

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 October 2024

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested a copy of a report assessing the risks associated with 'volumetric' modular construction. The Ministry of Housing, Communities and Local Government (the MHCLG) refused the request citing regulation 12(4)(d) (material which is still in the course of completion). The Commissioner's decision is that the MHCLG was not entitled to rely on regulation 12(4)(d) to withhold the requested information.
2. The Commissioner requires the MHCLG to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of the requested report to the complainant
3. The MHCLG 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

4. On 5 October 2023, the complainant wrote to the Department for Levelling Up, Housing and Communities, (DLUHC now the MHCLG) and requested the following information:

"Please provide a copy of the report prepared by academics at Edinburgh Napier University and Harlow Consulting assessing the risks associated with 'volumetric modular construction (also known as MMC)..." [Modern Methods of Construction]

5. The DLUHC responded on 20 October 2023. It stated that the information was exempt from disclosure under section 35(1)(a) of the FOIA, as it relates to government policy.
6. Following an internal review, the DLUHC wrote to the complainant on 28 February 2024, upholding its previous position. It stated that the report related to live policy development. The DLUHC added that it had carried out a public interest test and had concluded that the balance was weighted in favour of withholding the information in order to maintain the 'safe space' in which policy officials and Ministers are able to develop ideas and reach decisions away from external interference and distraction.
7. The DLUHC further informed the complainant that it has a default position of publishing all research over £12,000, and that the report would be released once the policy is no longer evolving.
8. The Commissioner has previously issued a decision notice ¹ regarding this request stating that it should have been considered under the EIR. Following this decision notice, the MHCLG sent the complainant an amended response refusing to disclose the information on the basis of regulation 12(4)(d) of the EIR.
9. As the request had already previously been fully considered, the Commissioner did not consider it necessary for the MHCLG to undertake an internal review.

Scope of the case

10. Following the previous decision notice under case reference IC-277930-S7L5, the complainant contacted the Commissioner on 18 July 2024 to complain about the MHCLG's amended response.
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4030065/ic-277930-s7l5.pdf>

11. The scope of the Commissioner's investigation is therefore to consider whether the MHCLG was entitled to rely on regulation 12(4)(d) to refuse the requested information. The Commissioner would point out that his investigation looks at the situation at the time of the request, not since his previous decision notice.

Reasons for decision

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

12. Under regulation 12(4)(d) of the EIR a public authority may refuse to disclose information to the extent that the request relates to:

- material which is still in the course of completion,
- to unfinished documents or,
- to incomplete data.

13. The Commissioner's guidance in relation to regulation 12(4)(d) states that:

"The exception goes beyond applying to requests for information in material that is in the course of completion, to unfinished documents, or to incomplete data. It may also be engaged if the requested information relates to material still in the course of completion, to unfinished documents or to incomplete data.²

14. Where a public authority is relying on material in the course of completion to a document which is itself complete, for the exception to be engaged, it is necessary to consider three questions:

- What is 'material'?
- What does 'still in the course of completion' mean?
- What does 'relates to' mean?

15. Regulation 12(4)(d) is class based, which means that if the information in question falls into one of the three categories specified above, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the

² [Regulation 12\(4\)\(d\) - Material in the course of completion, unfinished documents, and incomplete data \(Environmental Information Regulations\) | ICO](#)

exception. However, regulation 12(4)(d) is subject to the public interest test.

16. The aims of the exception are:

- To protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption from outside; and,
- To provide some protection from having to spend time and resources explaining and justifying ideas that are not, and may never be, final.

17. The MHCLG confirmed to the Commissioner that, it considers the report in question falls within the first limb of the exception. It considers that whilst the report itself may be complete, that it relates to material still in the course of completion. MHCLG explained to the Commissioner that the report did not consider the prevalence of the potential risks identified, and also made a series of recommendations that the government needed to consider.

18. The MHCLG further informed the Commissioner that as part of the development and consideration process, it asked the Building Safety Regulator (BSR) to complete further research on the theoretical risks identified in the report, and to provide evidence of their prevalence relative to construction, and advise whether action was required.

19. The MHCLG further informed the Commissioner that this is in line with the BSR's duty, set out in section 5 of the Building Safety Act 2022, to keep under review the safety and standards of buildings, as well as monitor any potential risks or changes that may affect residents' safety. It added, that in line with this duty, the BSR are responsible for advising the Government if they understand that Approved Documents should be updated to provide guidance on VMC or wider MMC.

20. The MHCLG further argued that the:

"Government needs to act responsibly in reflecting on the findings and carefully considering the recommendations identified in the report. Advice from the BSR may warrant a change in Approved Documents or other such interventions, and it is imperative that officials have the necessary thinking space to produce further research and consider these options in private. If the BSR conclude a change of approach is warranted, we would also need to consider the impact on our wider housing programmes where we support the use of MMC, in addition to the cross-government approach."

21. Although the Commissioner confirmed that he considers the situation at the time of the request, the MHCLG informed him that it considers the exception is still engaged in June 2024 on the basis that whilst the Health and Safety Executive (HSE) had concluded its research commissioned by the BSR, publication was subject to finalisation following the announcement that a General Election would be held on 4 July 2024.
22. It added that following the formation of the new Government, it is in discussions with new Ministers on the report and supplementary work undertaken by the regulator with the expectation that this will be published shortly. It added that that they are preserving the space for new Ministers to request that further work is undertaken to consider the report's findings or prepare additional guidance for example, prior to publication.

The Commissioner's view

23. The Commissioner accepts that the report was commissioned for, and relates to the then Government's policy to relieve the housing shortage by building 300,000 homes a year by the mid 2020s. Additionally, the former DLUHC had informed the Commissioner that the report is linked to a wide number of government policies including a specific commitment to support MMC in meeting housing needs and affordable and social housing.
24. The Commissioner has also considered the arguments put forward by the MHCLG that the report did not consider the prevalence of the potential risks identified, and made a series of recommendations that the government needed to consider, and in that respect, even though the report itself is complete, it 'relates to' the then Government's commitment to use MMC to address its housing target.
25. However, it is important to recognise that that the exception will not automatically apply to all information that can be linked to material that is still in the course of completion. If the information is a separate, independent, and complete piece of work in its own right, the information will not fall within this limb of the exception.
26. The Commissioner is mindful of the case of *Highways England v Information Commissioner and Manisty*³. The case related to information about the proposed routes of the Oxford to Cambridge Expressway (the route maps). This information was produced for a Strategic Study 'Stage

³ [Highways England v Information Commissioner and Manisty \[2018\] UKUT 423 ACC](#)

3' report that had already been published, along with an overview of the maps. The requester asked for specific detail about the routes and Highways England refused to disclose the information, arguing it was exempt under regulation 12(4)(d) and the public interest favoured withholding it.

27. The Upper Tribunal decided that the 'Stage 3' report was a piece of work which was complete, and separate, in itself, and the exception did not therefore apply.
28. It said that the piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. Whilst it accepted that the related work was 'material in the course of completion', it considered that the information was complete in itself, and that it was separate and independent from the continuing work on the expressway.
29. As with the Highways England case, the Commissioner considers that although the report in this case may form part of further work that is still in the course of preparation, the report itself is complete, separate and independent from the continuing work and report by the BSR.
30. However, the tribunal further stated that it may be helpful to consider whether there has been a 'natural break in the private thinking', or whether the authority is ready to go public about progress so far. It took into account that the Strategic Study Stage 3 and an overview of the maps had already been published by HE.
31. In this case, the report has not been published and there does not appear to be a 'natural break in private thinking', but conversely that the findings of the report necessitated further research by the BSR on the theoretical risks identified in the report, and to provide evidence of their prevalence relative to construction, and advise whether action was required.
32. This view, is further supported as the advice from the BSR may necessitate a change in the Approved Documents. In this sense, the Commissioner agrees that the report relates to 'material in the course of completion'.
33. However, whilst the Commissioner accepts that the report is linked to the possible impact on the Government's wider housing programmes which supports the use of MMC, he does not consider that this in itself is 'material' as it is a policy as opposed to a tangible document.
34. Nevertheless, on the basis that the report relates to the BSR research and report which was still in the course of completion, and potentially to the Approved Documents (ie tangible material), the Commissioner

accepts that the MHCLG were entitled to rely on regulation 12(4)(d) to refuse the request.

35. As the Commissioner has concluded that the exception is engaged, he has now gone on to consider the public interest test.

Public interest test

Factors in favour of disclosure

36. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
37. The MHCLG has acknowledged that there will always be some general public interest in making information held by public authorities available as it increases public participation in decision making and aids transparency and accountability.
38. The MHCLG has further stated that it is for this reason that it has always had a settled intention to publish the report once the policy is no longer evolving in accordance with its default position of publishing all research over £12,000.
39. The Commissioner also considers that there is a strong public interest in the disclosure of information in relation to building safety, particularly in the aftermath of the Grenfell fire.

Factors in favour of maintaining the exception

40. MHCLG has argued that public authorities should have a 'safe space' to finish ongoing work without interruption and interference from external sources.
41. The MHCLG further argued that the Government should be able to commission advice from its regulator without fear of a 'chilling effect' on such conversations. It added that it considers the chilling effect relates to the notion where, under the impediment of distraction, policy officials and Ministers may feel less able to participate in free, frank and objective discussions regarding any information and advice put before them.
42. The MHCLG reiterated its previous comments that it must act responsibly in reflecting on the findings in the report and carefully consider its recommendations. It further stated that advice from the BSR may necessitate a change in the Approved Documents and considers that it is imperative that officials have the necessary thinking space to produce further research and consider those options in private.

In addition, if the BSR conclude a change of approach is necessary, it would need to consider the impact on its wider housing programmes.

43. The MHCLG also informed the Commissioner that building safety is a sensitive topic, and considers it is necessary for officials to manage the release of important information responsibly. It added, that whilst it acknowledges that an EIR disclosure can be set into context by including explanatory commentary, it does not consider that the 20 working days afforded by the EIR to be a sufficient timeframe to mitigate the risks associated with premature publication of this particular report.
44. The MHCLG further informed the Commissioner that in this case, its publication plans included the research carried out by the Health and Safety Executive for the BSR and the Department, which was still live at the time of the request. It added that it was crucial that policy officials had time to complete this further research and prepare a suitable response before publication, in order to aid public understanding of the contents of the report. It further confirmed that this research is now complete and will soon be ready for publishing subject to Ministerial approval. It confirmed that it is working with the BSR and intends to publish the reports in parallel.
45. The MHCLG concluded that the public interest is met by the settled intention to publish the report in the near future, and considers that it is reasonable, in all the circumstances of the request, that the information should be withheld until that date.

The Commissioner's conclusion

46. The Commissioner has considered the arguments put forward by the MHCLG both in favour of disclosure and maintaining the exception.
47. The Commissioner believes that there are occasions when a 'safe space' is needed by public authorities to allow them to formulate policy, debate live issues and reach decisions without being hindered by external comment. The need for a 'safe space' is to allow free and frank debate and it is the Commissioner's view that this is required regardless of any impact that the disclosure of information may have.
48. The Commissioner considers the 'safe space' to be about protecting the integrity of the decision making process and whether it carries any significant weight will be dependent on the timing of the request. In this case, following the completion of the report, the MHCLG asked the BSR the undertake research into the theoretical risks identified in the report, provide evidence of their prevalence relative to traditional construction, and advise whether action was required.

49. However, the Commissioner does not consider that the BSR research and recommendations will be impacted significantly from the publication of the report. The results of the research into the theoretical risks identified in the report and their prevalence relative to traditional constructions will be the same regardless of whether or not the report is published. He does not therefore accept that the research and potential changes to the Approved Documents requires a safe space for deliberation.
50. Similarly, the Commissioner is not persuaded by the MHCLG's 'chilling effect' arguments as the research undertaken by the BSR at the time of the request and subsequent recommendations was unlikely to have been impacted by the publication of the report. Indeed, the only link to the 'chilling effect' is the discussion of the BSR findings and advice by Ministers, which, it has already been established does not engage regulation 12(4)(d) on the basis that housing policy is not a physical document.
51. Additionally, the Commissioner considers the MHCLG's arguments in respect of the chilling effect to be generic and lacking in detail regarding how disclosure of the report would be likely to have such an effect. Further, the Commissioner does not accept the MHCLG's argument that disclosure of the report at the time of the request would be misleading and that it would not be possible to put the findings of the report in context.
52. The Commissioner has also taken into consideration the MHCLG's intention to publish the report in conjunction with the BSR report, however notes that thus far it has failed to do so, and notes that its comment that it was subject to ministerial approval suggests that there is no guarantee that it will be published at all.
53. Whilst the Commissioner accepts that the building safety is a sensitive subject particularly in the aftermath of the Grenfell fire, he considers that this strengthens the public interest in the disclosure of information in relation to any aspect of building safety.
54. This is reinforced by an online article about the report published by 'Inside Housing' ⁴ which expresses concern that the information contained within the report has not been published. The Commissioner therefore considers that there is a very significant public interest in the

⁴ [Inside Housing - News - Government accused of 'suppressing' report into safety of modular building](#)

disclosure of information linked to VMC and MMC and the Government's wider intention to use it.

55. Having taken into account the various public interest arguments, the Commissioner considers, that in all the circumstances of the case, the balance of the public interest test is favours disclosure of the information and that the MHCLG is not therefore entitled to rely on regulation 12(4)(d) to withhold the report.

Right of appeal

56. 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

57. 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.
58. 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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