Information Commissioner's Office

Material in the course of completion, unfinished documents and incomplete data (regulation 12(4)(d))

Environmental Information Regulations

Contents

Overview 2
What the EIR say 3
Material which is still in the course of completion 3
Unfinished documents 5
Incomplete data 5
The public interest test 7
Safe space and the timing of the request 7
Chilling effect 8
Misleading information 10
Accurate information: regulation 5(4) 11
Distracting public debate 11
Content of the information 12
Timing of the request 13
Other considerations 14
Regulation 14(4) 14
More information 14

1. The Environmental Information Regulations 2004 (the EIR) give rights of public access to information held by public authorities.

2. An overview of the main provisions of the EIR can be found in The Guide to the Environmental Information Regulations.

3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations, and to promote good practice.

4. This guidance explains to public authorities what information may be covered by the exception in regulation 12(4)(d) and

discusses some arguments that may be used in the public interest test and factors that affect the weight of those arguments.

Overview

Regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data.

- Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.
- Draft documents are unfinished even if the final version has been produced.
- Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later.

Even if the exception is engaged the public authority must still carry out the public interest test. The information must be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosure.

Issues that may be relevant to the public interest test include the following:

- Safe space. This will be affected by whether the process in question is complete.
- Chilling effect. This will depend on what discussions would be affected by the chilling effect.
- We are sceptical of arguments that information should not be disclosed because it would give a misleading or inaccurate impression, but there may be circumstances in which this is relevant.
- The requirements for data quality in regulation 5(4) do not generally strengthen the argument for maintaining the exception.
- Arguments that publishing incomplete or unfinished information would distract public debate away from substantive arguments may be relevant to the exception.

The content of the information and the timing of the request can

affect the weighting of the public interest arguments.

Regulation 14(4) places certain obligations on a public authority when another public authority is completing the work.

What the EIR say

5. Regulation 12(4)(d) states:

> **12.**—(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
>
> (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data

6. Regulation 12(4)(d) provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion, unfinished documents or incomplete data. These terms are not defined in the EIR, but our understanding of what they mean is set out below.

7. If the information in question falls into one of those categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test.

Material which is still in the course of completion

8. The fact that the exception 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, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy. In this case, an officer may create an 'aide memoire' note which is not intended to be a formal record but is

nevertheless part of the on-going process of developing a particular policy. If this aide memoire note is within the scope of a request, the exception may be engaged because the request relates to material which is still in the course of completion. The need for public authorities to have a 'thinking space' for policy development was recognised in the original proposal for the Directive on public access to environmental information, which the EIR implement. The proposal explained the rationale for both this exception and the exception for internal communications:

> "It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account." (Explanatory memorandum to COM/2000/0402 final)

9. However, the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception. This is illustrated in the following example:

> **Example**
> In decision notice FER0349127 the requestor had submitted a request to Chichester District Council for information about a proposal to build affordable housing on land next to her property. The Council applied the exception in regulation 12(4)(d) to certain documents on the basis that its proposals were still at an early stage and contracts had not been finalised. The Commissioner found that the exception was not engaged. The withheld documents included a statement that the Council had given to the County Council to seek its advice in its capacity as the Highways Authority, and a report to the Council's Executive Board about the proposal.
>
> Both the statement and the report were finished documents and the Council had submitted them to the County Council and the Executive Board respectively, for consideration as part of a

formal process.

Unfinished documents

10. A document may be unfinished because it the authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it. Furthermore, draft documents will engage the exception because a draft of a document is by its nature an unfinished form of that document. Furthermore, the Information Tribunal has found, in the Eddington case below, that a draft version of a document is still an unfinished document, even if the final version of the document has been published.

Example
The Information Tribunal case of Secretary of State for Transport v the Information Commissioner (EA/2008/0052, 5 May 2009) concerned a request for the first draft of a study prepared by Sir Rod Eddington on the links between transport and the UK's productivity, growth and stability in the context of sustainable development. The Department of Transport had published the final version of the study, but the request was for the draft version. The Tribunal found at paragraph 81 that the status of the draft "does not change simply because a final version exists" and at paragraph 82 that "the Draft Report is, by its very name and giving the words their logical meaning, an unfinished document."

The Information Tribunal in the case of Mersey Tunnel Users Association v the Information Commissioner and Halton Borough Council (EA/2009/0001 Stage 2, 11 January 2010) agreed with this position at paragraph 23.

Incomplete data

11. The exception also applies to incomplete data. Data that is incomplete because a public authority is still collecting it will be covered by this, but where an authority is using or relying on data at the time of the request, then it cannot be considered incomplete simply on the basis that it may be modified or

amended in the future.

> **Example**
> Decision Notice FER0321779 concerned a request to Basildon Council for information about the eviction of travellers from unauthorised sites. The Council applied regulation 12(4)(d) to a small part of the information – an estimate of the number of mobile homes on the sites. They argued that this was incomplete data because it was an estimate that may be changed in the future. The Commissioner found that the exception was not engaged:
>
> "The Commissioner was not persuaded that an estimate could be said to be "incomplete" information simply by virtue of being an estimate that may turn out to be incorrect in the future or which is subject to change. As far as the Commissioner can see, the information represented the estimation of the contractor based on the information available at that time and in view of this, the Commissioner would regard that estimation as being "complete" information." (paragraph 51)

12. In the same way, if a public authority has collected raw data and is using it as part of ongoing research, that data is not incomplete, even though the data may later be published in a more meaningful form. Where data is collected on a regular basis, it is not incomplete simply because the data collection is ongoing.

> **Example**
> Decision notice FS50163282 concerned a request to Queen's University Belfast for data from tree ring research. The university said that they were using the data in ongoing research that would lead to future publications. It intended to publish the data on the internet in a "meaningful, controlled scientific and managed way" as part of new tree ring chronologies. However, the Commissioner found, at paragraph 49, that while the analysis of the data was ongoing, the university had already collected the data and it was not unfinished or incomplete.

The public interest test

13. As with the other exceptions in the EIR, when regulation 12(4)(d) is engaged, the public authority must still carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.

14. The public authority should therefore consider the arguments for disclosing the information as well as those for maintaining the exception. There is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. In addition, there may be an argument for informing public debate on the particular environmental issue that the information relates to. There may also be a public interest in disclosing the specific information in question; for example, it may show how a public authority has met its obligations under other environmental legislation. There is an explanation of the public interest arguments for disclosure in our guidance on How the exceptions and the public interest test work in the Environmental Information Regulations.

Safe space and the timing of the request

15. A public authority may well produce the types of material described in regulation 12(4)(d) as part of the process by which it formulates policy and reaches decisions. This is discussed above in relation to the definition of material in the course of completion. In such cases the public authority may argue that it needs a 'safe space' in which to do this away from public scrutiny, and that disclosing this material would harm that safe space. This is an argument about protecting the integrity of the decision making process. Whether it carries any significant weight in the public interest test will depend very much on the timing of the request. If the process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it difficult to bring the process to a proper conclusion. However, if the process is effectively complete (for example if the public

authority has made a policy announcement or published a final version of draft documents), then it is more difficult to argue that the safe space is still needed. The following two examples illustrate these points.

Example
In decision notice FER0322910 (Queen's College) the withheld information included a draft agreement to the sale of land for residential development. The contents of the agreement were still subject to negotiation and had not been finalised. The decision notice says at paragraph 52 that "the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into". In this case the fact that the agreement had not been finalised added considerable weight to the argument that disclosure would prejudice this safe space.

Example
Decision notice FER0184885 concerned a request for draft versions of a report on noise emissions from wind farms. The Department of Energy and Climate Change argued, in favour of maintaining the exception, that the Government and third party contractors need a safe space in which to work, and that disclosure of drafts would mean they could not do so candidly and freely. The Commissioner however found that "by the time the complainant submitted his request in July 2007 the final version of the report had been published some fourteen months previously. Therefore there was no need for a safe space to be provided for Hayes McKenzie and DTI/BERR to discuss drafts of the report free from intrusion" (paragraph 95).

Chilling effect

16. Public authorities may also argue that disclosing drafts would mean that those producing them will be less frank and candid in giving their views or presenting information in future, and so the quality of the advice and information in the drafts, and hence the quality of decision making, would suffer. This is what

is known as the 'chilling effect' argument. It differs from the safe space argument in that it is not necessarily affected by whether a public authority has published a final version; the chilling effect would, it is argued, occur simply because it had published a draft.

17. Our response to chilling effect arguments depends on how it is envisaged that disclosure would affect the frankness and candour of officials. In a situation where the relevant issue is still under consideration it may be plausible that the frankness of ongoing discussions on that issue would be adversely affected. It is harder to accept an argument that disclosure would affect the frankness of unspecified and unrelated discussions in the future. Moreover, the EIR have been in force for several years, and it should now be clear to public authorities that the exceptions are not absolute and that information may be disclosed even though an exception is engaged.

18. Officials also have a responsibility to provide information and advice as part of their job, whether or not it may subsequently be disclosed under the EIR. This is what the Information Tribunal in the case of *Department for Education and Skills v the Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) referred to at paragraph 75 as "the courage and independence that has been the hallmark of our civil servants since the Northcote - Trevelyan reforms".

Example

The Information Tribunal in the case of Secretary of State for Transport v the Information Commissioner (EA/2008/0052, 5 May 2009) considered what was essentially a chilling effect argument, but in relation to the effect on external advisors, rather than on civil servants. Even allowing for this difference, they were doubtful that disclosure would have a limiting or chilling effect on the quality of their work:

"…where an external advisor is prepared to put his own reputation on the line, we are sure that he would do everything he could to make sure that any circulated Report is as good as it can be, as useful as it can be and full as it can be. We agree with the Commissioner that it is implausible to say that the prospect of publication would deter such an

individual from acting in this thorough way." (paragraph 121)

Misleading information

19. It is sometimes argued that a public authority should not disclose information that is unfinished or incomplete because it would give a misleading or inaccurate impression. In most cases we do not consider that this argument in itself carries any significant weight, because it should generally be possible for the authority to put the disclosure into context. They should usually be able to provide an explanation if, for example, incomplete data contained errors or provisional estimates, or a draft differed significantly from a final version.

20. The argument would only carry some weight if the information would create a misleading or inaccurate impression and there were particular circumstances that would mean it would be difficult or require a disproportionate effort to correct this impression or provide an explanation. Examples of this could include where the explanation could only be provided by an employee who has left the public authority, or the authority does not hold the final or corrected information.

Example
Decision notice FER0210838 concerned a request to the Environment Agency (EA) for reports on the testing of incinerator bottom ash (IBA). The EA withheld a draft report it had received from the Environmental Services Association, a trade body, under regulation 12(4)(d). The draft contained information that was subsequently revised. In the public interest test the EA argued that:

- Disclosure of the draft would be misleading and create an inaccurate representation of issues relating to the testing of IBA.
- It did not hold the revised data and calculations which were made to this draft and so it was not in a position to make any technical caveats.

The decision notice commented that the Commissioner is generally sceptical about arguments that disclosure of information could mislead or cause confusion, since the public

authority can usually put the information into context. However, in the circumstances of this case the Commissioner accepted at paragraph 58 that "it would very difficult for this information to be placed into context and as a consequence for the EA to be able to counteract any confusion."

21. If the effort involved in correcting a misleading impression (for example, in answering a large volume of queries from the public) would be so great that it would actually hinder the public authority from completing the work of which the unfinished or incomplete information is a part, this may be a public interest argument for maintaining the exception.

Accurate information: regulation 5(4)

22. The EIR provide a right of access to all environmental information held by public authorities, subject to exceptions. Regulation 5(4) requires that where information made available in response to EIR requests "is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes". Our view is that the scope of this regulation is narrower than it may appear, and it only applies when:

- the request is for current factual data;
- the public authority is collecting this information on an ongoing basis for its own business purposes; and,
- the authority is or should be aware that the information is not accurate, up-to-date or comparable.

23. Even when this regulation applies, it should not be taken as strengthening the argument for the exception in regulation 12(4)(d), especially in view of the presumption in favour of disclosure in regulation 12(2). The public authority should be able to explain the reasons for any limitations in the incomplete data and publish corrected data if it is available.

Distracting public debate

24. Public authorities may wish to put forward the argument that releasing incomplete or unfinished material into the public domain would distract public debate away from the substantive environmental issues that the information relates to. Instead debate could focus on secondary issues such as any

deficiencies in the information or the differences between a draft and a final version. It should generally be possible for the authority to minimise this distraction by providing an explanation of any deficiencies or differences. But when this is not possible and there is a real risk that public debate would be distracted and therefore seriously impact on the public authority's resources, this may be a public interest argument for maintaining the exception.

Content of the information

25. A key factor in assessing the weight of public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. There is always an argument for presenting a full picture of how a decision was made or a policy position was arrived at. If disclosing incomplete material or draft documents would support this then it increases the weight of the argument for disclosure. On the other hand, information may be within the scope of a request but nevertheless shed little light on the issue itself. In that case the weight of the argument for disclosure may be less than it otherwise would be.

Example

Decision notice FER0184525 concerned a request to the Department for Business, Enterprise and Regulatory Reform (BERR; the responsibilities were subsequently taken over by the Department of Energy and Climate Change) for all information they held about the decision to produce a document entitled 'Onshore Wind Energy Planning Conditions Guidance Note'. The department withheld some information under regulation 12(4)(d).

In carrying out the public interest test, the Commissioner took particular account of the content of the information and how far it would contribute to public debate:

"… having reviewed the amount and nature of information withheld on the basis of regulation 12(4)(d) the Commissioner is not convinced that its disclosure would greatly inform the public as to how the Guidance was published not least because there are only a small number of documents withheld on this basis and the drafts are those compiled later in the process

and thus are closer to the final version of report than initial drafts and earlier discussions." (paragraph 102)

Timing of the request

26. The timing of the request may well be a factor that affects the relative weight of the arguments in the public interest test. If the public authority has completed work on the material in question or a final version of a draft document exists when the public authority receives the request, the public interest in withholding the incomplete or draft version is likely to be reduced.

Example
Decision Notice FER0322012 concerned a request to the London Borough of Hillingdon for the scoping note for a report into water level management at Ruislip Lido. The Council held a draft version of the scoping note at the point when they received the request, but they received the final version of the note two days later. The decision notice comments:

"Once the final version of a document is completed, the Commissioner's view is that generally, any prejudicial effect relating to the sensitivity of the information included in a draft will be likely to reduce … The Commissioner will take into account how recently the final version of the document was completed and how recently the draft was produced. In general, the more time that has passed since the finalisation of the information, the more the public interest in maintaining the exception is likely to have diminished." (Paragraph 30)

In this case the Council received the final version of the note while they were still dealing with the request. The final version was therefore quite recent, but the public interest in maintaining the exception was reduced because it contained only minor changes from the draft.

Other considerations

Regulation 14(4)

27. Regulation 14, which deals with refusals to disclose information, also refers specifically to this exception:

14 (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

This could be relevant in a situation where, for example, a public authority is contributing information to a report that another authority is producing, as part of a project or a wider piece of work. If the information held by the public authority that received the request is in the course of completion, unfinished or incomplete in the terms discussed above, the public authority could apply regulation 12(4)(d) and refuse to disclose it, depending on the balance of public interest. However, in the event that the information is going to be 'finished or completed' by the other authority, the public authority responding to the request has a duty to inform the requestor of this in accordance with regulation 14(4).

More information

28. This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

29. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

30. If you need any more information about this or any other aspect of freedom of information, please Contact us: see our website www.ico.gov.uk.