

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 28 April 2025

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the costs of a social housing project. The Northern Ireland Housing Executive (NIHE) refused the request, citing regulation 12(5)(e) (the confidentiality of commercial or industrial information) of the EIR.
2. The Commissioner's decision is that, whilst NIHE was correct to handle the request under the EIR, NIHE is not entitled to rely on regulation 12(5)(e), as it has not demonstrated that the exception is engaged.
3. The Commissioner requires NIHE to take the following step to ensure compliance with the legislation.
  - Disclose the withheld information (ie the withheld information provided to the Commissioner in NIHE's submissions of 28 March 2025).
4. NIHE must take this step 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 Freedom of Information Act 2000 (FOIA), and may be dealt with as a contempt of court.

## Request and response

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5. On 20 September 2024, the complainant wrote to NIHE and requested the below information. They stated they were making the request under FOIA.

"Records created after 1 January 2023 until 20 September 2024 relating to the cost of building six semi-detached social housing units at Sunningdale Gardens in north Belfast, or in the alternative, an analysis of the costs as they are known today, broken down by site costs, construction costs, professional fees."

6. NIHE responded on 17 October 2024. It handled the request under the EIR, stating that the requested information relates to a new-build project and "refers to our innovative Modern Methods of Construction/Low Energy". NIHE refused the request on the basis of regulation 12(5)(e). NIHE maintained this position at internal review.

## Scope of the case

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7. The complainant contacted the Commissioner on 21 November 2024 to complain about the way their request for information had been handled.
8. They disagreed with NIHE's refusal to provide the requested information.
9. They also emphasised that they submitted their request under FOIA, and complained that NIHE had decided to deal with it under the EIR.
10. They consider that the balance of the public interest lies in disclosure of the requested cost information.
11. The Commissioner therefore considers that the scope of this case is to consider whether NIHE was correct to handle the request under the EIR; and, if the EIR was the correct information access regime, whether NIHE was correct to refuse to disclose the withheld information on the basis of regulation 12(5)(e).

## Reasons for decision

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### Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being:

“... any information ... on—

- (a) 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;
- (b) 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);
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) ...”.

13. In this case the complainant requested information about the cost of building six social housing units, or an analysis of the costs as known at the time of the request.

14. NIHE considers that the information falls under regulation 2(1)(c) of the EIR. It explained to the complainant that “the cost information relates to building new houses, which is considered to be a measure which has affected the state of land as an element of the environment”. NIHE also said the information relates to an innovative Modern Methods of Construction/Low Energy new-build project and “is integral to the decision in building the houses and ... whether the environmental impact would be felt.”
15. Although the complainant has expressed dissatisfaction that NIHE handled the request under the EIR, and seems to dispute that the information is environmental, the Commissioner is satisfied that the requested information falls under regulation 2(1)(c) of the EIR as NIHE has argued.
16. He also highlights a recent decision notice, IC-331822-L9J6<sup>1</sup>, involving a request for the cost of constructing three properties. In that decision notice, that type of information was considered to be environmental.
17. The Commissioner therefore finds that NIHE was correct to handle the request in the present case under the EIR; and he too has assessed this matter under the EIR.

### **Regulation 12(5)(e)**

18. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest.
19. The exception, if engaged, is subject to a public interest test.
20. For regulation 12(5)(e) to be engaged, the following four criteria must be met:
  - The information is commercial or industrial in nature.

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<sup>1</sup> <https://ico.org.uk/media2/vyjnvyym/ic-331822-l9j6.pdf>

- Confidentiality is provided by law.
  - The confidentiality is protecting a legitimate economic interest.
  - The confidentiality would be adversely affected by disclosure.
21. For information to be commercial in nature, it will need to relate to a commercial activity. A commercial activity generally involves the sale or purchase of goods or services. Here, NIHE explained to the complainant that the information relates to the cost of building houses, a process which included NIHE contracting with a third party. The Commissioner is satisfied that it's commercial.
  22. For the second criterion, NIHE considers that the information is protected by the common law duty of confidence. Here, there are two key issues to consider. First, whether the information has the necessary quality of confidence (if the information is not trivial nor in the public domain, it has the necessary quality of confidence). Second, whether the information was shared in circumstances creating an obligation of confidence (consider whether a reasonable person in the place of the recipient would have considered that the information has been provided to them in confidence).
  23. NIHE has stated that "the information is non-trivial and has not been previously disclosed. It has been provided ... with an expectation of confidence". NIHE continued that the new-build project was awarded following a tender exercise in which the successful party made a confidential submission, and "The bid document was accepted on a confidential basis to protect the commercial interests of the developer and NIHE to ensure a fair and competitive bidding process which has an inherent duty of confidentiality ...".
  24. The Commissioner highlights that the complainant didn't request the developer's "confidential submission" or "bid document". They did, however, request "an analysis of the costs as they are known **today**" (emphasis added in bold), and NIHE's submissions to the Commissioner indicate that the withheld information relates to that part of the request.
  25. The Commissioner accepts that information about costs as they were known at the time of the request isn't trivial information, hasn't been previously disclosed and will have been shared in circumstances creating an obligation of confidence. He accepts that the second criterion is met.

26. To satisfy the third criterion, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It's necessary to consider the sensitivity of the information at the date of the request, and the nature of harm that would be caused by disclosure; and to establish that disclosure **would** cause harm (on the balance of probabilities – ie more probable than not). Examples of legitimate economic interests include ensuring competitors do not gain access to commercial valuable information; protecting a commercial bargaining position in the context of existing or future negotiations; and avoiding disclosures which would otherwise result in a loss of revenue or income.
27. If the information was provided by one party to another under the common law of confidence, it is the interests of the confider (the person providing the information) that are relevant.
28. Furthermore, if a third party's interests are at stake, the public authority needs to consult with the third party, unless it has prior knowledge of the third party's views. It is not sufficient for the public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. However, it remains the public authority's responsibility to decide whether or not the exception applies.
29. NIHE considers that the legitimate economic interests of both NIHE itself and its third-party contractor would be adversely affected by disclosure.
30. In its original response, NIHE said that disclosure of the withheld costs:

"... would disadvantage [NIHE] and the contractor in future similar projects. If the costs are disclosed, this would compromise [NIHE's] ability to obtain value for money ... would prejudice [NIHE's] and the contractor's ability to engage in future similar commercial activities."
31. At internal review stage, it added:

"NIHE has consulted with the contractor. The contractor has confirmed that the cost information, if released would damage their commercial interests ... Disclosure would provide information on the contractor's costing which would be of advantage to direct competitors, who would be able to adapt their pricing, thereby negating the ability of this contractor to develop a commercial advantage when tendering for

other contracts. These homes have been built recently and the information is current. Disclosing this information now could fetter the competitiveness for any future schemes ... Revealing the cost information would be detrimental to [NIHE's] negotiations on future projects in a way that would be likely to hinder its ability to obtain value for money. We are currently developing two further schemes, and if this cost information was made publicly available, there is the potential that tenderers would use the cost that was previously accepted to influence their bid ... NIHE may not gain the current market levels."

32. However, based on NIHE's comments, the Commissioner isn't convinced that "Disclosure would provide information on the contractor's costing", as its internal review claimed. As noted earlier, the withheld information relates to "an analysis of the costs as they are known today" – ie the alternative information that the complainant requested. The Commissioner's understanding is that that information isn't the same as "information on the contractor's costing".
33. Furthermore, NIHE didn't specify what information it had consulted the contractor about. The Commissioner wonders whether the contractor thought that it was being consulted about disclosure of cost information provided to NIHE during the tender process.
34. In addition, the complainant hasn't requested detailed information about the sourcing of materials and services, the suppliers or the labour costs.
35. The Commissioner also considers that, as part of the tender process, an indication or estimate of a project's cost is likely to be given by NIHE.
36. Regarding the two further schemes that NIHE said it was currently developing (at the time of its internal review), the Commissioner notes that NIHE hasn't explained whether those schemes were comparable to the Sunningdale Gardens project.
37. He also makes the point that costs change over time, and queries how far the withheld cost information for this project would really be relevant to other schemes in light of that.
38. The Commissioner isn't satisfied that NIHE has demonstrated that the third criterion of the four-part test (outlined in paragraph 20) is met; he

isn't satisfied that disclosure of the withheld information would cause the harms described by NIHE.

39. Consequently the Commissioner finds that the exception is not engaged.



## Right of appeal

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40. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Daniel Kennedy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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