

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

Decision notice

Date: 12 August 2024

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

Decision (including any steps ordered)

1. The complainant has requested DHSC to disclose its internal working paper relating to possible guidance for medical device users during a power outage. DHSC disclosed some information but withheld the remainder citing regulation 12(4)(d) and 12(4)(e) of the EIR.
2. The Commissioner's decision is that 12(4)(d) and 12(4)(e) of the EIR apply to the remaining withheld information but the aggregated public interest in maintaining these exceptions is outweighed by the aggregated public interest in favour of disclosure.
3. The Commissioner requires DHSC to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. DHSC 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

5. On 16 January 2024, the complainant wrote to DHSC and requested information in the following terms:

"Please treat this as a request for information under the Freedom of Information Act.

Last year, as part of its response to a complaint by me to the information commissioner (IC-238829-D4Y5), DHSC told the ICO:

"DHSC is still in the process of determining the department's policy position on whether guidance should be issued specifically on the matter of the use of at-home medical devices during a power outage. The document is an internal scoping paper that is being used to record information gathered during the policy exercise and to identify options for potential action by the department and its arms-length bodies. This activity continues and the document remains in draft."

DHSC has now told me in another FoI response (16.1.24, FOI-1488895) that it has decided not to produce any guidance after all. Therefore, as the previous "ongoing policy formulation and development" has now ended, please send me a copy of the internal scoping paper."

6. DHSC responded on 5 February 2024. It disclosed some information but withheld the remainder citing regulation 12(4)(d) and 12(4)(e) of the EIR.
7. The complainant requested an internal review on 9 February 2024.
8. DHSC carried out an internal review and notified the complainant of its findings on 13 February 2024. It upheld the application of regulation 12(4)(d) and 12(4)(e) of the EIR.

Background

9. IC-238829-D4Y5¹ looked at the complainant's request of 28 April 2023, which requested the following information:

¹ [ic-238829-d4y5.pdf \(ico.org.uk\)](https://ico.org.uk/foi/238829-d4y5)

"[1] Please provide a copy of the latest document that covered your plans for protecting people who rely on medical equipment at home, such as ventilators or dialysis machines, in the event of winter blackouts.

[2] Please provide a copy of any guidance that was sent out to NHS bodies by DHSC to help them prepare for the protection of people who rely on medical equipment at home, such as ventilators or dialysis machines, in the event of winter blackouts."

10. Two documents fell within the scope of this particular request; one of which was an earlier draft of the internal scoping paper (March 2023). The Commissioner upheld the application of regulations 12(4)(d) and 12(4)(e) of the EIR and found that the public interest favoured maintaining the exceptions.
11. The withheld information for this particular request is an updated version of the internal scoping paper – still showing as draft, with tracked changes and dated July 2023. The document has been disclosed, except sections 1.2, 2.3 and a sentence from section 4.

Scope of the case

12. The complainant contacted the Commissioner on 15 February 2024 to complain about the way their request for information had been handled.
13. The Commissioner considers that the scope of his investigation is to establish whether or not DHSC is entitled to rely on regulation 12(4)(d) and 12(4)(e) of the EIR.

Reasons for decision

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

14. Regulation 12(4)(d) of the EIR allows a public authority to withhold information if it relates to material in the course of completion, to unfinished documents or to incomplete data.
15. It is also subject to the public interest test. In accordance with regulation 12(2) a public authority must apply a presumption in favour of disclosure.
16. For the same reasons outlined in paragraphs 17 and 18 of the Commissioner's earlier decision notice, the Commissioner is satisfied that regulation 12(4)(d) continues to be engaged.

17. Although a later version, the remaining withheld information is segments of a document still labelled "draft", with a couple of tracked changes populating, still, comments of the officials that were involved in the draft.
18. DHSC confirmed that work was stopped on issuing specific guidance and so no final version was produced. As worked stopped, the withheld information remains in draft and as an unfinished document. With regards to sections 1.2 and 2.3 it also said:

"The first and second sections (1.2 and 2.3) set out the reasonable worst case planning assumptions for power supply failure. This information is provided to DHSC by the Department for Energy Security and Net Zero (DESNZ). This information is being withheld under 12(4)(d) as material still in the course of completion and as an unfinished document. While the planning assumptions are given for winter 2023/24, a power outage can occur at any time of year and planning activity continues on an ongoing basis. The final outputs of this work is the National Risk Register, which was last published in 2023 and is reviewed on a rolling quarterly basis. Therefore, the sections withheld cover live issues, which Government officials need to discuss, review and test away from external interference and distractions. DHSC also considers that the information in these sections of the document do not relate directly to advice or guidance for medical device users or vulnerable people in a power outage, which was the information requested by the complainant."

Regulation 12(4)(e) – internal communications

19. Under the EIR, where two or more exceptions are found to apply to the same information, the public authority is entitled to consider the aggregated public interest in maintaining both exceptions. The Commissioner will therefore consider whether regulation 12(4)(e) of the EIR applies before turning to the public interest test.
20. Regulation 12(4)(e) of the EIR allows a public authority to withhold information if it would disclose internal communications.
21. A "communication" will cover any format that attempts to convey (or communicate) information from one person to another. The communication will be "internal" if it has only been shared within the organisation.
22. Regulation 12(8) of the EIR states that any communication between government departments can still be an internal communication.
23. Sections 1.2 and 2.3 contain information provided to DHSC by the Department of Energy Security and Net Zero (DESNZ). Section 4 is

information provided to DHSC to Ofgem. The withheld information is recorded within an internal working paper that DHSC was working on at the time. The Commissioner understands that the document was not shared with any external third parties, which would then alter DHSC's ability to rely on the 'internal communications' exception.

24. The Commissioner is therefore satisfied that regulation 12(4)(e) of the EIR is also engaged.

Public interest test

25. Where two or more exemptions apply to the same information it is possible to aggregate the public interest arguments.
26. In terms of the public interest in disclosure for regulation 12(4)(d) DHSC said:

"There is a general public interest in transparency and accountability in how DHSC spends public money. It is also in the interest of public to ensure good decision-making and due process were carried out by public bodies in reaching a decision on spending, and DHSC recognises the value of third-party scrutiny of its analysis and decision-making processes, as well as the value in the public being able to challenge and test those decisions. DHSC considered that it was in the public interest to see the scoping work undertaken on advice for medical device users in a power outage and a decision was taken to release the document to the complainant despite it being unfinished. This was because a decision was taken not to publish separate DHSC guidance on advice to vulnerable people in a power outage. In the time since the complainant made his requests, the Government published the Prepare website ([Prepare](#)), an online resource to support the public in planning for emergencies. There are specific webpages on general advice for disabled persons in an emergency: [Advice for disabled persons and carers - Prepare](#) and advice for the public in a power outage, including advice on disabled persons and medical device users: [Power cuts - Prepare](#)."

27. In relation to 12(4)(e), DHSC said that it considered the public interest arguments outlined above apply to this regulation too. It added that it recognised the public interest in understanding how government works together to plan for risks such as a power outage.
28. Against disclosure, for regulation 12(4)(d), it submitted:

"It is clearly in the public's interest to know how the government plans for emergencies such as power outages, and the Government considers very carefully how information about risks are communicated to the public to ensure they are best able to understand the risks and prepare

accordingly. The planning assumptions given in the redacted text are intended for internal use and taken out of context or in isolation are open to misinterpretation which could cause misunderstanding.

"The information remains incomplete until it is published in the National Risk Register – available here: [Failure of the National Electricity Transmission System \(NETS\) \(cabinetoffice.gov.uk\)](https://www.cabinetoffice.gov.uk/news/failure-of-the-national-electricity-transmission-system-nets), and here: [Regional failure of the electricity network \(cabinetoffice.gov.uk\)](https://www.cabinetoffice.gov.uk/news/regional-failure-of-the-electricity-network). It is also available on the Prepare website. As the final, complete version of the planning assumptions are freely available it was decided that the balance of public interest lay with withholding the redacted information rather than have incomplete versions in circulation."

29. For 12(4)(e) of the EIR and the public interest in maintaining the exemption, DHSC advised:

"Public interest arguments were considered for all three sections and we consider that the public interest considerations outlined above apply to this section also. We recognise that there is a public interest in understanding how government works together to plan for risks such as a power outage. However, it was also considered that, as these planning assumptions are a draft tool used to develop products for public consumption in the National Risk Register, to release the version could be misleading to the public. It is also considered that, as the information is internal communication between departments, the release of this information could lead to a chilling effect between officials as they collaborate across government to develop plans for risks. It is clearly in the public interest that government departments are able to communicate openly with one another and share materials as appropriate, to ensure effective and collaborative working. This is particularly important where work is in draft and planning stages and that departments can be confident in sharing draft working with each other without concern of release of incomplete or rough working. On balance, it was decided that the public interest lay in withholding this information, as outlined here and in the above sections."

30. For 12(4)(d), in favour of disclosure, DHSC said:

"The third withheld section (in section 4 of the document) is a rough statistic provided to DHSC by Ofgem and is being withheld as 'incomplete data' as it has not been quality checked and is an unpublished statistic. It was considered that this information may be within the public's interest as it is important that those who are eligible for the Priority Services Register are encouraged to sign-up."

31. Against disclosure, DHSC submitted:

“However, the statistic may be misleading as it has not been quality assured. It is also more than 18 months old and likely to be inaccurate. Therefore, it was considered the balance of public interest lay in with withholding this information. You note that supplementary information can be provided alongside misleading information. However, in this case, it is considered that there is a risk of the statistic being taken out of context and misinterpreted as accurate.”

32. For 12(4)(e) DHSC addressed section 4 at the same time it addressed sections 1.2 and 2.3. So paragraph 29 above applies here.

The balance of the public interest – the Commissioner’s decision

33. As the Commissioner explained in his earlier decision notice (from paragraph 25 onwards), whilst DHSC is entitled to aggregate the public interest in maintaining both exceptions, the Commissioner does not consider that, in these circumstances, aggregation significantly increases the public interest in withholding the information.

34. Both exceptions are designed to protect the public authority’s internal thinking space in which it can develop and refine policy options before presenting them for a decision and for scrutiny. Therefore, there is a considerable overlap between the two exceptions, and, in this case, the public interest arguments against disclosure are largely the same. There is also no need to demonstrate that disclosure would be harmful in order to engage either exception.

35. He also notes that the circumstances at the time of this request had significantly moved on. At the time of the request a decision had been made not to publish separate DHSC guidance. Although the withheld information remains in draft form and unfinished, it was known at that point that no further work was needed on it. The need for collaborative working and free and frank communication between government (arguments presented in paragraph 29 above) departments had therefore diminished somewhat. There could also be no chilling effect on ongoing discussions and work around the intended guidance, as it wasn’t going ahead.

36. DHSC has argued that it is not in the public interest to disclose the remaining withheld information, as it would be misleading to the public, it was intended for internal use and if taken out of context or viewed in isolation, could lead to misinterpretation and misunderstanding. The Commissioner accepted in his earlier decision that it was not in the public interest to disclose information which could be incomplete or inaccurate information, as this could be harmful to the very people the

information is intended to protect when finalised guidance was going to come out.

37. However, in this case, considering the specific contents of the remaining withheld information here the Commissioner is not convinced that disclosure would cause such harm. DHSC has not explained in any detail what the specific consequences would be. It also remains the case that any disclosure can be supplemented with additional commentary to ensure that such misinterpretation and misunderstanding does not occur.
38. With regards to section 4, DHSC could explain that it was a rough estimate and may therefore be inaccurate. The Commissioner considers this statistic was the working data at the time. This was what was provided by Ofgem and the elements of the internal working paper already disclosed show when it was being drafted. The public can easily see this and would expect that such data can change.
39. DHSC also said that disclosure would encourage those eligible for the Priority Services Register to sign up. This can only be seen as a positive and beneficial outcome for all concerned.
40. The request was also made in the January 2024, when the threat of blackouts was at its most immediate. The public interest in the disclosure of the requested information was therefore high. It is also noted that DHSC said in its submissions to the Commissioner that the government published the general advice outlined in paragraph 26:

“In the time since the complainant made his requests...”

In other words, afterwards, suggesting again that there was very little guidance available to the public at the time of the request.

41. DHSC has argued that disclosure is met by the information it has already disclosed, suggesting that the remaining elements do not relate directly to advice or guidance for medical device users or vulnerable people in a power outage (which is what the complainant required). Whilst the Commissioner would agree that the information disclosed goes some way to meeting the public interest in disclosure, it remains the case that the remaining withheld information was considered suitable for inclusion in the working paper being drafted and in the scope of the request. It clearly was thought to add context and be relevant to the advice or guidance that was being drafted.
42. The Commissioner considers that DHSC has not demonstrated sufficiently here why the public interest rests in maintaining the exceptions (i.e. outlined sufficiently the consequences of disclosure in relation to the specific contents that remain withheld, which would then

tip the balance of the public interest test towards non-disclosure). There also remained significant public interest arguments in favour of disclosure at the time of the request.

43. This has led the Commissioner to therefore conclude that the public interest in favour of maintaining the exceptions is outweighed by the public interest in favour of disclosure.

Right of appeal

44. 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

45. 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.
46. 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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