

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

Date: 20 October 2023

Public Authority: Department of Health and Social Care (DHSC)
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information relating to reinforced autoclaved aerated concrete (RAAC) in hospitals. The Department of Health and Social Care ('DHSC') disclosed some information but withheld other information under regulation 12(5)(e) (commercial or industrial information) and regulation 12(4)(d) (material still in the course of completion).
2. The Commissioner's decision is that:
 - The DHSC breached regulation 14(3) of the EIR.
 - The withheld information engages either regulation 12(5)(e) or regulation 12(4)(d).
 - The public interest favours maintaining regulation 12(5)(e).
 - The public interest favours disclosure of the information withheld under regulation 12(4)(d).
3. The Commissioner requires the following steps:

- Disclose the information withheld under regulation 12(4)(d).
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 6 July 2023 the complainant requested:

“Please send me a copy of the Mott MacDonald report held by the DHSC which was completed last year into hospital buildings constructed of reinforced autoclaved aerated concrete (RAAC).”
6. The DHSC responded on 21 July 2023. It refused to provide the requested information, citing section 35(1)(a) (formulation or development of government policy) and section 43(2) (commercial interests) of FOIA.
7. The complainant requested an internal review on 3 August 2023. The DHSC provided the outcome to its internal review on 21 August 2023. It partially upheld its previous response; it released the executive summary of the report in question (with redactions made under section 43(2) and section 40(2) (personal information)). The DHSC indicated that the report itself remained withheld under section 35(1)(a) and section 43(2).
8. During this investigation, the DHSC revised its position. It wrote to the complainant on 10 October 2023 and explained that the request should have been handled under the Environmental Information Regulations ('the EIR'). It disclosed the report with redactions made under:
 - regulation 12(5)(e) (commercial or industrial information);
 - regulation 12(4)(d) (material still in the course of completion);
 - regulation 13 (personal data).
9. At no point has the complainant raised any concerns about the redaction of personal data. The Commissioner is also of the opinion that it would be lawful to withhold this personal data so the Commissioner won't consider this matter any further.
10. The scope of the Commissioner's investigation is to consider the DHSC's application of regulation 12(5)(e) and regulation 12(4)(d).

11. RAAC is a lightweight form of concrete and was used from the 1950s to mid-1990s. The Standing Committee on Structural Safety ('SCOSS') has explained that 'Although called 'concrete', RAAC is very different from traditional concrete and, because of the way in which it was made, much weaker.'¹
12. RAAC has a lifespan of approximately 30 years and the Health and Safety Executive has noted that 'RAAC is now beyond its lifespan and may "collapse with little or no notice"'.²
13. As per the executive summary of the report (which has been disclosed):

'Mott MacDonald has been appointed by the Department of Health and Social Care (DHSC) and NHS England and NHS Improvement (NHSE & I) to produce an independent report on five NHS hospitals which currently have significant amounts of Reinforced Autoclaved Aerated Concrete (RAAC) in their construction.'
14. The Commissioner understands that these five hospitals will be rebuilt by 2023, in line with the New Hospitals Programme.² The brief for this report covered:
 - when and how can the risk in relation to RAAC plan failure be mitigated,
 - the cost of maintaining a viable hospital with RAAC panels,
 - the cost of replacement of each hospital.

Reasons for decision

Regulation 12(5)(e) – commercial or industrial information

15. Regulation 12(5)(e) states that a public authority can refuse to disclose information if disclosure would adversely affect the confidentiality of commercial information where such confidentiality is provided by law to protect a legitimate economic interest.

¹ [What is RAAC concrete and why is it a safety risk? - BBC News](#)

² [New Hospital Programme – media fact sheet - Department of Health and Social Care Media Centre \(blog.gov.uk\)](#)

16. The exception imposes a four-stage test which is:
 - Is the information commercial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
17. The report is a deep-dive into five hospitals that currently have a significant amount of RAAC in their construction and the report explores the options for each of these hospitals. The Commissioner has seen the information that's been withheld under regulation 12(5)(e) and it includes:
 - Indicative capital costs - the cost of maintaining a fully operational hospital has been calculated for each option considered in the report;
 - Detailed assumptions underpinning the cost estimates.
 - Qualitative analysis for each option to describe the clinical and operational impacts, risks, benefits, health and safety risks and costs.
 - Detail of the hospital condition – in addition to detail of the RAAC planks, the report contains information of the backlog maintenance and the physical condition of the hospital estate.
18. For information to be commercial in nature, it needs to relate to a commercial activity; the end result of a commercial activity usually involves making a profit. However, it can be simply an activity a business conducts to remain solvent.
19. In the context of conducting work to mitigate the presence of RAAC in the hospitals, or rebuilding the hospitals, the Commissioner is satisfied that the information to which regulation 12(5)(e) has been applied is commercial in nature.
20. The Commissioner considers confidentiality provided by law to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. He can see there's a clear expectation that the report will be treated as confidential and the withheld information is marked up as such.
21. Having studied the withheld information, the Commissioner is satisfied that it's not trivial and it's not already in the public domain. He's also

satisfied that it was imparted in circumstances creating an obligation of confidence and therefore, the withheld information is subject to confidentiality provided by law.

22. The Commissioner will now go on to consider whether this confidentiality is required to protect a legitimate economic interest.
23. The DHSC has explained:

“The 5 trusts provided strategic outlined cases (‘SOC’s’) for the purposes of this report. Business cases will include commercially sensitive information that, if released, would undermine the negotiating position for future contracts for the schemes at the early stage they are in. Given the priority government has placed on delivering these schemes as soon as possible (owing to the safety risks associated with RAAC), these commercial discussions will be taking place in the very near future. This significantly heightens the impact here.”
24. The Commissioner acknowledges that an enormous amount of work will be needed to make these five hospitals safe and fully operational or to be rebuilt entirely. If any bids towards this work are influenced by the disclosed information, this could compromise the DHSC’s ability to obtain value for money, both in relation to each individual hospital and the New Hospital Programme as a whole.
25. Therefore the Commissioner is satisfied that the withheld information engages regulation 12(5)(e), on the basis that the confidence needs to be maintained in order to protect economic interests. The Commissioner will go onto consider whether the public interest lies in disclosure or in maintaining the exemption later on in this notice.

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

26. According to the Commissioner’s guidance³, regulation 12(4)(d) can be split into three limbs:

“Information which is, or which relates to:

- material which is still in the course of completion;
- unfinished documents; or

³ [Regulation 12\(4\)\(d\) - Material in the course of completion, unfinished documents, and incomplete data \(Environmental Information Regulations\) | ICO](#)

- incomplete data.”
27. The DHSC has confirmed that it’s relying upon the first limb, material still in the course of completion. For this limb to be engaged, either the requested information itself must be still in the course of completion, or the requested information must relate to material which is still in the course of completion.
 28. The Commissioner can see that the report in question is a final draft. Therefore, the exempt information must relate to material that is still in the course of completion.
 29. The DHSC has explained:

“Whilst the selection process that this report was commissioned to support has completed, the report overall relates to material that is still in the course of completion. The details and the scope of these five hospital replacement schemes as part of NHP are still being formulated. All cases will require Ministerial sign off ahead of HM Treasury approval...The nature of a SOC means that the proposed project is at a very early stage of development. As the final business cases are still being developed in line with the standard NHP process, releasing the detailed report would risk undermining the ongoing decision-making process and the development of business case.”
 30. Regulation 12(4)(d) is a class-based exemption. There is no requirement that disclosure would have an adverse effect for the exception to be engaged – the Commissioner only needs to satisfy himself that the exempt information is material which is still in the course of completion.
 31. The Commissioner acknowledges the fact that the exception under regulation 12(4)(d) refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, its focus may be on material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.
 32. The Commissioner is satisfied that the information withheld by the DHSC under regulation 12(4)(d) relates to ongoing discussions which were ongoing both at the time of the request and presently. In addition, the withheld information forms part of documentation required for the NHP.
 33. The Commissioner accepts that the withheld information constitutes material in the course of completion and he finds that regulation 12(4)(d) is engaged.

34. As a qualified exception, regulation 12(4)(d) is subject to the public interest test. The Commissioner will go onto consider the public interest in disclosure and the public interest in maintaining both regulation 12(4)(d) and regulation 12(5)(e) simultaneously.

The public interest test

Arguments in favour of disclosure

35. When raising their complaint with the Commissioner, the complainant noted that 'The DHSC has also failed to consider public interest arguments in favour of disclosure. These include the dangerous state of the buildings, risks to patients and staff, and scrutiny of rebuild decisions costing billions of pounds of taxpayers' money. It is also important to assess the report's value for money.'
36. Since then, the DHSC has disclosed a redacted version of the report but also acknowledges 'the public interest in understanding the scale and potential impact of the issue of RAAC contained in public buildings. In particular, there is a strong public interest in understanding the potential risks to health and safety, and to the effective functioning of the public estate.'
37. The DHSC also acknowledges the general public interest in transparency, accountability and inviting public debate and scrutiny around ministerial decisions.

Arguments in favour of maintaining the exemption

38. In relation to regulation 12(5)(e), the DHSC has argued that:

"The disclosure of the information in the report would be a harm to legitimate economic interests that undermine the NHP business case process and the negotiating position for future contracts. This would undermine the future negotiating position of not just the RAAC schemes but also other schemes in the programme and would impact the overall negotiating position of schemes and negatively impact the value for money that could be achieved by individual schemes and the programme."

39. In relation to regulation 12(4)(d), the DHSC has argued that:

"These public interests must be weighed against a strong public interest that decision making, and its implementation are of the highest quality and informed by a full consideration of all the options. Officials must be able to protect ongoing work and processes, so that focus and resources can be used to complete work. Having to use some of those resources to explain or justify ideas that are not or may never

be final would not be in the public interest. In this case the need to pick the correct and safe option in solving or mitigating RAAC within hospital buildings. This process must be allowed to continue relatively unhindered so that hospitals can use building resources to the full at the earliest opportunity.”

40. It’s also argued that:

“Releasing the report would likely undermine the way the trusts manage communicating the presence and management of RAAC on a local level (for example, where outdated information is released into the public domain and creates confusion in comparison to what Trusts are doing in reality today).”

41. In relation to both exceptions, it’s also argued that:

“Furthermore, it would cause unjust reputational damage to both the department and individual NHS Trusts despite the RAAC risk already being managed in line with official guidance.”

Balance of the public interest arguments

42. The Commissioner has determined that the balance of the public interest lies in maintaining the exception at regulation 12(5)(e) and disclosure at regulation 12(4)(d).
43. The Commissioner accepts some of the DHSC’s arguments in relation to maintaining regulation 12(4)(d) but is more cautious of others.
44. He accepts that there is the need to protect the safe space public authorities require in order to develop and implement policies robustly. Disclosure of the information withheld under regulation 12(4)(d) would undermine this safe space and may affect the robustness or effectiveness of the policies in question, which isn’t in the public interest.
45. However, the Commissioner doesn’t accept that disclosing information that relates to material in the course of completion (and so might become outdated) would create confusion and thus undermine the management of RAAC on a local level. It should be very easy for the DHSC, or the Trust in question, to publish a supplementary statement alongside the complete report which explains that calculations, estimates or plans might be provisional or based on incomplete or inaccurate data.

46. The Commissioner accepts that, in relation to regulation 12(5)(e), it's not in the public interest to prevent the DHSC, or Trust's individually, ability to obtain value for money. To do so would have a knock-on effect on the service provided to patients.
47. However, in relation to both exceptions, the Commissioner questions the DHSC's arguments relating to reputational damage. The Commissioner doesn't see how disclosing the 'detail on the RAAC risk, where RAAC is located and to what extent it is present in the estate' would damage the hospital's reputation, considering it has already been identified by the report as a hospital which currently has significant amounts of RAAC in its construction.
48. The DHSC believes that it's met the public interest by the disclosure of the executive summary of the report which details the scope of the report as well as the options considered and the recommended option. It's also explained that 'the executive summary also presents a table summarising the different options and key considerations. Furthermore, on review additional information has been released from the main report to supplement the executive summary.'
49. Having read the executive summary, the Commissioner agrees. The key issue for him to consider is whether the redacted information would sufficiently contribute to the public interest, to the extent that it would warrant the prejudice that disclosure would cause.
50. First turning to the commercial and industrial information that has been withheld under regulation 12(5)(e), the Commissioner is of the opinion that the commercially sensitive information should continue to be withheld. To disclose it would prejudice the DHSC's, or the Trust's, negotiating position when it comes to RAAC mitigation or the rebuilding of the hospitals. It's not in the public interest to do so.
51. Furthermore, it's already been announced that the hospitals which are the subject of the report will be rebuilt as part of the NHP⁴ and details about the cost of the NHP are already in the public domain. Whilst disclosure would shed light on the cost of mitigating the effects of RAC in the meantime, the Commissioner believes that information which is being withheld under regulation 12(4)(d) also addresses this matter.

⁴ [Five major hospitals to be rebuilt as part of over £20 billion new hospital infrastructure investment - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/five-major-hospitals-to-be-rebuilt-as-part-of-over-20-billion-new-hospital-infrastructure-investment)

52. Turning next to regulation 12(4)(d), the DHSC has acknowledged:

“In particular, there is a strong public interest in understanding the potential risks to health and safety, and to the effective functioning of the public estate. Information on how RAAC is being mitigated within the NHS estate is already in the public domain, and all 5 hospitals are part of the national RAAC remediation programme.”

53. The Commissioner must consider the extent to which the withheld information would add to public understanding about the RAAC crisis, specifically in relation to the five hospitals which are the subject of the report.

54. The hospitals in question are part of the national RAAC remediation programme, however there doesn't appear to be any information in the public domain about the full extent of the issue within each individual hospital, despite the acknowledgement that there is 'a significant amount of RAAC in their construction.'

55. The Commissioner agrees with the DHSC, the withheld information hones in on the potential risks the RAAC poses to patient health and safety and the Commissioner assigns this considerable weight when considering where the balance of the public interest lies. There's also a public interest in understanding how decisions in relation to these hospitals have been made.⁵

56. The Commissioner accepts that disclosure of the material still in the course of completion could compromise the safe space the DHSC needs to continue to consider how it will mitigate the effects of RAAC. He's not dismissing this argument outright; though he notes that public officials should not easily be deterred from providing robust opinions and deliberating effectively for fear that information will be disclosed.

57. However, looking at the report and the recommended option, the Commissioner considers the deliberation around the options is effectively complete. Therefore, he thinks the DHSC has overemphasised the severity and the extent of the prejudice that would occur as a result of disclosure.

⁵ [Rishi Sunak blocked rebuild of hospitals riddled with crumbling concrete | Raac \(reinforced autoclaved aerated concrete\) | The Guardian](#)

58. The DHSC has explained:

'The assessment made in the report is high-level with general assumptions and made with partially incomplete data, noting that additional work is required to further develop and refine the programme scope and costs. It is important to emphasise that the facts and figures are subject to change through further investigations which in turn would influence future decisions affecting these projects.'

59. This can be explained further, if the DHSC wishes, alongside disclosure.

60. The DHSC is also concerned that:

'Releasing this report with detail on the RAAC risk, where RAAC is located and to what extent it is present in the estate would put pressure on how these sites are managed as part of the national remediation programme, as well as create unwarranted lack of confidence in the current mitigations, where the two do not match.'

61. The Commissioner isn't convinced by this argument. How RAAC is managed in the sites in question shouldn't be affected, at all, by the disclosure of the information in question. Furthermore, the Commissioner considers the opposite of the DHSC's concerns is possible; that disclosure would reassure the public that the necessary steps are being taken to mitigate the effects of RAAC and ensure patient safety. If this isn't the case, then any scrutiny is justifiable.

62. The Commissioner acknowledges that disclosure may increase public contact to the DHSC, or the individual hospitals, about RAAC and the mitigation plans. However, he disagrees with the DHSC when it says, 'Queries raised would not create constructive debate due to the fluid dynamic of the report that will change over time, giving rise to unnecessary discussion of out-of-date information.'

63. The information within the report, although subject to change, is still entirely relevant to increasing public understanding in relation to RAAC at the hospitals in question. The Commissioner also considers that such contact would be entirely justifiable, given the overwhelming public interest in the RAAC crisis and how it's being handled. There is always an argument for presenting a full picture of how a decision was made or how a specific option was chosen.

64. Ultimately, the presence of RAAC in the hospitals in question, and any mitigating plans to address this, will have a significant impact on a significant amount of people. Coupled with the presumption in favour of disclosure under the EIR, the Commissioner has determined that the public interest lies in disclosure.

Procedural matters

65. Because the DHSC issued its refusal under FOIA and not the EIR it breached regulation 14(3) of the EIR, which states that a public authority must state, no later than 20 working days after received the request, what exceptions it is relying upon.

Right of appeal

66. 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

67. 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.
68. 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

Alice Gradwell
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