

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

Decision notice

Date: 30 October 2024

Public Authority: Department for Environment, Food and Rural Affairs (Defra)

Address: 2 Marsham Street
London SW1P 4DF

Decision (including any steps ordered)

1. The Commissioner's decision is that the information the complainant has requested about the Report Packaging Data (RPD) service is excepted from disclosure under regulation 12(5)(e) of the EIR, which concerns commercial interests.
2. It's not necessary for Defra to take any corrective steps.

Request and response

3. The complainant made the following information request to Defra on 21 March 2024:

"The capital spend on the packaging EPR [Extended Producer Responsibility] RPD system to date ie payments to contractors The budget for the complete development of the RPD system for EPR including the development of the reprocessor and exporter accreditation and data system."
4. Defra's final position was that the information was excepted from disclosure under regulation 12(5)(e) of the EIR.

Reasons for decision

5. This reasoning covers Defra's application of regulation 12(5)(e) to the complainant's request.
6. Under regulation 12(5)(e) of the EIR, 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.
7. The Commissioner considers four tests when deciding whether the regulation 12(5)(e) exception is engaged. All four tests must be met for the exception to be engaged:
 1. The information is commercial or industrial in nature.
 2. The confidentiality is provided by law.
 3. The confidentiality is protecting a legitimate economic interest.
 4. The confidentiality would be adversely affected by disclosure.
8. In its submission to the Commissioner, Defra has first confirmed that it considers that this exception is engaged because the information relates to the capital spend, budget allocations and payments to contractors for the RPD system. It considers that releasing this information would have an adverse impact on commercial interests. The Commissioner is satisfied that this test is met as the requested information is clearly commercial in nature.
9. Regarding the second test, Defra says that because the requested information is commercial information in nature it engages a common law duty of confidence. It is neither trivial nor in the public domain and relates to the economic activity of the department. Furthermore, Defra considers that the Public Contracts Regulations 2015 apply in this case and provide a duty of confidence in law.
10. The Commissioner considers that this test is also met. The circumstances in which the information in question is held, and Defra's reason for holding it, would, in his view, be sufficient to impose an obligation of confidence on Defra. Defra's officers who had access to the information would understand that the information was to be held in confidence until such time as decisions about the RDP had been finalised, at least. The information therefore has the necessary quality of confidence.
11. Regarding the third test, Defra considers that it is more probable than not that the economic interest, and so its confidentiality, would be adversely affected through disclosing this information. This is because

releasing these details would give organisations tendering for other government work a commercial advantage by revealing the costs of their competitors. In addition, releasing this information would directly impact further procurement work planned across pEPR (packaging EPR). This would jeopardise Defra's ability to establish a pEPR scheme, because of the impact a release may have on the economic interests of those contracting for the work.

12. Defra says its main concern is future procurements. Releasing Defra's budget and expenditure could compromise Defra's negotiating position in both current procurement and any future pEPR-related procurements. It argues that this isn't in Defra's commercial interests, could distort competition, and result in the department getting poorer value for money.
13. Once it has moved beyond the immediate procurements and "has more stability in supplier", Defra's Procurement team considers that there could be a case for the information to be released. However, it says that disclosing the information at the time of the request and currently, while the process is still ongoing, would be harmful to Defra's commercial activities.
14. In respect of the fourth and final test, although this is a necessary element of the exception, once the first three tests are met, the Commissioner considers it's inevitable that this test will be satisfied. Disclosing truly confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests that have been identified.
15. Since the four tests have been met, the Commissioner finds that Defra correctly applied regulation 12(5)(e) of the EIR to the requested information. He's gone on to consider the associated public interest test.

Public interest test

16. In their request for an internal review, the complainant argued that the information should be in the public domain because it relates directly to interest in the overall cost of EPR. In particular, it concerns the value for money that the public is entitled to in respect of public procurement.
17. The complainant said that there are widespread industry concerns about the way that the RPD system for EPR is being developed and is functioning. They considered it was reasonable to understand the costs associated with this project to determine whether there should have been a more effective way to deliver the necessary functionality.

18. In their complaint to the Commissioner, the complainant re-stated that Defra was using public money and argued that the overarching costs they'd requested don't provide the basis for any competitive advantage to other contractors.
19. Against disclosure, Defra has argued that there are two key points:
 1. Disclosure will reduce the likelihood of future bidders for planned procurements within the pEPR space more generally if they believe their costs are going to be published whilst they are early in their delivery
 2. It will reduce the likelihood of future bidders for procurements specifically within the digital space, where there is a more limited pool of suppliers who could undertake the work, and therefore reduce the value for money of those procurements.
20. Defra has provided the following by way of further detail:
 - “• The contract for our current supplier is a framework contract against which statements of work are negotiated and agreed. Defra has the right to bring in further suppliers should it feel that either the performance or value provided by the supplier does not meet its needs.
 - Defra reserves the right to contract further suppliers should the scale and/or complexity of the service require it. This will only become fully known as work on pEPR progresses.
 - To ensure that Defra receives best value for money it reserves the right to compete further delivery contracts for specific scope within the EPR.
 - Defra has already contracted a second supplier on the EPR contract to provide additional technical capabilities in parallel to its main supplier.
 - Defra is continuing to look at how to make delivery more resilient by considering its supplier strategy / model.
 - The information requested relates to specific suppliers and will impact on both existing suppliers (as it looks at spend to date) and future suppliers (as it covers total available budget for them to bid against). Defra has a legitimate economic interest in protecting its commercial bargaining position in the context of existing or future negotiations and avoiding disclosures which would result in a loss of value for money (i.e., a detriment to the finances of a public authority).

- Beyond the immediate digital delivery, there is a separate procurement being run by the pEPR programme to appoint a Financial Services Supplier to run the financial elements of the scheme. This procurement launched on 1 August 2024 with the deadline for submission of tenders on 30 September 2024, evaluation and contract award anticipated in October 2024 with the process of contract negotiation due to run to the end of this calendar year. We consider that releasing information relating to a specific supplier in the midst of an active procurement space would be harmful to Defra's economic interest, and therefore the public interest."

21. On the evidence and arguments presented to him by both parties, the Commissioner has decided that the public interest in the exception being maintained outweighs the public interest in the information being disclosed in this instance.
22. The Commissioner considers disclosure of the costs in this case would deter future bidders from procuring with Defra. This would result in a smaller pool of bidders to choose from, reducing the value for money that Defra could achieve. This is not in the wider interests of the public.
23. Defra has stated that its main concern is future relationships. However, and as noted, the procurement process associated with the pEPR was live at the time of the request. There's also a public interest in protecting information about an ongoing procurement process from disclosure to ensure the process goes ahead as efficiently as possible.
24. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure, and the Commissioner has kept that in mind when reaching his decision. There's also a general public interest in public authorities demonstrating that they're transparent particularly when, as in this case, there's a significant amount of public money involved.
25. The Commissioner appreciates that the complainant is interested in the RPD. He's noted that in their request for an internal review, the complainant said that there are "widespread industry concerns" about the RPD system that's being developed. However, the Commissioner hasn't been provided with detail about those concerns and can find no information on this from an internet search, albeit not an exhaustive one.
26. In the Commissioner's view, the public interest in the exception being maintained outweighs that in the information being disclosed at the time that Defra responded to the request. The harm that would be caused to Defra by disclosure – in terms of its relationship with future bidders and

not being able to achieve the maximum value for money – and the public interest in preserving the principle of confidentiality, carry more weight in this case than the public interest in full transparency.

27. The Commissioner notes that Defra has indicated that there may be a case for publishing the requested information in the future, when further procurement work that's planned across pEPR is completed.
28. The Commissioner's decision is therefore that the presumption in favour of disclosure required by regulation 12(2) doesn't change his decision that, at the time of the request, Defra correctly applied the 12(5)(e) exception in this case.

Right of appeal

29. 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

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF