

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

Date: 20 December 2018

Public Authority: Ministry of Housing, Communities & Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested reports related to a planning application concerning Highbury Surface Mine. The Ministry of Housing, Communities and Local Government ("MHCLG"). MHCLG disclosed some information but withheld the remainder citing EIR regulation 12(3) (by virtue of regulation 13) and EIR regulation 12(4)(e) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that MHCLG cannot rely on either of these EIR exceptions from the duty to disclose in relation to a portion of the information referred to in the Confidential Annex to this notice. It can rely on both regulation 12(3) (by virtue of regulation 13) and regulation 12(4)(e) in respect of the rest of the information caught by the scope of this request which remains withheld.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified in the Confidential Annex to this notice.
4. The public authority must take these steps 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 Act and may be dealt with as a contempt of court.

Request and response

5. On 14 December 2017 the complainant requested information of the following description:

"Copies of all reports prepared by or in the name of the National Planning Casework Unit as provided to the Department in relation to the planning application allocated with Northumberland County Council reference 15/03410/CCMEIA (known as Highthorn Surface Mine, including any summary of the reports). For the avoidance of doubt, this request is inclusive only of the reports provided to the Secretary of State in making his decision to call-in the planning application for the Highthorn Surface Mine. This request excludes any appendices associated with these reports and any other representations which may have been made to any other Government Department in relation to Highthorn Surface Mine."

6. This followed earlier correspondence that the complainant had had with MHCLG regarding a related, if wider, request.
7. On 17 January 2018, following notification of a required extension to consider the public interest, MHCLG responded. It supplied a redacted copy of the withheld information to the complainant but withheld the remainder citing regulation 12(3) (by virtue of regulation 13) and regulation 12(4)(e) as its basis for doing so. It explained that this was an ongoing planning issue and, as such, greater weight must be accorded to protecting the safe space in which ongoing matters are discussed.
8. The complainant requested an internal review on 7 March 2018. MHCLG sent him the outcome of its internal review on 6 April 2018. It upheld its original position and added that the final part of the request was for "any other representations which may have been made to any other Government Department in relation to Highthorn Surface Mine" and that it did not hold this information. This was an error. The complainant had, in fact, specifically, excluded information of this description from his request.

Scope of the case

9. The complainant contacted the Commissioner on 9 May 2018 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether MHCLG is entitled to rely on the EIR exceptions it has cited as its basis for withholding the remainder of the report.

Reasons for decision

Is any of the withheld information environmental information?

11. Regulation 2(1) of the EIR defines environmental information as:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) 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);..."

12. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC¹ which the EIR enact. While information about planning

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

matters is not automatically considered to be environmental information, the Commissioner is satisfied that in this case the withheld information is environmental caught by the requirements of the EIR. It is information on a measure (namely a planning application) which is likely to affect the land referred to in that application as well as measures to protect that land.

Regulation 13 – unfair processing of personal data

13. In order to engage regulation 13 of the EIR in this case, the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1998 (“DPA98”)² and disclosure must otherwise contravene any of the data protection principles of DPA98.³
14. In summary, information is personal data under DPA98 if it relates to a living identifiable individual and is biographically significant about them. The most relevant data protection principle is the first which requires that personal data is processed fairly and lawfully and without contravening with any of the conditions for processing set out in Schedule 2 of DPA98. Sensitive personal data (such as health information or information about a person’s sexual orientation) must also be processed without contravening any of the conditions set out in Schedule 3 of DPA98. Sensitive personal data as defined by DPA98 is not at issue in this case.
15. The Commissioner must first consider whether the withheld information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of regulation 13 of the EIR ends here. However, if she decides that disclosure would be fair and lawful on the data subject concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 of the DPA are also met.

² Since the date of this request, new data protection legislation has come into force (the General Data Protection Regulation and the Data Protection Act 2018) in May 2018. However, this request and the time for compliance with this request predates that new legislation. The applicable data protection legislation is therefore DPA98.

³ Regulation 13 of the EIR is available online in full via this link:
<http://www.legislation.gov.uk/uksi/2004/3391/regulation/13/made>

16. In this case the information to which regulation 13 has been applied is three lines of information which shows a named junior official and their contact information. The Commissioner is entirely satisfied that this information is that person's personal data. It tells you where they work, what their contact details are and that they were involved in this particular project at work. The Commissioner is satisfied that this is information from which they can be identified and which is biographically significant about them. The Commissioner also finds that, as a junior official, they would reasonably expect that their name and contact details would be withheld. This accords with a position that the Commissioner has taken on several previous cases where the personal data in question is the name of a junior official. The Commissioner recognises that in some cases it may be appropriate to disclose a junior official's name but does not consider that this is such a case. While there is a legitimate interest in transparent decision making, the Commissioner has concluded that, in the circumstances of this case, disclosure of a junior official's name is not necessary to serve this interest. It adds little or nothing to this important and legitimate interest.
17. For the above reasons, the Commissioner is satisfied that disclosure would be unfair and in breach of the first data protection principle of DPA98. Consequently, MHCLG can rely on regulation 13 of the EIR as a basis for withholding the small section of information that it has applied this to.

Regulation 12(4)(e)

18. Aside from three lines of text referred to above, the remainder of the requested information has been withheld under regulation 12(4)(e) of the EIR.
19. Regulation 12(4)(e) states that:

'...a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.'
20. If the information in question falls within the class of information described in regulation 12(4)(e), MHCLG is excepted from its obligation to disclose it upon request subject to a balance of public interest test.
21. Having read the withheld information, the Commissioner is satisfied that it is an internal communication. It is an internal piece of written advice which self-evidently constitutes an internal communication.
22. The Commissioner therefore accepts that the information to which this exception has been applied falls within the scope of regulation 12(4)(e).

Public interest test

23. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.
24. For reasons set out in a Confidential Annex to this notice, the Commissioner has concluded that the public interest favours disclosing some of the information which has been withheld in this case. Although the Commissioner is unable to set out the detail of her analysis on the face of this notice without herself disclosing the information in question, she has concluded that the information does not merit the same degree of protection as other parts of the information in the document. It is not information which should attract a strong expectation of confidentiality in the circumstances of this case and the Commissioner does not agree that its disclosure would undermine the safe space in which such briefing material should normally be prepared and submitted. The Commissioner has identified in the Confidential Annex which information cannot be withheld under regulation 12(4)(b).
25. The rest of this section deals with the other withheld information ("other information").

Public interest in favour of disclosure

26. MHCLG acknowledged that there was a public interest in favour of "openness and transparency of planning decisions which will ultimately affect an entire community". It recognised the widespread interest in this case and acknowledged the arguments arising from this interest.
27. MHCLG accepted that disclosure would allow people to participate in decisions by being well-informed. It acknowledged that this would assist people in understanding "decisions that affect them and their community".
28. The complainant emphasised the lengthy and expensive process that had taken place in order to progress this planning application. It observed that the strength of feeling generated by this application had led to a public inquiry. It also emphasised that its request had not sought copies of submissions made, implicitly being mindful of the confidential nature of that aspect of the process.
29. Naturally, MHCLG's error described at paragraph 8 above added to the complainant's concern this matter had not been properly considered. Further comment is made on this point in the Other Matters section of this notice.

Public interest in favour of maintaining the exemption

30. The complainant did not submit any arguments in favour of maintaining this exemption nor did the Commissioner require this.
31. MHCLG stressed the importance of protecting the safe space in which matters were thought through (it called this the "thinking space") and discussed. It observed that disclosure would affect the candour with which matters were presented to Ministers where information of this nature relating to sensitive live issues were to be disclosed.
32. It explained that given the compelling public interest in disclosure it did disclose factual details upon request. It also said that the Secretary of State's call-in letter on this matter was also made public. The public interest in disclosure had been satisfied as far as was possible and the factors favouring disclosure were taken into account.
33. MHCLG also drew the Commissioner's attention to her previous decision on similar information which upheld MHCLG's position.⁴

Balance of public interest

34. The Commissioner considers each case on its merits and while previous decision notices may be relevant they are not binding upon her. She considers the particular circumstances of each case.
35. In the Commissioner's view, the key factor here is the timing of the request and the fact that the matter was still live at the time of the request. In the Commissioner's view, this adds particular weight to the public interest in maintaining the exception.
36. The Commissioner agrees that there is a strong public interest in transparency about this contentious decision. The Commissioner accepts that there is widespread and keen interest in the subject matter which translates into a valid and compelling public interest in disclosure in the circumstances of this case.
37. However, the Commissioner considers that the public interest in protecting the safe space in which such matters are discussed, particularly when the subject is live at the time of the request, adds weight to the public interest in maintaining the exception.

Conclusion

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042599/fer_0543450.pdf

38. For reasons set out in the Confidential Annex to this decision notice, the Commissioner accepts that there is a stronger public interest in disclosing that information which is identified in the Confidential Annex.
39. As for the other information and for the reasons outlined above, the Commissioner is satisfied that the public interest in maintaining the exception is more compelling than the public interest in disclosure. MHCLG is entitled to rely on the EIR exception at regulation 12(4)(e) in respect of the other information. In reaching this view, the Commissioner has given particular weight to the matter being live at the time of the request.

Other Matters

40. The Commissioner notes that MHCLG's error in describing the scope of the complainant's request to the complainant increased the complainant's concern that the request in this case had not been correctly considered. The Commissioner would urge MHCLG and other public authorities to ensure precision in their responses to information access requests.

Right of appeal

41. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

**Gerrard Tracey
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