

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 April 2024

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 copies of certain communications received by the Department for Levelling Up, Housing and Communities (the DLUHC) which concern The Future Homes and Buildings Standards, due to be implemented in 2025.
2. The DLUHC refused the request, citing regulation 12(4)(d) - material in the course of completion, and regulation 13 - personal information, of the EIR.
3. The complainant has not contested the DLUHC's decision to apply regulation 13 to information that is the personal data of third parties.
4. The Commissioner has decided that the exception at regulation 12(4)(d) is not engaged in respect of part of the withheld information. Furthermore, where the Commissioner has accepted that regulation 12(4)(d) is engaged, he has found that the public interest favours disclosure of the information.
5. The Commissioner requires the DLUHC to take the following steps to ensure compliance with the legislation.
 - Release all of the withheld information, with the exception of any personal information, which should be redacted.
6. The DLUHC must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

7. In 2019, the Government announced its plan to reduce carbon emissions produced in new homes and non-domestic buildings by way of the implementation of the Future Homes and Building Standards. Changes to the building regulations and certain transitional arrangements have already been introduced in preparation for the implementation of the policy in 2025. In addition, a number of public consultation exercises have been carried out.
8. On 15 August 2023, the complainant wrote to the DLUHC and requested information in the following terms:

"I write to request copies of any correspondence received by DLUHC since 1/1/23 concerning the implementation of the Future Homes Standard sent by the Home Builders Federation or Cadent."
9. On 11 October 2023, the DLUHC issued a refusal notice. The DLUHC confirmed that it had applied regulation 12(4)(d) to information that it considered to be "material which is still in the course of completion". The DLUHC advised that it had considered the public interest test, and had decided that this favoured maintaining the exception in this instance.
10. The DLUHC confirmed that it considered some of the requested information to also fall within the exception at regulation 12(3), "by virtue of regulation 13". The DLUHC said that such information was the personal information of third parties and that disclosure "would breach one or more of the data protection principles in UK data protection legislation."
11. On 13 October 2023, the complainant requested an internal review. They argued that the disclosure of the specific information requested would not "distract" ministers as claimed by the DLUHC, and would instead aid debate which would assist ministers in reaching a timely and well considered decision.
12. On 13 November 2023, the DLUHC issued its internal review response, upholding its original decision.

Scope of the case

13. The complainant has raised concerns about the DLUHC's decision to withhold information under regulation 12(4)(d). They did not contest the DLUHC's decision to apply regulation 13 to information considered to be the personal data of third parties at either the internal review stage, or within their complaint to the Commissioner.
14. The Commissioner therefore intends to only consider whether the DLUHC is entitled to rely on regulation 12(4)(d) of the EIR as its basis for withholding part, or all, of the information held that is relevant to the request.

Reasons for decision

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

15. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
16. The exception is class-based, which means that it is engaged if the information in question falls within its scope. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.
17. If engaged, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing this information.
18. The aims of the exception at regulation 12(4)(d) are:
 - To protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption from outside; and,
 - To provide some protection from having to spend time and resources explaining or justifying ideas that are not, and may never be, final.
19. The DLUHC has argued that regulation 12(4)(d) is engaged on the basis that all of the withheld information relates to material that is still in the course of completion.

20. The Commissioner's guidance states that the "material" being referred to by the public authority has to have some physical existence. As a process or a project does not have a physical existence, when relying on this limb of the exception, a public authority will need to be able to identify the physical material that they consider the withheld information "relates to".
21. In this case, the DLUHC has said that, at the time of the request, and at the internal review stage, policy proposals were still being developed for the Future Homes and Buildings Standards Consultation (the consultation) which was subsequently launched on 13 December 2023 (and closed on 27 March 2024).
22. The DLUHC has said that the withheld information consists of communications between officials and a key stakeholder which, at the time of the request, were expected to inform policy proposals for the consultation, as well as the final policy document, The Future Homes and Buildings Standards. The DLUHC states that given this, it considers that the requested information relates to material which is still in the course of completion, and therefore regulation 12(4)(d) is engaged.
23. The Commissioner notes that the public consultation exercise was not launched until December 2023. He therefore accepts that it is likely that the DLUHC held draft or incomplete documents relating to that consultation at the time that the request was received.
24. The Commissioner also acknowledges that once the policy development process is at an end, there will be complete, final policy documents which will set out The Future Homes and Buildings Standards.
25. The Commissioner therefore accepts that, at the time of the request, the DLUHC held material that was actively being worked upon both in relation to the consultation which was due to be launched, and the Future Homes and Buildings Standards, and that such information falls under the definition of material still in the course of completion.
26. The next step is for the Commissioner to consider whether the withheld information "relates to" the "material" which has been identified as being in the "course of completion".
27. The Commissioner takes a broad approach when interpreting "relates to". However, his guidance states that it is important to recognise that the exception will not automatically apply to all information that can be linked to material that is still in the course of completion. There will be a point at which the link between the withheld information and the material in the course of completion is considered too remote for the exception to apply.

28. The Commissioner has considered the content of the withheld documents. He has also considered the arguments presented by the DLUHC as to why all of the information contained within these documents relate to "material in the course of completion."
29. In the Commissioner's view, a key point to consider in the circumstances of this case is the context of the information contained within each document, and the purpose for which it was created.
30. The Commissioner considers some of the correspondence containing the withheld information to be primarily about the consultation process, rather than the actual material by which that consultation, or The Future Homes and Buildings Standards, will be achieved.
31. In addition, in the Commissioner's view, part of the withheld information is about the process and overall policy being developed, and will not directly "feed" into the policy itself.
32. The Commissioner is therefore not persuaded that such information "relates to" either the consultation documentation, or any draft documents that set out the final Future Homes and Building Standards policy.
33. The Commissioner also considers the focus of some of the withheld information to be on changes that have already been implemented, and therefore matters that he considers to be complete. Whilst the Commissioner again accepts that the changes may have a connection to the material in the course of completion, having considered the context of this part of the withheld information, it is his view that it is too far removed for it to be considered to "relate to" such material.
34. The Commissioner is not persuaded from the arguments presented by the DLUHC that the release of part of the withheld information would prevent the aims and purpose of the application of the exception described within paragraph 18 of this decision notice from being fulfilled.
35. The Commissioner therefore concludes that part of the withheld information does not "relate to" material that is still in the course of completion. He therefore finds that the exception at regulation 12(4)(d) is not engaged in respect of such information, and it should therefore be disclosed.
36. The remaining withheld information is contained within two emails received by the DLUHC on, or around, 22 May 2023 (both of which are almost identical in content). The Commissioner accepts that it could be argued that such information might potentially be used to "feed" into draft documents relating to the impending (at the time of the request)

consultation exercise, and the development of the Future Homes and Buildings Standards.

37. As a result, the Commissioner is persuaded that the withheld information contained within the two relevant emails relates to material in the course of completion, and that regulation 12(4)(d) is engaged in respect of such information. He will therefore go on to consider the public interest test in relation to such information.

Public interest test

38. 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.
39. With regard to the public interest in disclosure, the DLUHC has said that it recognises that there is always a degree of benefit in making information held by public authorities available; it increases public participation in decision making, and aids transparency and accountability of government. The DLUHC says that this allows for the scrutiny of government policy which, in this case, could increase public understanding of government plans for achieving its Future Homes and Buildings Standards.
40. With regard to the public interest in withholding the information, the DLUHC has said that it considers that the correspondence in question shows informal and candid engagement between officials and stakeholders. It argues that there is a real risk that disclosure of these communications would dissuade the writer from being frank and candid in giving their views or presenting information in the future, thus creating a "chilling effect" on general policy making. The DLUHC goes on to say that this "chilling effect" relates to the notion where, under the impediment of distraction, policy officials, ministers, and other stakeholders may feel less able to participate in free, frank, and objective discussions regarding any information and advice put before them.
41. The DLUHC has said that whilst the consultation has been launched, stakeholder engagement remains a key part of the ongoing policy development of the final Future Homes and Buildings Standards, due to come in to force from 2025. It states that it considers that the prospect of correspondence being disclosed would impair the quality of future advice from external parties to the detriment of the live policy in question.

42. The DLUHC has said that it considers that there is a strong public interest in maintaining a "safe space" for government to develop ideas and reach decisions away from external interference and distraction. It says that at the time of the request, officials were engaged in ongoing policy work to support the publication of the Future Homes and Buildings Standard consultation. The DLUHC argues that disclosure of communications from a key stakeholder could have prompted undue public scrutiny of this piece of work, which in turn would impair the ability of officials to reach objective, fully informed, decisions. The DLUHC has also said that it does not consider that the correspondence would generate useful debate, if released.
43. The DLUHC states that it is important for the informal engagement shown in the withheld correspondence to be able to continue unhindered so that the DLUHC is able to effectively solicit views that could inform policy development. The DLUHC states that releasing details of the engagement could make both stakeholders and officials more guarded and less candid in future correspondence and that consequently, this would have an adverse effect on the DLUHC's ability to deliver on its commitment to improving the energy efficiency and reducing the carbon emissions of new homes.
44. The DLUHC argues that, given the points set out above, the balance of the public interest test favours withholding the requested information in this instance.
45. The Commissioner recognises that authorities will need a safe space to develop ideas, debate issues and reach decisions away from external interference and distraction. This may carry significant weight in some cases, particularly when the issues in question are still live, or only recently decided.
46. The Commissioner accepts that communication and debate between the DLUHC and particular stakeholders will have an important part to play in the development of the policy for the Future Homes and Building Standards. He also recognises that to reveal certain discussions that have taken place at a time when that policy is being developed could cause detriment to the process, particularly if stakeholders and officers within the DLUHC were to become less candid about matters.
47. However, the Commissioner recognises the legitimate interest in disclosing information about the consultation exercise and the Future Homes and Building Standards; it would better inform the public about the process leading up to the implementation of policy in 2025.

48. The Commissioner is also mindful that access rights under the EIR are designed to support public access to environmental information and public participation in decision making.
49. In this particular case, the Commissioner considers it important to note that whilst the stakeholders referred to in the complainant's request may contribute to the development of government policy in relation to energy efficiency in new homes, they also have other responsibilities, including representing their members and other organisations within the building industry. Therefore, there will be times when the primary intention of a communication will be to represent the construction industry, rather than with the intention of having free and frank discussions within a "safe space" to aid the development of government policy.
50. The Commissioner also considers it to be of some relevance that the request is only for communications directed to the DLUHC; they do not reveal the DLUHC's responses, nor do they provide an insight into the "thinking space" of the DLUHC.
51. Given the content of the withheld information, and the context in which it was sent to the DLUHC, the Commissioner is not persuaded that its disclosure would have the detrimental impact on free and frank discussions, or safe space, described by the DLUHC.
52. The Commissioner is mindful that under regulation 12(2) requests for information handled under the EIR carry a presumption in favour of disclosure, and he is not satisfied that the arguments for withholding the information presented by the DLUHC override this presumption in the circumstances of this case. Therefore, the Commissioner's decision is that the public interest in disclosure outweighs the public interest in maintaining the exception.

Right of appeal

53. 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

54. 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.
55. 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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