

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 October 2019

Public Authority: Northern Ireland Housing Executive
Address: The Housing Executive
2 Adelaide Street
Belfast
County Antrim
BT2 8PB

Decision (including any steps ordered)

1. The complainant has requested any minutes of meetings regarding a specific cavity wall insulation study. The Northern Ireland Housing Executive disclosed some information and withheld the remainder, citing regulation 12(4)(d) (Material in the course of completion) of the EIR.
2. The Commissioner's decision is that the Northern Ireland Housing Executive has applied regulation 12(4)(d) of the EIR appropriately.
3. The Commissioner does not require Northern Ireland Housing Executive to take any steps as a result of this decision.

Request and response

4. On 17 October 2018 the complainant wrote to the Northern Ireland Housing Executive (NIHE) and requested information in the following terms:

"Can you provide any minutes of meetings of the Insulation Performance Panel on the NIHE/BBA/CIT on the cavity wall insulation study. Further can you tell me how many meetings of this panel have been held to date?"

5. The NIHE responded on 14 November 2018. It disclosed the number of meetings held and withheld the remainder of the information under

- Section 43 (Commercial interests) of the Freedom of Information Act 2000 (FOIA).
6. Following an internal review the NIHE wrote to the complainant on 13 December 2018. It upheld its original decision and also explained that it was also relying on section 41(1) FOIA exemption.

Scope of the case

7. The complainant contacted the Commissioner on 14 January 2019 to complain about the way his request for information had been handled. He explained that he considered that his request for minutes could in no way be deemed commercially sensitive as there were no planned works as the outcomes were unknown. He also explained that if any works were planned as a result of the survey they would be tendered accordingly with relevant information being revealed at that time.
8. The Commissioner asked the NIHE, given the subject matter, whether it had considered the request under the EIR. The NIHE explained that it had looked at the request again and considered that it should have dealt with it under the EIR, as it fell under the definitions set out at regulations 2(1)(b) and (c).
9. Regulations 2(1)(b) and (c) of the EIR provide the following definitions of environmental information:

"...any information in written, visual, aural, electronic or any other material form on-

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharge and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;"

10. The NIHE explained that the requested information relates to cavity wall insulation, which is recognised as one of the most effective means for improving the heating efficiency of dwellings. Reduction in household heating costs represents a significant way of saving money for residents as well cutting down on CO₂ emissions, which falls under regulation

2(1)(b). It also considered that the requested information was a measure under regulation 2(1)(c). The Commissioner also considers that the requested information relates to the elements in 2(1)(a),¹ in this case air and atmosphere. The Commissioner is therefore satisfied that the requested information is environmental information for the purposes of the EIR.

11. The NIHE explained to the Commissioner that it was withholding the requested information under the following regulations:

- 12(4)(d) (Material in the course of completion, unfinished document and incomplete data) and
- 12(5)(e) (Commercial confidentiality) of the EIR.

12. The NIHE also confirmed that it would inform the complainant of this. Additionally, the NIHE confirmed that it was no longer relying on section 43(2) of the FOIA.

13. During the Commissioner's investigation the NIHE published a report regarding research carried out into cavity wall insulation in social housing and private homes in Northern Ireland. The NIHE explained that this research was commissioned by it in 2017 in response to concerns about the standard of cavity wall insulation in its own properties. The Commissioner contacted the complainant to see if this disclosure satisfied his request. The complainant confirmed that it did not and reiterated that he wanted the withheld minutes.

14. The Commissioner will consider the NIHE's application of regulations 12(4)(d) and 12(5)(e).

Reasons for decision

¹ The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.

Regulation 12(4)(d) - Material in the course of completion, unfinished document and incomplete data

15. Regulation 12(4)(d) of EIR provides that:

"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."

16. Regulation 12(4)(d) is subject to public interest considerations as set out in regulation 12(1)(b): in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
17. For regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories set out below.
18. The first category is that the information relates to material which is in the course of completion. The 'material' in question may be a final policy document that is to be produced later. Therefore, although the requested information may be contained in a document which is, in itself complete, if that document is intended to inform a policy process that is still ongoing, the information may engage the exception.
19. The second category is unfinished documents. A document will be unfinished if the public authority is still working on it at the time the request is received. Furthermore, a draft version of a document will remain an unfinished document even once a final, finished version of that document has been produced.
20. The third category is incomplete data. This is data that a public authority is still collecting at the time of the request. However, data that is being used or relied upon at the time of the request cannot be considered incomplete, simply because it may be modified later.
21. The NIHE explained that it considered that the requested information was still in the course of completion.

Is regulation 12(4)(d) engaged?

22. The Commissioner has considered whether the withheld information engages regulation 12(4)(d) on the basis that the request relates to material which is still in the course of completion.
23. In the recent Upper Tribunal (UT) decision in *Highways England Ltd v Information Commissioner & Mainstay* [2018] UKUT 423 ACC the UT made a number of observations in relation to the meaning of 'material' in regulation 12(4)(d). It considered that *"material' [within the meaning of regulation 12(4)(d)] must have a physical existence. It is not apt to*

describe something incorporeal, like a project, an exercise or a process. That is what the [Aarhus] implementation Guide says and it is surely right as a matter of language.”²

24. In relation to ‘material in the course of completion’ the UT observed that: *“The Aarhus Convention does not clearly define ‘materials’ in the course of completion. However it is clear that the expression in the course of completion relates to the process of preparation of the information or a document and not to any decision-making process for the purpose of which the given information or document has been prepared. ...it is the material that must be in the course of completion, not the project.”*
25. The UT also stated: *“Can it also include documents that are finished and data that is complete? The Commissioner’s guidance says that it can and I accept that this is correct.”³*
26. The UT also explained that the exception: *“must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.”*
27. Additionally, the UT stated: *“It is not engaged when a piece of work may fairly be said to be complete in itself....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. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of the project to another? Another factor may be whether the authority is ready to go public about progress so far.”*
28. The NIHE explained that the complainant had requested copies of minutes of meetings of the Insulation Performance Panel. It confirmed that it holds three sets of minutes. It also explained that although the minutes themselves are completed documents, it considered that they formed part of a broader, ongoing (and therefore incomplete) piece of work; namely the process of working towards final recommendations for its policy on the use of cavity wall insulation, which will be embodied in

² Paragraph 23

³ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf (Para 8)

a final report. To that extent, the NIHE explained that it considered that the minutes were 'material which is still in the course of completion'.

29. The NIHE argued that it considered that of particular importance was the need to allow the Panel to have a 'thinking space' for policy development. It pointed out that this was recognised in the original proposal for the Directive on public access to environmental information⁴, which the EIR gives effect to, as follows:

"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."

30. The Commissioner notes the NIHE's explanation that the minutes form part of a broader, ongoing piece of work ie the process of working towards final recommendations for its policy on the use of cavity wall insulation.
31. The Commissioner is satisfied that, although the withheld minutes are completed documents, they relate to the production of NIHE's policy regarding cavity wall insulation. She considers that this issue is still "live", and therefore the withheld information relates to material which is still in the course of completion.
32. The Commissioner therefore considers that regulation 12(4)(d) is engaged. As regulations under the EIR are all subject to the public interest test, the Commissioner will go on to consider whether, in all the circumstances in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of maintaining the exception

33. The NIHE argued that the public interest in maintaining regulation 12(4)(d) outweighed the public interest in disclosure. It also argued that in relation to the incomplete/ on-going work that the Panel was engaged in, the primary concern under regulation 12(4)(d) is to protect the private thinking space needed to complete this important body of work.

⁴ Council Directive 2003/4/EC[4] on public access to environmental information and repealing Council Directive 90/313/EEC

34. The NIHE also argued that the Panel should be afforded the necessary room to think in private and have a safe space in which to hold discussions in order to develop and explore a full range of options. In turn, this would enable it to make effective decisions whilst formulating policies in this subject area.
35. Additionally, the NIHE argued that disclosure would be likely to prejudice this 'thinking space', impacting the integrity of its decision-making process and the free and frank exchange of ideas, options and suggestions that form part of that process, by inviting external comments and criticism prior to approval or development of a final approach or policy.
36. The NIHE also confirmed that it was committed to engage and consult with relevant stakeholders, including representatives of the insulation industry, on completion of the Panel's final report.

Public interest arguments in favour of disclosure

37. The NIHE acknowledged that there is a rebuttable presumption in favour of disclosure under the EIR. It also accepted that there is a general public interest in transparency, accountability and understanding the reasons why certain decisions are made, including the advice on which they were based.
38. The complainant explained that he considered that the NIHE withholding the information was actually against the public interest as it could be this be seen as hiding the issues from its tenants and the public in general.

Balance of the public interest arguments

39. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.
40. The Commissioner accepts that there is always a general public interest in disclosing environmental information. She also considers that there may be an argument for informing public debate on the particular environmental issue that the requested information relates to.
41. The Commissioner understands that, given the impact that cavity wall insulation may have on the local community, the strength of the public interest in transparency and accountability in this case cannot be underestimated.
42. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of the non-disclosure of the relevant information.

43. In its explanation to the Commissioner about why regulation 12(4)(d) is engaged, she notes that the NIHE has referred to the need for the Panel to have the necessary room to think in private and have a safe space in which to hold discussions to develop and explore a full range of options. In turn, this would enable it to make effective decisions when formulating policies in this subject area.
44. The Commissioner considers that arguments about the need for space for the Panel to be able to engage with others are considered to be 'safe space' arguments. The term 'safe space' is about the need to be able to formulate policy, debate live issues and reach decisions without being hindered by external comments and/or media involvement. Whilst part of the reason for needing a safe space is to allow for free and frank debate, it is the Commissioner's view that the need for a safe space exists regardless of any impact that the disclosure of information may have on this. The Commissioner considers the 'safe space' argument to be about protecting the integrity of the decision-making process and whether it carries any significant weight will depend on the timing of the request. She notes that at the time of this request, the decision making process was still live and incomplete.
45. With regard to the NIHE's argument that a safe space is needed to hold discussions to develop and explore a full range of options, which in turn would enable effective decisions whilst formulating policies, the Commissioner considers that this is reasonable. She considers that the Panel should be able to develop its ideas in the knowledge that it has the space to do so, whilst the decision-making process is still ongoing.
46. However, the Commissioner also gives weight to the subject matter; ie, cavity wall insulation and the public interest there would be in this. She notes that the NIHE has confirmed that it is committed to engage and consult with relevant stakeholders, including representatives of the insulation industry, on completion of the Panel's final report. She also notes that the NIHE has published research into cavity wall insulation in social housing and private homes in Northern Ireland. The Commissioner considers that this goes some way to meeting the public interest.
47. The Commissioner also notes the NIHE's arguments regarding disclosure being likely to prejudice its "thinking space", impacting on the integrity of the decision-making process, having a detrimental and prejudicial impact on it and free and frank exchange of ideas, options and suggestions. She considers that this relates to disclosure having a 'chilling effect', which concerns the loss of frankness and candour, should the information be disclosed. In turn, this would lead to poorer quality advice and less well formulated policy and decisions.
48. The Commissioner's view is that if the withheld information were disclosed in response to the request, there would be a realistic prospect

that it would interfere with the decision-making process regarding the NIHE's policy on cavity wall insulation.

Conclusion

49. Taking all of the above into account, the Commissioner is satisfied that regulation 12(4)(d) has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.
50. As the Commissioner considers that regulation 12(4)(d) applies to the all of the withheld information, she has not gone on to consider the NIHE's application of regulation 12(5)(e).

Right of appeal

51. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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

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