE considers that the situation in this case is similar as the withheld information is part of DfE formally following-up concerns around the potential presence of RAAC raised in the survey. DfE has explained that it considers formal proceedings to be covered by its commissioning of a specialist company to carry out a survey of the school estate and then following that specialist advice to ascertain whether RAAC is indeed present. DfE explained that where a survey confirms the presence of RAAC, the school is assigned dedicated support from departmental officials, who will work with the school to consider what actions are required.
17. The Commissioner is therefore satisfied that regulation 12(5)(d) of EIR is engaged because the information relates to DfE's formal procedure for checking concerns about the presence of RAAC and the arrangement of any necessary precautions or remedial measures.
18. Second, this confidentiality must be provided by law. DfE has explained that it considers the information to meet the threshold for the common law of confidentiality. This is because the information in the requested report is not in the public domain, it is not trivial as it relates to potential health and safety concerns on school premises, and it is important to the confider as the report contains confidentiality notices.
19. Having considered the context in which the information has come to be held, the Commissioner is satisfied that this information is subject to the common law of confidentiality.
20. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.
21. DfE has explained that disclosure of the withheld information would threaten the likelihood that DfE would be fully informed of serious safety risks to pupils and teachers at school and college buildings. DfE considers it would also threaten DfE's ability to oversee the safety of school and college buildings if education settings are concerned that the

DfE would release sensitive information about the safety of their buildings into the public domain.

22. DfE considers that disclosure would also mean that education settings are less likely to permit DfE to arrange surveys on their behalf to investigate further serious building risks. DfE explained that the safety of pupils and staff in schools is paramount, and it is essential that schools and colleges are able to share free and frank information with DfE always, particularly when it concerns a significant safety risk.
23. DfE added that there would be a lack of clarity in the evidence provided via such formally commissioned surveys to ascertain whether a school may have RAAC. It explained that the company providing the surveys clearly stated in their reports that their findings were to be handled in confidence and not released into the public domain. DfE stated that there is a risk that the detail within these reports would risk dilution if or when further surveys are commissioned and, that this in turn, would not provide officials with the depth of evidence and detail they require to make an informed decision on the most appropriate actions to take. DfE considers that this would lead to a protracted exchange of questions between officials and the survey company before officials could make any decisions on necessary next steps. DfE has argued that unnecessarily delaying decisions around such a significant issue like RAAC, with clear health and safety consequences, would clearly not be in the public interest.
24. In this case, the Commissioner considers that disclosure would have an adverse effect on the confidentiality of the information gathered through DfE's RAAC identification programme as it would damage the general principle of confidentiality itself, and result in harm to the interest the exception is designed to protect.
25. In the Commissioner's view disclosing the specific information requested in this case would discourage full engagement with the RAAC identification process, both from the specific school in this case and other schools, for fear of the public dissemination of such information.
26. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) has therefore been found to be engaged.
27. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the general public interest in transparency and accountability.

Public interest test

Public interest factors in favour of disclosing the requested information

28. The complainant has argued that it is in the public interest to be able to examine the way that DfE has carried out its inspection of the school premises, particularly as the school named in their request has been willing to share an inspection report that it had also carried out on the same matter.
29. DfE has acknowledged that there is a public interest in releasing the information to be open and transparent, and to establish the public understanding of its approach to resolving the issue of RAAC in schools and colleges.
30. It has also acknowledged that RAAC received substantial media coverage. DfE has recognised that the approach taken by government to resolve this issue is of significant interest to those working within the education sector and the wider school and college community, including pupils and parents.

Public interest factors in favour of maintaining the exemption

31. DfE has explained that RAAC was a 'live' issue at the time of the request and continues to be a 'live' issue at the time of this decision notice. It explained that, between July and September 2023, the department was undertaking actions and responses at pace, as the level of potential RAAC across schools was being considered and assessed.
32. DfE stated that it is vital that the department is allowed to consider urgent issues such as RAAC within a 'safe space' so as to allow it to consider, discuss and act upon the evidence presented in the surveys. DfE explained that:

"A fundamental part of the department's ability to consider the evidence relating to an issue prior to actions being taken to resolve an issue, is to follow a structured and formal process of investigation, collection and analysis of evidence, and then proposed further actions to tackle issues head-on, without undue or premature scrutiny. It is vital that the department is allowed to consider urgent issues such as RAAC within a 'safe space' so as to allow us to consider, discuss and act upon the evidence presented in such surveys".
33. DfE considers that it is crucial that officials have the ability to consider and share the free and frank findings and advice provided within the surveys, with senior officials and RBs. This is particularly so when dealing with a significant safety risk to children and staff across the

country and when far reaching decisions, which will impact the education of hundreds of thousands of pupils, need to be made at speed.

34. DfE has said that it is concerned that disclosing the requested information would lead to the dilution of the severity of issues and risks being discussed within future surveys, for fear of the company's findings making it into the public domain. DfE therefore considers that disclosure of the requested information could undermine how effective DfE is when considering and addressing RAAC issues, by discouraging the frankness and openness in the reports.
35. DfE has argued that the ability for specialist companies to provide this level of clarity without fear of it going public is even more essential when working at pace on an issue like RAAC and its potential far-reaching impact.
36. DfE has explained that as RAAC is still a very 'live' issue. DfE is still in the process of working closely with schools and their RBs to fully resolve the issue. DfE has stated that unnecessarily prejudicing this work by releasing the requested information would hinder the flow of key information to the department. This would lead to evidence and opportunities for an effective and considered resolution being missed.
37. DfE added that releasing the withheld information would be likely to adversely affect the relationship between the department and the respective RBs. It explained that, in each case, the survey has been procured by DfE with the co-operation of the school and has done so in confidence. It explained that releasing the requested information may adversely affect the confidence the RBs have in the department, particularly at a time when a cordial relationship is required to ensure that a lasting solution to RAAC can be implemented.

Balance of the public interest

38. Whilst the Commissioner accepts that there is public interest in transparency and openness, he also understands the importance of DfE being able to obtain, and act on, frank and detailed professional advice when determining the potential impact of an issue like RAAC in schools across the country.
39. RAAC is a high-profile and potentially dangerous issue so the Commissioner understands the desire to have access to detail about the measures being taken to identify and safeguard against any risks to health and safety it poses. He agrees however, that DfE should be able to carry out its formal processes that rely on cooperation with education

settings without the risk of misinformation and loss of candour and trust affecting the process and outcome.

40. The Commissioner notes that the complainant is interested in the DfE inspection report for a particular school, but he is mindful that the DfE's arguments for withholding the requested information cover the wider concern of all schools potentially affected by the presence of RAAC and not just the school named in the request.
41. The Commissioner has also noted that DfE pro-actively publishes information about its response to RAAC². The Commissioner considers that there's greater public interest in this case in DfE being able to focus on managing the problem effectively and with pace, away from the external distraction that might be generated from disclosing the requested information.
42. 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.
43. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly.

Procedural matters

44. The Commissioner also finds that DfE breached regulation 14 of the EIR by failing to provide a regulation 12(5)(d) refusal notice within 20 working days of the request.

² [Government confirms plans to permanently remove RAAC from all schools and colleges in England - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/government-confirms-plans-to-permanently-remove-raac-from-all-schools-and-colleges-in-england)

Right of appeal

45. 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

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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