

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

Date: 10 July 2023

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested ecological and wildlife surveys, associated reports and assessments for a specified air base which is a potential site (subject to a planning application and permission) for the building of two new prisons. The Ministry of Justice (the 'MOJ') refused to provide any of the requested information citing Regulation 12(5)(e) of the EIR (the exception for confidentiality of commercial or industrial information).
2. The Commissioner's decision is that the MOJ is not entitled to withhold the requested information under Regulation 12(5)(e) of the EIR for the reasons set out in this notice.
3. The Commissioner requires the MOJ to take the following step to ensure compliance with the legislation:
 - Disclose that information withheld under Regulation 12(5)(e), ensuring that any personal data is redacted where necessary.
4. The MOJ 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 Act and may be dealt with as a contempt of court.

Background

5. In September 2021, the MOJ issued a public consultation document on the proposed development of two new prisons at a site in Braintree, Essex.¹
6. The MOJ has confirmed that the proposed site is currently owned by the Secretary of State for Defence and the potential purchase of the land by the MOJ is "subject to further negotiations".

Request and response

7. On 23 October 2022, the complainant wrote to the MOJ and requested information in the following terms:

'On the 15th June 2022 the Ministry of Justice responded to a petition entitled "Do not build two new prisons at Wethersfield Air Base". I attach an extract from that response which listed a number of ecological and wildlife surveys which have been carried out or were in the process of being carried at Wethersfield Airbase. I have highlighted the relevant paragraph in yellow.

Please can you provide me with a copy of all the surveys listed and any ongoing surveys referred to which have now been concluded. Please could you also provide me with a copy of any studies, surveys, assessments or reports which have been carried out and which relate to any potential contamination at Wethersfield Airbase. Please treat this e-mail as a request under the Freedom of Information Act. I would appreciate your guidance under Section 16 of the FOIA (Advice and Assistance) in relation to this matter."

8. The MOJ responded on 21 November 2022. It refused to provide the requested information, citing Regulation 12(5)(e) of the EIR (the exception for commercial confidentiality) and said that the associated public interest test favoured maintaining the exception.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1028259/wethersfield-prisons-consultation.pdf

9. The complainant requested an internal review on 21 December 2022. Following its internal review the MOJ wrote to the complainant on 3 February 2023. It maintained that Regulation 12(5)(e) applied to the requested information. However it provided the following outside of the EIR:

“...I can advise that the MOJ has not yet decided whether to submit a planning application for new prisons at the site in RAF Wethersfield. If a decision is made to submit a planning application, the MOJ will continue to consult and update the residents of Wethersfield.

You may find the link below useful should you wish to request any information relating to the Ministry of Defence: Publication scheme - Ministry of Defence - GOV.UK²”.

Scope of the case

10. The complainant contacted the Commissioner on 24 February 2023 to complain about the way her request for information had been handled. She disagreed with the MOJ’s assessment of the public interest test and also said any personal data could be removed if the information was to be disclosed.
11. The Commissioner has considered whether the MOJ was entitled to rely on Regulation 12(5)(e) of the EIR to withhold the requested information.

Reasons for decision

Is the requested information Environmental?

12. Information is ‘environmental information’ if it meets the definition set out in Regulation 2 of the EIR. If the information satisfies the definition in Regulation 2 it must be considered for disclosure under the terms of the EIR rather than FOIA.
13. Regulation 2(1) of the EIR defines environmental information as being information on:
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² <https://www.gov.uk/government/organisations/ministry-of-defence/about/publication-scheme#how-to-make-an-official-request-for-information>

- (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);
14. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land and in this case, there is a possibility of a planning application which would constitute a 'measure' or 'activity'. Further, the reports undertaken could be considered as an 'activity'.
15. As the requested information relates to both the state of elements of the environment and potential contamination at the air base site, the Commissioner believes that the requested information is likely to be information on Regulations 2(1)(a) and 2(1)(b). For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(5)(e) – confidentiality of commercial information

16. The MOJ has withheld all the requested information in scope of the request under Regulation 12(5)(e) of the EIR. It consists of a number of ecological surveys and assessments, the description of which the MOJ

has requested remain confidential. Although the Commissioner does not agree that the description of each of the surveys and assessments withheld should be confidential, he has not reproduced the MOJ's actual list here. However, he notes that the requester made her request referring to the following publicly available information which she highlighted to the MOJ³:

"A Preliminary Ecological Appraisal, reptile survey, and dormouse survey were conducted in 2020. A Breeding Bird Survey (BBS), great crested newt surveys, invasive non-native species survey, and an updated Phase 1 habitat survey were conducted in 2021. A Wintering Bird Survey was conducted in winter 2021/2022. A bat Preliminary Roost Assessment (PRA) has been conducted in 2022, and the following surveys are ongoing: bat activity surveys, bat roost surveys of buildings, invertebrate surveys, and a botanical survey."

17. Regulation 12(5)(e) states:

"A public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."

18. The purpose of this exception is to protect any legitimate economic interests underlying commercial confidentiality. The exception is broken down into a four-stage test, all four elements of which are required in order for the exception to be engaged:

- The information is commercial or industrial in nature;
- Confidentiality is protected by law;
- The confidentiality is protecting a legitimate economic interest;
- The confidentiality would be adversely affected by disclosure.

19. The MOJ has explained:

"MOJ has consulted on building two new prisons at RAF Wethersfield. The site is not owned by MOJ, and no decision has

³ https://www.parallelparliament.co.uk/petitions/603619/do-not-build-two-new-prisons-at-wethersfield-air-base#gov_response

been taken on whether to apply for planning. The surveys we have withheld, which are neither trivial or available in the public domain and therefore necessarily possess the quality of confidentiality, inform our assessment of the feasibility of the site and its relative commercial value.

The disclosure of the information would weaken our existing and future negotiating position in relation to the purchase of the land (regarding its value). This would affect our bargaining position and would assist competitors. The effective conduct of planning consideration and sale negotiations are imperative to the public's interest, in particular the taxpayers. We believe that disclosure of the disputed information would be detrimental to those interests."

20. The Commissioner has reviewed all of the survey and assessment information being withheld.
21. The Commissioner also sought further submissions and clarification from the MOJ following its initial investigation response before reaching his decision in this case. He has considered the four tests which he normally takes into account when deciding whether the exception can be maintained or not.
22. In support of its stance that the requested information should be withheld, the MOJ cited two previously issued decision notices⁴ where the Commissioner upheld the respective public authority's reliance on Regulation 12(5)(e). Whilst previous decisions are not binding upon the Commissioner who must consider each case on its merits, he has reviewed both decision notices.
23. He notes that one of the requests related to company accounts submitted with a planning application, and the other to funding agreements and contracts (where some information was disclosed with Regulation 12(5)(e) redactions). For the latter, some of the withheld information constituted land purchases and contracts. Both decision notices upheld the application of Regulation 12(5)(e).
24. The Commissioner considers that in both the cited decision notice cases, the withheld information meets all the requirements of Regulation

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023493/ic-160446-w4z2.pdf> **and** <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024244/ic-211087-c6c4.pdf>

12(5)(e). He will determine whether the position is the same in this case.

25. The Commissioner's guidance⁵ on Regulation 12(5)(e) states:

"For information to be commercial in nature, it needs to relate to a commercial activity, either yours or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In particular, information about your revenue or resources is not generally commercial information, unless the particular income stream comes from a charge for goods or services. Examples include:

- Planning: information about development plans for land.
- Procurement: information about the purchase of goods or services from private contractors, including information submitted during the tendering process by bidders, information about the resulting contract, and information about your own purchasing position."

26. In this case, the withheld information consists of ecological surveys and assessments as stated earlier. The MOJ has confirmed that any other prospective purchasers of the airfield site would have to carry out their own surveys, the type of which would be dependent on the type of proposed development. The MOJ has argued that:

"The surveys instructed by the MOJ will directly influence our negotiations."

27. The Commissioner accepts that there is a potential commercial angle in that the MOJ has argued that the conditions of the proposed development site and mitigations required could affect its negotiating standpoint.

28. On balance, therefore, the Commissioner accepts that the requested information is commercial in nature. It relates to the MOJ's potential procurement of land and the services in order to complete the development. The procurement and provision of services in a

⁵ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

competitive environment is a commercial issue. However, he is of the view that the exception has been applied in too general a manner to the withheld information in its entirety and that the MOJ has not specified any particular commercial aspects within the information itself.

29. The Commissioner will next consider whether the withheld information was provided in confidence. The MOJ has explained that:

“The reports are subject to commercial sensitivity whilst the negotiations are ongoing. At the point a planning application is made the negotiations should be well advanced and the sale of land would be agreed, subject to gaining planning consent. The reports and surveys will then be put into the public domain through the planning process.”

30. The MOJ also told the Commissioner that:

“The surveys we have withheld, which are neither trivial or available in the public domain, and therefore necessarily possess the quality of confidentiality, inform our assessment of the feasibility of the site and its relative commercial value.”

31. The Commissioner accepts that the information is clearly more than trivial as it relates to the wider project of building two new prisons and relates to the requisite surveys and assessments undertaken in order to facilitate the potential wider development.
32. The circumstances in which the information is held, and the MOJ’s reasons for holding it, would in the Commissioner’s view, be sufficient to impose an obligation of confidence upon the MOJ and its employees. MOJ employees with access to the information would understand that the information was to be held in confidence until such time as the necessary purchases and agreements were achieved. Some information may even need to remain in confidence beyond this point. The information therefore has the necessary quality of confidence.
33. The Commissioner has next considered whether the confidentiality is provided to protect a legitimate economic interest.
34. The MOJ has argued that a disclosure of the information would have an adverse affect upon its commercial interests. Its arguments centre on the potential adverse impact disclosure “could” have on its negotiating position. The withheld information does not contain any financial details or set out the MOJ’s definitive intended way forward – the reports are simply an analysis of the particular ecological issues at the proposed development site and a consideration of the risks and potential mitigation.

35. On the question of whether the confidentiality is protecting a legitimate economic interest, the Commissioner's guidance on Regulation 12(5)(e)⁶ states that:

"It is not enough that disclosure might cause some harm to an economic interest. You need to establish that disclosure **would** cause harm (on the balance of probabilities – ie more probable than not)."

36. The Commissioner does not agree that disclosure of this information whilst the negotiations have not been concluded **would** adversely affect the MOJ's commercial interests. It is still up to the MOJ to determine what it is prepared to pay for the site and the results unearthed by the ecological surveys and assessments are only a part of this internal decision. Further, given that any other prospective purchasers of the site would be required to undertake their own surveys irrespective of whether the MOJ reports have been released into the public domain, negates any argument (not made by the MOJ) that disclosure would give their competitors an advantage.

37. Consequently, the Commissioner does not consider that the MOJ has provided sufficient evidence that confidentiality is provided to protect a legitimate economic interest. He, therefore, finds that the MOJ is not entitled to engage Regulation 12(5)(e) of the EIR to the withheld information. As he has found the exception is not engaged, there is no requirement for the Commissioner to consider the associated public interest test.

38. The MOJ is, therefore, required to disclose the requested withheld information as set out in paragraph 3 of this notice.

⁶ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

Right of appeal

39. 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

40. 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.

41. 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

**Laura Tomkinson
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