

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

**Date:** 13 January 2014

**Public Authority:** Department of Finance and Personnel for Northern Ireland

**Address:** Rosepark House  
Upper Newtownards Road  
Belfast  
BT4 3NR

**Decision (including any steps ordered)**

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1. The complainant has requested information contained in the Northern Ireland Non Domestic Energy Performance Certificate Register. The Department of Finance and Personnel relied on the exception at regulation 12(4)(b) of the EIR on the grounds that the request was manifestly unreasonable. Following his consideration of the public authority's representations, the Commissioner has reached the decision that it is obliged to comply with the request.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
3. The public authority must take this step within 35 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 FOIA and may be dealt with as a contempt of court.

**Request and response**

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4. On 28 March 2013, the complainant requested the following information from the Department:

*"For each building on the Northern Ireland Non Domestic Energy Performance Certificate Register, please supply the following information (in the form of an Excel spreadsheet or as a csv file):*

- 1. Organisation name*
  - 2. Address*
  - 3. Certificate reference number*
  - 4. Energy performance operational rating*
  - 5. Energy performance band (A-G)*
  - 6. Useful floor area*
  - 7. Total CO2 emissions*
  - 8. Date certificate was issued*
  - 9. Most recent previous operational rating (where available)"*
5. The Department responded on 1 May 2013. It stated that the request was manifestly unreasonable and cited the exception at regulation 12(4)(b) of the EIR to refuse the request.
6. The complainant requested an internal review on 3 May 2013. Following the review the Department wrote to the complainant on 3 June 2013. The Department stated that the outcome of the internal review upheld the decision to refuse the request.

### **Scope of the case**

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7. On 10 June 2013 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant did not accept that the request was manifestly unreasonable and contended that even if it was, there was a strong public interest in disclosure.

### The requested information

8. Regulation 24 of the Energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008 provides that the Department may nominate a person to maintain the Northern Ireland Non Domestic Energy Performance Certificate Register on the Department's behalf. In this case the Department has nominated Landmark plc (Landmark) to maintain the register. Regulation 3(2)(b) of the EIR states that information is held by a public authority if it is held by another person on the authority's behalf. Therefore in this case the register is "held" by the Department for the purposes of the EIR.

9. In November 2013 an online search facility<sup>1</sup> was launched allowing members of the public to access the following information in relation to individual buildings (with some limited exceptions):
- Energy Performance Certificate (EPC) and Recommendation Report (RR);
  - Display Energy Certificate (DEC) and Advisory Report (AR), and
  - Air Conditioning Inspection Report (AC-REPORT) and Air Conditioning Inspection Certificate (AC-CERT).

## Reasons for decision

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### Regulation 13: personal data

10. The Department argued that compliance with the request would be burdensome “based on a perceived need” to redact personal data from the information contained within the register. However the Commissioner is mindful that the EIR contains separate provision for personal data under regulation 13, and asked the Department if it sought to rely on regulation 13 as well. The Department confirmed that it did.
11. The Commissioner has considered the Department’s reliance on regulation 13 before moving on to consider regulation 12(4)(b). This is because, if regulation 13 is engaged then the Department would be required to redact the personal information in question before disclosure even if regulation 12(4)(b) is not engaged.
12. Regulation 13 of the EIR states that a public authority is not obliged to disclose information if to do so would:
- constitute a disclosure of third party personal data, and
  - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).

*Would disclosure of the requested information constitute a disclosure of personal data?*

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<sup>1</sup> <https://www.epbniregisternd.com/reportSearchAddressByPostcode.html>

13. As indicated above the Department argued to the Commissioner that regulation 13 was engaged in relation to personal data contained within the register. The Department argued that the names and addresses of the buildings contained within the register could constitute personal data if the owner or occupier of a particular building is an individual or a sole trader. For example, the Department explained that it would be possible to match the name and address of a building with other publicly available information (for example information held by Land Registry) in order to identify the owner of that building.
14. The Commissioner accepts that the addresses of a building will be personal data where the owner or occupier is an individual or sole trader, as it is possible to use the building address to identify an individual in these circumstances. Therefore the Commissioner has gone on to consider the Department's arguments in relation to the data protection principles.

*Would disclosure of the requested information breach any of the data protection principles?*

15. The Department argued that disclosure of the requested information could potentially breach all of the data protection principles. The Commissioner has published guidance on regulation 13 (and its equivalent provision under the FOIA, section 40)<sup>2</sup>. The guidance sets out the Commissioner's view that for the purposes of disclosure under FOIA, it is only the first principle – data should be processed fairly and lawfully – that is likely to be relevant. Therefore, although the Commissioner has considered each principle, his focus is on the first data protection principle.

#### The first data protection principle

16. The Department argued that disclosure would breach the first data protection principle because it would be unfair to the individuals concerned. In the Department's view individuals would have no expectation that their information could be made publicly available in this manner. The Department distinguished between the existing ability to access individual records, and the complainant's request for "bulk data". Although the Department accepted that accessing individual

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.ashx)

records would not contravene the data protection principles, it was of the view that the possible disclosure of a large number of records should be treated differently.

17. The Commissioner understands that the Energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008 require that a register be maintained. Regulation 27 provides for relevant information from the register to be disclosed to any person (including a member of the public). The Commissioner notes that, at the time of drafting this decision notice, a member of the public could access the register to obtain information relating to a named building (see paragraph 9 above). Therefore the Commissioner does not accept that individuals could reasonably expect that their information would not be disclosed into the public domain.
18. In addition the Commissioner does not consider the number of records to have any practical impact on the reasonable expectations of any individual. An interested person can currently search the register using the online facility and access several records one after another. Therefore the Commissioner does not accept this argument as relevant to the first data protection principle.
19. In light of the above, and having regard to his published guidance, the Commissioner finds that disclosure of the requested information would not contravene the first data protection principle in that it would not be unfair.

#### The second data protection principle

20. The second data protection principle provides that personal data shall be obtained only for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with those purposes. The Department argued that disclosure would breach the second principle because the personal data disclosed may be used for a different purpose.
21. The Commissioner's view as set out in his published guidance is that a disclosure under the FOIA or EIR that complies with the DPA in other respects will not breach the second principle, as it cannot be incompatible with a public authority's business purposes. Therefore the Commissioner does not accept this argument as relevant.

#### The third, fourth and fifth data protection principles

22. The third, fourth and fifth principles relate to issues of data quality (including adequacy, accuracy and retention). The Department sought to argue that disclosure would contravene each principle because the

Department would lose control over the personal data. However the Commissioner's view is that the third, fourth and fifth principles are likely only to be relevant to holding and using data, not to disclosure. Therefore the Commissioner does not consider the Department's arguments to be relevant in this case.

#### The sixth data protection principle

23. The sixth principle provides that personal data shall be processed in accordance with the rights of data subjects. The Department cited section 11 of the DPA which provides that an individual is entitled to prevent his personal data being used for the purpose of 'direct marketing'. The Department argued that if personal data was disclosed then the Department would be unable to prevent unwanted marketing.
24. The Commissioner considers that the Department has misinterpreted section 11 of the DPA, as it relates to processing undertaken by the data controller (in this case the Department) for the purposes of direct marketing. A disclosure under the EIR would not constitute processing for the purposes of direct marketing, therefore section 11 of the DPA is not affected.

#### The seventh and eighth data protection principles

25. The seventh principle relates to the security of data, and the eighth principle concerns adequate protection when transferring data outside the European Economic Area (the EEA). The Department argued that if it disclosed personal data in bulk into the public domain, it would lose control over that information and could not therefore prevent data mining or transfer outside the EEA.
26. Again, the Commissioner's published guidance states that consideration of these principles is unlikely to add anything where it is fair to release the information to the public at large under the first principle. The Commissioner does not consider the Department's arguments to be relevant and has not considered them further.

#### Conclusion

27. As set out above, the Commissioner is of the view that none of the data protection principles would be contravened by disclosure of the requested information under the EIR. Therefore the Commissioner finds that regulation 13 is not engaged, and has gone on to consider the Department's reliance on regulation 12(4)(b).

## **Regulation 12(4)(b)**

28. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable. There is no definition of "manifestly unreasonable" under the EIR, but the Commissioner's opinion is that "manifestly" implies that a request should be obviously or clearly unreasonable.
29. In this case, the Department considered the request to be manifestly unreasonable owing to the time and cost it estimated would be necessary to provide the requested information.
30. Unlike the FOIA, the EIR do not have a provision where a request can be refused if the estimated cost of compliance would exceed a particular cost limit. However, the Commissioner considers that if a public authority is able to demonstrate that the time and cost of complying with the request is obviously unreasonable, regulation 12(4)(b) will be engaged. The Commissioner thus considers section 12 of the FOIA to provide a useful benchmark or starting point for the investigation.
31. Section 12(1) of the FOIA provides that an authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit, known as the cost limit (£600 for central government, £450 for all other authorities). Section 12 of the FOIA should be considered with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Regulation 4(3) of the Fees Regulations states that in producing an estimate an authority may only take into account the time taken in:
  - (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
32. In relation to a Northern Ireland government department the cost limit is £600 as set out in regulation 3(2). The regulations state that the cost limit must be calculated at the rate of £25 per hour, effectively giving a time limit of 24 hours.
33. In this case the Department has explained that it could retrieve and extract the requested information by two methods, and the Commissioner has considered each in turn.

### **Collation of the requested information by departmental staff**

34. As explained above Landmark maintains the register on the Department's behalf. The Department also has access to the register, although it does not have the level of access to allow it to generate a report which will provide the information in the format requested. Instead, departmental staff would have to access records for each individual building on the register in a similar way to that available to the public (see paragraph 9 above).
35. The Department advised the Commissioner that the register contained 23958 certificates and reports at the time the request was received. The Department did not have access to the raw data contained within the register and was therefore unable to collate the requested information in a single document. For the purposes of the request therefore the Department focussed on extracting EPCs, AC-CERTS and DEC's from the register as these would contain the requested information. This equated to 14497 relevant records contained in the register at the time of the request. The Department conducted a 2 hour sampling exercise which resulted in 40 records being produced in the format requested by the requester. This suggests that 3 minutes would be required to produce each record, equating to 725 hours for the 14497 relevant records. The Department explained that this estimate was conservative, and added that it may also have to provide a small fee to Landmark in relation to providing a list of certificate numbers or addresses to help locate each record.
36. The Commissioner understands that the Department's access permissions mean staff could only extract relevant information from one record at a time. Even if the Department's estimate was excessively cautious, the process of checking nearly 15000 records would be likely to exceed 24 hours in total. Taking the FOIA appropriate limit as a starting point it is clear to the Commissioner that the request would be manifestly unreasonable if the Department was obliged to collate the information itself. Therefore the Commissioner accepts that the exception at regulation 12(4)(b) is relevant to this method of complying with the request.

### **Collation of the required information by Landmark**

37. The Department confirmed that, as the nominated keeper of the register, Landmark is able to produce the requested information in the format specified. The Department argued that the cost of engaging Landmark to collate the requested information rendered the request manifestly unreasonable.



38. The complainant argued that the Department should not have considered the request in a commercial context in terms of the cost. The complainant stressed that she was not looking to make any commercial gain from the requested information. The Commissioner understands the complainant's position, but he must decide whether information ought to be disclosed into the public domain, rather than take into account the motivations or otherwise of any particular requester.
39. The Department provided the Commissioner with a copy of a quotation from Landmark charging the Department £3922.94 plus VAT to collate the requested information. This would greatly exceed the cost limit of £600 as set out at section 12 of the FOIA, although again the Commissioner is mindful that it is not a direct comparison. The Commissioner has considered whether Landmark's quotation is reasonable and therefore pertinent to the Department's argument that the cost of compliance renders the request manifestly unreasonable.
40. The Department referred the Commissioner to the Energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008, as amended by the Energy Performance of Buildings (Certificates and Inspections) (Amendment) Regulations (Northern Ireland) 2013 (the Northern Ireland regulations). The Department clarified that the equivalent legislation in England and Wales was the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2012 (the England and Wales regulations). The Department explained that the England and Wales regulations contain explicit provision for the nominated keeper of the records in England and Wales to charge for access to "bulk data". However the Northern Ireland regulations do not contain any such provision. The Department also confirmed that it does not have any contractual arrangements with Landmark relating to the disclosure of "bulk data" or other information contained within the register.
41. In light of the above the Commissioner concludes that Landmark has no statutory or contractual basis for charging the Department for access to information contained within the register. In any event the Commissioner is also mindful that regulation 5(6) of the EIR provides that any enactment or rule of law that would prevent the disclosure of information in accordance with the EIR shall not apply. Therefore the Department would not have been able to rely on a statutory charge unless it was demonstrably reasonable.
42. The quotation provided by Landmark indicates an "effort cost" of £2,473.24. This is for 5.5 days' work, broken down by the time required for contract management, project management, report development and processing, testing and data delivery. The Commissioner is not satisfied that the "effort cost" represents a reasonable charge as there is

insufficient evidence to show that it reflects the true cost of producing the requested information. For example the Commissioner is of the view that Landmark, as the keeper of the register, ought to be able to extract the requested information without requiring payment for contract management and project management.

43. The Landmark quotation also specifies a "per record set" price for 14,497 records of £0.10 per record. The "per record set" price appears to correspond to a fee chargeable for "large data packs" set out in the England and Wales regulations. With regard to the "per record set" cost, the Commissioner notes the fees chargeable by the England and Wales regulations. However the Commissioner is mindful that the Northern Ireland regulations do not provide for such a charge. Again the Commissioner is not satisfied that this charge reflects the true cost of supplying the requested information; rather, it reflects the chargeable fees under the England and Wales regulations.
44. In any event, there is no provision in the EIR for a public authority to pass to the applicant the cost of retrieving the requested information from a third party. Regulation 8 of the EIR allows authorities to recover the cost of providing the requested information (ie disbursements) but this provision does not apply in this case. In the Commissioner's view it follows that the public authority ought not to be able to use that cost as a reason for refusing a request.
45. In light of the above the Commissioner does not accept that the cost quoted by Landmark represents a reasonable charge for producing the requested information. Nor does the quotation provided by Landmark reflect the true cost of providing the information. Therefore the Commissioner does not accept it as a relevant factor in considering whether the request is manifestly unreasonable under regulation 12(4)(b).
46. In making a decision with regard to the exception at regulation 12(4)(b) the Commissioner has carefully considered the Department's arguments. The Commissioner accepts that producing the requested information in-house would be extremely burdensome in terms of the time required, and he is satisfied that regulation 12(4)(b) is engaged in this respect.

### **Public interest test**

47. Regulation 12(4)(b) is a qualified exemption and is therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

48. As the Commissioner has found that the exception is not engaged in relation to Landmark's quotation for collating the requested information, he has only considered the public interest in relation to the Department collating the information in-house. (The Commissioner has done this in the interests of completeness due to the particular circumstance of this case.)

### **Public interest arguments in favour of disclosing the information**

49. The Department acknowledged that disclosure of the requested information would promote accountability and transparency by public authorities for their decisions, and in the spending of public money. The Department also accepted that disclosure of the requested information would allow individuals and companies to understand issues and decisions that affect them.
50. The complainant argued that there is a substantial public interest in disclosing the requested information. The complainant drew the Commissioner's attention to the Department's website which states that:

*"Even comparatively minor changes in the energy performance of, and the way we use, each building would have a significant effect in reducing energy consumption, and hence, carbon emissions<sup>3</sup>."*

51. The Department further identified that increasing public access to this type of environmental data should increase public awareness of energy efficiency, both generally and with regard to buildings.
52. Both the Department and the complainant suggested that disclosing the requested information would encourage organisations to take steps to improve the energy efficiency of their buildings.

### **Public interest arguments in favour of maintaining the exception**

53. The Department emphasised that *"...the overriding concern is the sizeable cost involved"*, and reiterated its comments with regard to burden and distraction from its core duties. The Department pointed out that the complainant would shortly be able to obtain most of the requested information through the online search facility, and in fact this

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<sup>3</sup> <http://www.dfpni.gov.uk/index/buildings-energy-efficiency-buildings/energy-performance-of-buildings.htm>

was the case at the time of issuing this decision notice. In the Department's view this weakened the public interest in spending time and money to comply with the request.

54. The Commissioner accepts that cost can be a relevant factor in balancing the public interest in relation to regulation 12(4)(b). The Commissioner is mindful that, even though the exception is engaged, the public interest may still lie in disclosing the requested information. However, if the Commissioner accepts cost as a reason to engage the exception, it will also be pertinent to the consideration of the public interest.
55. The Department further argued that disclosing "bulk data" would result in businesses and individuals receiving a greater level of unwanted contact from energy efficiency suppliers. The Department was concerned about the criticism it could receive for enabling this. The Commissioner attaches limited weight to this argument as both the likelihood and impact identified by the Department appear highly speculative. Suppliers and businesses are already free to market their goods and services, and may use pre-existing resources to do so.
56. The Department expressed concern that disclosure of the information into the public domain "was not balanced" and would not be as helpful to the public as the full certificates which could be accessed online. Similarly the Department was concerned that it would have no control over how the requested information was used, interpreted or re-published. The Commissioner does not accept these arguments as the EIR clearly provides for information to be disclosed into the public domain. If a public authority is concerned about the interpretation of published information it may choose to publish additional explanatory or contextual information to assist public understanding.
57. The Department also argued that the requested information was a snapshot, therefore compliance with this request, while burdensome, would not provide a useful reference for the public. Rather, further requests would be required in order to access up to date information. The Commissioner is inclined to accept this argument because the public interest in disclosing information is likely to be weaker where the information is liable to become out of date in a relatively short space of time.

### **Balance of the public interest**

58. The Commissioner is mindful of the presumption in favour of disclosure in regulation 12(2) and the concurrent duty to interpret the exceptions restrictively. The Commissioner considers that there is a strong public interest in the Department making environmental information available

to the public, especially concerning energy efficiency, as it increasingly affects everyday life. The Commissioner is also mindful that both parties agree that disclosure could encourage organisations to increase energy efficiency of buildings, which would benefit the environment and the wider public.

59. The Commissioner considers that certain arguments of the Department in favour of maintaining the exception are relatively weak. In particular the Commissioner does not accept that a public authority should withhold information in case the public misinterprets it or does not use it as the authority would prefer. However the Commissioner attaches significant weight to the argument that disclosure of the requested information would provide a one-off benefit, as it is liable to become out of date when the register is updated.

### **Conclusion**

60. For the reasons set out above, the Commissioner finds that producing the information in-house would take so long as to create an unreasonable burden on the Department, and the exception at regulation 12(4)(b) is engaged. Further, the public interest in maintaining the exception outweighs the public interest in complying with the request in this manner.
61. However, the Commissioner finds that, as the keeper of the register, Landmark is in a better position to produce the information more quickly. In the Commissioner's opinion Landmark has no legal authority to charge the Department, particularly in light of the provisions of the EIR. The Commissioner concludes that the exception at regulation 12(4)(b) is not engaged in relation to Landmark collating the requested information on behalf of the Department. Therefore the Commissioner requires the Department to disclose the requested information to the complainant.

## Right of appeal

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62. 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: 0300 1234504  
Fax: 0116 249 4253  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
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