

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

Date: 11 February 2020

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information associated with the Asbestos Management Assurance Process. Department for Education (DfE/the department) has released the majority of the information requested and withheld the remainder under regulation 12(5)(f) of the EIR (interests of the person who provided the information). DfE considers that the public interest favours maintaining this exception. It considers that some of the withheld information is also excepted from release under regulation 12(3)(personal data).
2. The Commissioner's decision is as follows:
 - The information DfE is withholding is excepted from disclosure under regulation 12(5)(f) and the public interest favours maintaining this exception.
 - DfE breached regulation 5(2) and regulation 14(2) as it did not make some of the information available or refuse to disclose the remaining information within 20 working days after the date of receipt of the request.
3. The Commissioner does not require DfE to take any remedial steps.

Background

4. In its submission to the Commissioner DfE has provided the following background and context to the request.
5. DfE launched the Asbestos Management Assurance Process (AMAP) on 1 March 2018 to enhance its understanding of how asbestos is managed in schools. The AMAP was, and continues to be, a voluntary data collection.
6. Although voluntary in nature, all state-funded schools and academies in England, and their respective responsible bodies, were strongly encouraged to participate in the AMAP. Responsible bodies (RBs), who are usually the duty-holders, were expected to provide an assurance declaration to complete the process to confirm that the information provided by their schools was correct.
7. In March 2018 there were 22,072 schools and their respective RBs which were invited to participate in the AMAP. Schools were asked to provide information about the management of asbestos in their school estate, using the AMAP online portal.
8. By 15 February 2019, a total of 19,522 (88.4%) schools had voluntarily participated, by providing information to be assured by their respective RBs. 14,840 (67.2%) schools had their responses assured by the appropriate RB.
9. In total 2,550 (11.6%) schools did not participate. The non-participant schools varied by institution type, phase of education and region. It is not possible to draw conclusions about the effectiveness of the management of asbestos in schools where no information was provided.
10. Although the AMAP is a voluntary data collection, DfE expects all schools and their respective RBs to participate. The AMAP remains open to enable non-participating schools and RBs to do so.
11. DfE has strongly encouraged participation as this will help it develop a more comprehensive understanding of the management of asbestos in school estates

Request and response

12. On 30 April 2019 the complainant wrote to DfE and requested information in the following terms:

"[1] How many responsible bodies in total responded to the Asbestos Management Assurance Process with complete information that

indicates asbestos on school premises? Please provide the names of all responsible bodies and a full list of each of the schools - including each schools Unique Reference Number - that they are responsible for.

[2.1] How many responsible bodies in total have responded to the Asbestos Management Assurance process with incomplete information?

[2.2] Please provide the names of all responsible bodies and a full list of each of the schools - including each schools Unique Reference Number - that they are responsible for.

[3] How many schools in total has the DfE referred to the HSE following their response to the Asbestos Management Assurance Process. Please provide the names of all responsible bodies and a full list of each of the schools - including each schools Unique Reference Number - that they are responsible for."

13. DfE responded on 24 June 2019. It released information within the scope of parts 1, 2.1 and 3 of the request and withheld information falling within the scope of part 2.2 under regulation 12(5)(f) of the EIR. DfE considered the public interest favoured withholding this information.
14. The complainant requested an internal review on 11 July 2019, with regard to DfE's response to part 2.2 of the request. She clarified that she is not seeking the full details of every school's submission to the AMAP and that she was willing to restrict her request to the name and reference number of the school and if this school does or does not contain asbestos.
15. DfE provided an internal review on 9 August 2019. Having sought confirmation from the complainant, DfE reviewed its response to her request of 30 April 2019. It maintained its original position.
16. In its submission to the Commissioner DfE has advised that it considers that some of the withheld information is also excepted from disclosure under regulation 12(3) as it is the personal data of third persons.

Scope of the case

17. The complainant contacted the Commissioner on 13 August 2019 to complain about the way her request for information had been handled.
18. In response to a concern raised by the complainant, the Commissioner has first explained why the information in question is environmental information that should be managed under the EIR. Her investigation has then focussed on DfE's reliance on regulation 12(5)(f) to withhold the information falling within the scope of part 2.2 of the complainant's

request, and the balance of the public interest. If necessary, she has also been prepared to consider whether DfE can withhold some of this information under regulation 12(3).

19. Finally, the Commissioner has considered the timeliness of DfE's response to the request.

Reasons for decision

Is the information environmental information?

20. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
21. Regulation 2(1)(a) defines environmental information as information that concerns the state of the elements of the environment, including: air and atmosphere, water, soil, land, landscape and natural sites. Regulation 2(1)(b) gives a definition of environmental information as factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).
22. Regulation 2(1)(c) defines environmental information as information that concerns measures (including administrative measures) such as policies, legislation, plans, programmes and activities affecting or likely to affect the elements referred to in (a) and (b) as well as measures or activities designed to protect those elements.
23. The withheld information in this case is associated with the management of asbestos in school estates. As such the Commissioner is satisfied that the information can be categorised as environmental information under regulation 2(1) of the EIR; it concerns an activity (the AMAP) affecting or likely to affect a substance (asbestos) affecting or likely to affect elements of the environment such as air and atmosphere.
24. Regulation 12(2) of the EIR says that a public authority shall apply a presumption in favour of disclosure. However, just because information is environmental information this does not mean it *must* be released. The EIR also includes exceptions that a public authority can rely on to withhold information, although the authority must also consider the public interest test under regulation 12(1)(b) when relying on these exceptions.

Regulation 12(5)(f) – interests of the person providing the information

25. Regulation 12(5)(f) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided that information where that person (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority; (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and (iii) has not consented to its disclosure.
26. As discussed, the exception under regulation 12(5)(f) is subject to the public interest test.
27. The exception can be broken down into a five-stage test, as recognised by the Information Rights Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012):
 - (i) Would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - (ii) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - (iii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - (iv) Has the person supplying the information consented to its disclosure?
 - (v) Does the public interest in maintaining the exception outweigh that in disclosure?
28. Where the first four stages of the test are satisfied a public authority will owe the person that supplied the information a duty of confidence. The public interest test will then determine whether or not the information should be disclosed.
29. The disputed information in this case is the names of the RBs and a list of the schools (with their reference numbers) for which the RBs are responsible. DfE has provided the Commissioner with a copy of this information.

(i) Would disclosure adversely affect the interests of the person who provided the information to the public authority?

30. In her published guidance on regulation 12(5)(f), the Commissioner explains that in considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the harm.
31. The First-tier Tribunal (Information Rights) has noted that there is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test. However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
32. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
33. Public authorities should be able to evidence the harm that would arise as a result of disclosure. In many cases this will stem from direct consultation with the person who supplied the information. This is most likely to have been at the time the information was provided. However, there may be instances in which it is necessary to consult the information provider at the time of the request.
34. In its submission to the Commissioner DfE has addressed this condition as follows:
 - It confirmed that the schools and RBs ('the person') that responded to the AMAP exercise are not under any legal obligation to provide DfE with information relating to asbestos within their school estate.
 - Due to this, it considers that any release of the withheld information, particularly as it has previously stated that this specific information will be held in confidence and not shared outside of the department and relevant associated agencies, would be likely to have a prejudicial impact on the department, with schools and RBs being unwilling to supply this information for fear of release into the public domain.

- This in turn would reduce the department's ability to work closely with the sector to ensure that any asbestos within their school estate is dealt with effectively and appropriately. To hinder this work could potentially lead to the health of pupils and staff etc being unnecessarily put at risk, which is obviously not in the public interest, nor the interest of those attending and working at these schools.
35. DfE's has argued that disclosing the information would harm its own interests, as it would make RBs and schools less likely to engage with the AMAP. However, it has gone on to argue that, ultimately, this reluctance to engage would harm RBs and schools as it would hinder DfE's ability to help schools appropriately manage any asbestos in their estates.
36. Elsewhere in its submission DfE has confirmed that it considers it is more than likely that the interests of the schools and RBs providing the information to the department would be adversely affected by disclosure. It says this is because the withheld information relates to schools and RBs that have supplied information on asbestos, but with key elements missing at the time of the request and subsequent returns. DfE says it is working closely with all such respondents to ensure that these gaps are filled, with some that were previously incomplete now being fully resolved. Due to this, disclosure would mean that schools and RBs that have now responded fully would be likely to have to divert limited resources to field unnecessary questions from concerned parents, pupils, the broader public and possibly the media, on historic issues that have now been dealt with, rather than focus on educating pupils.
37. In her correspondence to the Commissioner the complainant has argued that DfE could address schools being deterred from supplying information voluntarily in the future by making the AMAP mandatory.
38. In its discussion of the fourth of the conditions, below, DfE has noted a concern that certain schools have expressed. This is that if a school's response to the AMAP was known, this would deter some parents from sending their children to a school (because "incomplete and historic" information contained in the AMAP might indicate to the them that asbestos was or had been present in the school) and would also impact on recruiting and retaining staff.
39. The Commissioner does not consider the complainant's point to be a strong one; at the time of the request (and currently) participation in the AMAP was voluntary and so the status of the AMAP in the future is not relevant. And even if participation in the AMAP had been mandatory, that would not necessarily mean that the information

generated must therefore be disclosed. The Commissioner is persuaded by DfE's position, which she considers to be credible, and is satisfied that the first condition has been met, for the reasons DfE has given. She has gone on to consider the second and third conditions.

(ii) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

(iii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

40. In its submission DfE has addressed these conditions as follows:

- The schools and RBs that provided information as part of AMAP did so voluntarily in response to the request from the department to the sector.
- Due to the voluntary nature of this provision, the department confirmed that the schools and RBs supplying the information did not supply it in circumstances in which the department is entitled to disclose it, apart from under the EIR.
- DfE argues that this is the case in this instance because the information was provided in confidence and the possibility of release was 'tested' with a number of schools that provided this information (this is discussed further below).
- Due to this, DfE believes that its arguments in favour of 12(5)(f) are similar to a case where the Commissioner found in favour of the application of this exception: case FER0798596.
- When considering this condition to the application of 12(5)(f) in that case, the Commissioner stated the following:

"33. In considering the third stage of the tests, UKRI argues that the information was provided to it in confidence and therefore it was supplied in such circumstances that UKRI is not entitled to disclose it.

34. In common law, following the case of Coco v Clark [1969] RPC 41, when determining if disclosure would constitute a breach of confidence, the Commissioner considers that an authority will usually need to consider:

- *whether the information has the quality of confidence;*

- *whether it was imparted in circumstances importing an obligation of confidence; and*
 - *whether disclosure would be an unauthorised use of the information to the detriment of the confider."*
- DfE considers that the arguments surrounding the provision of information is the same in both of these cases.
41. The Commissioner considers that confidence can be explicit or implied and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
42. As outlined above, DfE's position is that the information was provided to it voluntarily and there are no circumstances, other than under the EIR, where DfE would be entitled to disclose the disputed information.

Does the information have the necessary quality of confidence?

43. Information will have the necessary quality of confidence if it is more than trivial and if it is not otherwise accessible.
44. The Commissioner is satisfied that the withheld information has the necessary quality of confidence. The information is more than trivial because it is associated with asbestos management in school estates. DfE has released the majority of the information the complainant has requested, and it advised the RBs and schools participating in the AMAP that the information they provided would not be shared further. The Commissioner is therefore satisfied that the information DfE continues to withhold is not otherwise accessible to the wider public.

Was the information imparted in circumstances importing an obligation of confidence?

45. The Commissioners' guidance says that there are essentially two circumstances in which an obligation of confidence may apply:
- The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example the wording of a letter); or
 - The restrictions on use are obvious or implicit from the circumstances, for example information between a client in therapy and their counsellor.
46. The Commissioner notes that certain schools that DfE has approached have indicated that, when they provided the information, they did not

expect that it might subsequently be released to the wider world. However, of the two circumstances above the Commissioner considers the second applies more broadly. This is because DfE introduced the AMAP to schools as a voluntary process and advised schools that the information would be held in confidence and not shared outside of the department. The Commissioner is therefore satisfied that restrictions on the use of the information are obvious.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

47. The Commissioner's published guidance on regulation 12(5)(f) establishes that case law now suggests that *"any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right"*.
48. It has been established that the disputed information was provided voluntarily with the expectation that it would be treated confidentially.
49. As noted above, it is not necessary for there to be any detriment to the confiders in terms of tangible loss, for this information to be protected by the law of confidence. Therefore, the Commissioner has not considered this particular issue further and has found the second and third stages of the test to have been met.

(iv) Has the person supplying the information consented to its disclosure?

50. Regarding the fourth stage, as has been discussed DfE has confirmed that some of the schools concerned have categorically not consented to the information's disclosure. This is because they consider that disclosing the information may deter parents from enrolling to particular schools and/or have a negative impact on recruiting and retaining staff. The Commissioner considers it likely that, in the circumstances, none of the schools would consent to the information's disclosure. As such she is satisfied that this stage of the test has been met.
51. In her request for an internal review the complainant had made the argument that DfE can legally require the schools that have responded to the AMAP to provide this same information to the department, and therefore 12(5)(f) cannot apply. She said she considered it is quite possible that DfE has the power to compel schools to provide this information even though it had currently chosen not to make responses to the survey mandatory.
52. The complainant also argued that she considered that DfE is free to release information on which schools contain asbestos, if it wanted to, and that there is no statutory restriction on its disclosure. She said

that, furthermore, the schools that took part were informed through the associated online portal of DfE's intention to publish data from the survey. She said DfE, through the portal, acknowledged this as '*an important part of being transparent on meeting health and safety duties*'. The complainant considered that if DfE is able to disclose the information outside of the EIR then it cannot be withheld under 12(5)(f); that within the survey there is no commitment to keep individual school results confidential and that means that regulation 12(5)(f) cannot apply. The Commissioner will address these arguments.

53. The voluntary nature of the AMAP has been discussed above. The AMAP's online portal may advise that certain information would be published; in the circumstances the Commissioner considers it unlikely that the portal advises that the specific information being withheld would be published. DfE has told the Commissioner that it advised RBs and schools that the information they voluntarily provided to the AMAP would be treated confidentially – the Commissioner sees no reason to doubt that was the case. Finally, it is true that DfE could have voluntarily chosen to release the withheld information, even though it considered the information engaged the regulation 12(5)(f) exception. However, on this occasion DfE has decided to withhold it and it was entitled to make that decision.
54. Having considered DfE's and the complainant's positions the Commissioner finds that the first four stages of the test at paragraph 27 have been satisfied. As such, she finds that DfE owes the person that supplied the information – the RBs and schools concerned – a duty of confidence. She has gone on to consider the final stage – the public interest test.

(v) Does the public interest in maintaining the exception outweigh that in disclosure?

Public interest in maintaining the exception

55. DfE has provided the following arguments:
- It has considered the potential impact on schools, the impact on the programme of interrupting the assurance process and the likelihood that those experiencing problems as a result of release would be less likely to participate in a voluntary exercise in future. This would weaken the department's ability to understand the current state of asbestos in the school estate and weaken its ability to support schools and RBs in managing their asbestos effectively.
 - Releasing this information is likely to have a negative impact on

the schools/RBs involved, even where historic absences of information have now been addressed and resolved, following work with the department and appropriate agencies. This is because schools and RBs will face unnecessary questions from concerned parents etc in relation to historic issues that have subsequently been addressed ie gaps in the information provided regarding asbestos on their school estate. To divert RBs and the limited resources at schools away from educating children, as well as effectively managing asbestos, to respond to such unnecessary questions cannot be in the public interest.

- Such schools, just through association with the withheld information, could face reputational damage, with parents, teachers etc believing that they do not have a grasp on the issue of asbestos in their schools, even though this may not be the case. This in turn could lead to pupils being unwilling to attend such schools, parents being reluctant to send their children to these schools and even recruitment problems with schools being unable to recruit staff. Such unnecessary disruption and potential damage cannot be in the public interest, nor in the interest of pupils, parents and the wider school community.
- If the department is required to disclose this information, it would prejudice the department's ability to deal effectively with the handling of the sensitive and potentially significant issues surrounding the presence of asbestos in school buildings. This could lead to delays, with the department and potentially agencies such as the Health and Safety Executive (HSE) being unable to decide whether any issues raised require further support. This would particularly be the case where there are gaps in the information provided or where schools are unwilling to provide such information due to fear of wider release. It is very much in the public interest that unnecessary delays are avoided wherever possible, especially where there are potential health risks.
- When confronted with reasonable concerns relating to insufficient information about asbestos management in schools, the department must be allowed to act as quickly and rigorously as possible to ascertain and clarify the facts. It cannot risk confusion regarding its approach or delays to resolving these issues, eg through schools being unwilling to engage with the department on this important area. To risk this cannot be in the public interest, especially where there could be real and significant health risks to pupils, staff and the wider school community.
- As part of its transparency agenda, the majority of the requested

information has already been released to the complainant. It is also the case that significant amounts of information regarding AMAP can be found via the published report on the GOV.UK website at:

www.gov.uk/government/publications/asbestos-data-collections

- It is also worth noting that, after accessing the information available on GOV.UK, parents or the wider general public who continue to have concerns about a specific school or RB can contact the school directly under the FOIA for further information specific to its setting/settings. This, with the information already provided, meets the public interest without the need to release the withheld information.

Public interest in disclosing the information

56. The complainant has provided the following arguments:

- The AMAP survey has demonstrated that almost 700 schools have needed to be reported to the HSE due to failure to safely manage asbestos. As DfE highlights in the survey, transparency helps to ensure health and safety duties are met and provides assurance to members of the public that asbestos is being safely managed.
- DfE suggests disclosure may put off schools from taking part in future, however it is more likely to achieve the opposite. Whilst 88% of schools have provided the information requested, 12% have not. Disclosing the names of schools that have responded to the survey is more likely to increase the pressure on those that have not taken part. This would increase the overall number of schools that complete the survey.
- In correspondence between DfE and Meg Hillier MP, DfE has repeatedly reassured her that it will be making the details of the AMAP public. Failing to release the names and asbestos status of the schools that have taken part would suggest to the public that DfE is complicit in covering up for those schools that have not taken part in the survey, rather than championing those that have taken part.
- The complainant has provided the Commissioner with a link to a published news article that discusses children's exposure to asbestos in the UK.

Balance of the public interest

57. Having considered both sets of arguments, the Commissioner's view is that, in this case, there is greater public interest in maintaining the regulation 12(5)(f) exception. In addition to DfE's other arguments for withholding the information, she considers it is more important that RBs and schools are prepared to provide accurate information to the AMAP – participation in which, at the time of the request and currently, is voluntary. The fuller and more accurate relevant information DfE has access to, the better it will be able to understand and manage asbestos in the school estate. RBs and schools are more likely to provide information to the AMAP if the information being withheld is treated confidentially and not released into the public domain.
58. Asbestos in the school estate in the UK is clearly a concern. But, as DfE has noted, it has released the majority of the information the complainant has requested; further information about the AMAP is published on GOV.UK and if the complainant or anyone else has concerns about asbestos and a specific school, they have an option of submitting a request for information to that school. And, that DfE has introduced the AMAP – and publishes information about it – is evidence that it is aware of the concern about asbestos in schools, is taking steps to understand and manage this concern and is addressing the public interest in it.
59. Since the five stages of the test at paragraph 27 have been met, the Commissioner is satisfied that DfE has correctly applied section 12(5)(f) to the information it is withholding. Since she has found that the information engages this regulation it has not been necessary to consider whether certain of the information also engages the regulation 12(3) exception.

Regulation 5(2) / regulation 14(2) – time for compliance

60. Under regulation 5(2) a public authority must make information available as soon as possible and no later than 20 working days after the date of receipt of the request.
61. Similarly, if a request, or part of a request, is refused under regulation 12(1), under regulation 14(2) the refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request.
62. In this case, the complainant submitted her request on 30 April 2019 and DfE did not make some of the information available or refuse to disclose the remainder until 24 June 2019. DfE therefore breached regulation 5(2) and 14(2) on this occasion.

Right of appeal

63. 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

64. 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.
65. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF