

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

Date: 7 December 2021

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

Decision (including any steps ordered)

1. The complainant has requested copies of the Condition Data Collection reports for particular schools. The Department for Education (“the DfE”) eventually relied on Regulation 12(5)(e) (commercial confidentiality) and Regulation 12(5)(f) (detriment to the confider) of the EIR in order to withhold the requested information.
2. The Commissioner’s decision is that the DfE has not demonstrated why either Regulation 12(5)(e) or Regulation 12(5)(f) of the EIR are engaged and is therefore not entitled to rely on either exception.
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, a copy of each report.
4. The DfE must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 February 2021 the complainant requested information of the following description:

"with regards to the announcement on Friday February 5th, 2021 of 50 new school rebuilding projects, I would like to request copies of the latest condition data collection report for each school."

6. On 10 March 2021, the DfE responded. It refused to provide the requested information and relied on Regulation 12(5)(e) of the EIR in order to do so.
7. The complainant requested an internal review on 16 March 2021. The DfE sent the outcome of its internal review on 16 April 2021. It upheld its previous position, but now also considered that it was entitled to rely on Regulation 12(5)(f) of the EIR to refuse the information.

Scope of the case

8. The complainant contacted the Commissioner 24 May 2021 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine whether or not the DfE is entitled to rely on either Regulation 12(5)(e) or Regulation 12(5)(f) of the EIR in order to withhold the requested information.

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being 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)...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);*
11. The DfE provided a sample of the Condition Data Collection (CDC) reports to the Commissioner so that he could understand the nature of the information being withheld.
 12. The reports provided to the Commissioner were all presented in a standard format. After a preamble discussing the methodology, each report then contains a series of tables which reflect the current condition of each aspect of the schools buildings from roofing, to doors, to air conditioning and to lighting.
 13. Each aspect is given a grading from A to D to reflect its current condition (A being the best) and a score (from 1 to 4) which indicates what priority has been or should be given to dealing with that specific aspect. Aspects scoring a 4 do not require attending to within the next five years, aspects scoring a 1 are assessed as requiring attention immediately or, at least, within the next 12 months.
 14. Taken as a whole, the Commissioner considers that the information in question falls within category (f) of the definition of environmental information. This is because the information is "on" the condition of built structures (ie. school buildings) and how those built structures might be affected by the elements of the environment.
 15. The condition of external aspects of a building (such as its roof) will clearly be affected by the weather. For internal aspects of the building, the effect will be less clear. Some aspects (such as air conditioning or lighting) will have an obvious effect on (or will obviously be affected by) the elements of the environment. Other aspects (such as internal doors and walls) are less obviously affected on a day to day basis, but could be potentially be affected by the elements of the environment (for example by water leaking in from outside) or by factors (such as noise

or substances) which would in turn also affect the elements of the environment.

16. The Commissioner is thus satisfied that the information in question is environmental and therefore the DfE was correct to deal with the request under the EIR.

Regulation 12(5)(f) – detriment to the confider

17. Regulation 12(5)(f) of the EIR states that:

a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(f) the interests of the person who provided the 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 these Regulations to disclose it; and

(iii) has not consented to its disclosure

18. The EIR reflect the incorporation into UK law of the principles of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Aarhus Convention implementation guide suggests that the purpose of the exception provided at Regulation 12(5)(f) is to protect and encourage the voluntary flow of information to public authorities from third parties.¹

19. There are many situations where public authorities rely on the voluntary provision of environmental information in order to perform their functions. However, the Commissioner's guidance on this exception states that the starting point must always be the effect on the party that

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https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

originally provided the information.² In this case, the third party in question will be the school to which each particular report relates.

20. As with all the Regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure "would adversely affect" a confider's interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.
21. Although asked directly by the Commissioner to do so, the DfE did not put forward any distinct arguments in its submission which drew a causal link between disclosure and an adverse effect on the schools' interests. However, the Commissioner also notes that the DfE has cited two similar exceptions and so he has considered the submission as a whole.
22. The DfE's position is that disclosure of the information would affect the ability of each school to achieve value for money when tendering for maintenance work. Whilst the Commissioner notes that such an argument is better suited to the Regulation 12(5)(e) exception, he accepts that it is applicable to both exceptions as commercial harm can be detrimental.
23. Because disclosure under the EIR is disclosure to the world at large, the DfE argued that disclosing this information would mean that it would be available to any supplier who wished to compete for the work. By revealing each school's priorities for maintenance, the DfE argued that would-be suppliers would artificially inflate their prices for the most urgent work, undermining the school's ability to achieve value for money.
24. The DfE also noted that schools were competing with each other for funding from central government to carry out capital improvements. It thus argued that disclosing the information would put those schools who had not submitted reports at an advantage.
25. The DfE noted in its submission that:

"It would also be the case that release could hinder the ongoing discussions and work between the department and schools, with departmental and school resources being diverted to answer questions from parents and students etc. It is more in the public interest to allow the department to work effectively with these

² https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

schools to ensure that the information they have voluntarily supplied the department on condition of their school estate is complete and accurate, leading to further actions being undertaken where required, rather than delay this process through fielding questions from interested or concerned parties, especially where the concerns may now be historic and unwarranted, as some/all improvements and maintenance has been completed. The same potential negative impact applies to individual school resources when needing to field unnecessary questions or concerns."

26. Finally, the DfE noted the danger of reputational damage being caused where it was revealed that a particular school's buildings were in a poor state of repair – potentially discouraging would-be staff and students.

The Commissioner's view

27. In the Commissioner's view, the DfE has not done enough to demonstrate that disclosure would be more likely than not to have an adverse effect on any of the schools in question.
28. Firstly, the Commissioner is not persuaded that there is a significant risk of price inflation arising from disclosure.
29. In *Higher Education Funding Council for England v Information Commissioner & Guardian Media Ltd* (EA/2009/0036), the Tribunal was asked to consider similar information in respect of higher education institutions. The Tribunal found that the institutions in question would be unlikely to be able to bring an action for a breach of confidence, because the HEFCE (despite advancing similar arguments to those advanced here by the DfE) had been unable to demonstrate that those institutions would suffer any significant detriment as a result of disclosure.
30. Building and maintenance contractors operate in a competitive market. If a contractor submits an inflated quote, they will be aware of the risk that they will be undercut by a competitor. Even if all contractors have access to the same information about the school's priorities, they will not know what price their competitors are likely to offer – which restricts their opportunities to "price-gouge". Contractors would be prevented by law from collaborating to fix prices artificially.
31. In any case, a reputable contractor is unlikely to offer a firm quote without having made their own assessment of the task in hand. Experienced contractors are likely to make their own estimate of the extent and urgency of any repairs – regardless of what might be in the CDC report – and set their prices accordingly.
32. Furthermore, even if the Commissioner were to accept the logic of the argument, the logic runs both ways. If contractors are incentivised to

overcharge for high priority work, that would suggest that they would be equally incentivised to *undercharge* for lower priority work – on the basis that offering a discount might persuade the school to bring forward work that it was planning to carry out later.

33. However, the Commissioner is not wholly persuaded that this information is of considerable use to would-be contractors. Firstly, the information was at least two years out of date at the point the request was made – and, in some cases, four years out of date. Even in the world of building work, that remains a considerable amount of time and there is no guarantee that a school's priorities two years ago will be the same today.
34. Because of the time lag, items which originally required dealing with within twelve months will mostly have been dealt with by the point that the request was responded to.
35. In addition, it is entirely possible that items that were thought to require relatively immediate work have in fact deteriorated less than predicted. Equally, items not thought to be a problem might have moved up the priority list because of intervening events. For example, a school's roof could have been in an excellent state of repair when the report was carried out, but might since have been damaged by weather.
36. Therefore a contractor would be unwise to inflate their bid price on the basis of information which may be up to four years out of date.
37. Finally on this point, the Commissioner notes that the information being withheld does not provide any pricing information or any information about the budgets available to each school. Therefore any contractor who overbid would risk pricing themselves out of the competition.
38. In terms of enquiries caused by disclosure, the Commissioner considers it likely that schools already field enquiries from a wide range of contractors touting for business. In his view the main effect of disclosure is more likely to be a focus on enquiries about work that the school actually needs, rather than a more general increase in correspondence. For example, a glazer who was aware that a particular school's windows were in superb condition and unlikely to need replacing in the next five years is likely to be wasting their time by asking that school if it wishes to replace its windows – however, there may be another nearby school whose windows do need replacing.
39. Finally, on reputational effects, the Commissioner accepts that schools with excellent facilities find it easier to attract staff and students. However, the state of facilities is only one of a number of factors that make up a school choice. Furthermore, the Commissioner notes that

most prospective students and staff members are likely to visit schools prior to making their decision. The visual state of the school is likely to have a far greater impact on someone's willingness to study or teach there than any assessment of the school's maintenance needs – not least because the information will be at least two years old.

40. Whilst the DfE did provide a considerable amount of information demonstrating why the provision of this information had occurred in circumstances implying a duty of confidence and why its own interests might be harmed, as the Commissioner has already pointed out, the first step with this exception is to establish that the confider is more likely than not to experience an adverse effect. If the public authority cannot demonstrate that the supplier of the information is more likely than not to suffer an adverse effect, the circumstances in which the information was imparted are irrelevant.
41. In this case, the Commissioner does not consider that the DfE has demonstrated that an adverse effect is more likely than not to result from disclosure and therefore Regulation 12(5)(f) is not engaged. However, even if he had been persuaded that the likelihood of an adverse effect was sufficient to reach the threshold, the severity of the effect would be at the lower end of the spectrum and therefore unlikely to warrant a significant public interest in maintaining the exception.

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

42. Regulation 12(5)(e) states that:

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."*

55. The Commissioner's public guidance³ on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

43. The EIR do not provide a precise definition of what constitutes commercial or industrial information. The Commissioner's guidance on this exception states that "industrial" information will relate to the processing of raw materials or the process for manufacture – as opposed to their sale.

44. The guidance goes on to state that the essence of commerce is trade and therefore commercial information will need to relate to some sort of purchase of goods or services. The guidance also notes that:

"Not all financial information is necessarily commercial information. In particular, information about your revenue or resources is not generally commercial information, unless the particular income stream comes from a charge for goods or services."

45. The DfE argued that the information was commercial in nature because:

"it covers the condition of individual school buildings across individual school sites, with conditions of buildings and/or their utilities etc. being rated from 'good' to a 'full replacement' being required. It also ranks the priority level of the work required, from '0 years' (i.e. immediate work required) to more than 5 years to undertake improvement work.

"This reports [sic], which are a result of visits to every government funded school, have dual key purposes:

³ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

- i. to collect building condition data, general site information and site management data about the condition of school buildings, data which can then be shared with the individual schools and their responsible bodies; and*
- ii. help the DfE prioritise future funding of the school estate in England, based on sound information and data."*

46. The DfE then went on to offer further arguments which, in the Commissioner's view, focused more on the alleged commercial harm that might result from disclosure rather than the nature of the information itself.
47. Having viewed the withheld information himself, the Commissioner is not convinced that it is commercial in nature. The information only relates to the condition of various aspects of each school building and a priority for repair.
48. The information does not reveal the time when each school will actually tender for any particular piece of maintenance work, the precise nature of the tender that will be offered or the budget that will be available to complete the work.
49. The Commissioner therefore considers that this information is not commercial in nature because it does not have a sufficiently close relation to any sale of goods or services – whether actual or intended. The information might inform the way in which each school manages its own internal resources, but it does not give an indication of whether any school is, or intends to be, managing its capital resources in exactly the manner set out in the report – or indeed the extent of the resources that are, or would be, available to each school.
50. Nor is the information industrial in nature because it does not have a sufficiently close connection to the purchase or processing of raw materials.
51. As the information is not commercial in nature, it thus follows that Regulation 12(5)(e) cannot be engaged.
52. The Commissioner notes that, even if he were to be persuaded that the information was commercial in nature, he considers that the DfE's arguments do not demonstrate that any adverse effect on each school would be either significant or likely – for the same reasons as set out in respect of the Regulation 12(5)(f) exception.
53. As the DfE has not indicated that it wishes to apply any other exception, or that complying with the request would be unduly burdensome, the Commissioner now expects the DfE to disclose the withheld information.

Right of appeal

54. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

55. 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.
56. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF