

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 March 2014

Public Authority: Department for Environment, Food and Rural Affairs

Address: Nobel House
17 Smith Square
London, SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested copies of Norfolk County Council's reports for the 'Waste Treatment PFI'.
2. The Commissioner's decision is that the Department for Environment, Food and Rural Affairs (Defra) has correctly applied regulation 12(4)(e) of the EIR to the withheld information.
3. The Commissioner does not require Defra to take any steps as a result of this decision notice.

Request and response

4. On 4 July 2013, the complainant wrote to Defra and requested information in the following terms:

"copies of Norfolk County Council's Waste Infrastructure Delivery programme (WIDP) Transactors Monthly Reports (TMRs) for the Waste Treatment PFI, January 2012 to date (4 July)."
5. Defra responded on 1 August 2013. It refused to provide the requested information citing regulations 12(4)(e) and 12(5)(e) of the EIR.
6. Following an internal review Defra wrote to the complainant on 24 September 2013, in which it upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2013 to complain about the way her request for information had been handled. The complainant was advised that she should wait for the outcome of the internal review before referring her complaint to the Commissioner.
8. On 29 September 2013 the complainant contacted the Commissioner again, providing a copy of the internal review from Defra. During the course of the Commissioner's investigation Defra also sought to rely on regulations 12(3) and 13(2)(a)(i) which relate to personal data.
9. The Commissioner considers the scope of this case to be to determine if Defra has correctly applied the exceptions it has cited.

Reasons for decision

Regulation 12(4)(e) – internal communications

10. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has recently published guidance on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
11. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance on the exception, the Commissioner acknowledged that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.
12. The Commissioner considers that communications within one public authority will constitute internal communications for the purpose of this exception. All central government departments (including executive agencies) are deemed to be one public authority. However, communications between a public authority and a third party will not constitute internal communications except in very limited circumstances.
13. In its response to the complainant Defra stated that the Transactors Monthly Reports (TMRs) are written by Waste Infrastructure Delivery Programme (WIDP) transactors for the use of WIDP management to monitor the project. They are not shared with Norfolk County Council

(NCC) nor have they been shared with third parties. Therefore, they constitute internal communications.

14. The complainant has argued that in 2011 Defra previously shared TMRs with Norfolk County Council (NCC) and contends there is no evidence that further reports were not shared. She stated the three TMRs released at the end of 2011 were only done so as a result of long and continued pressure by the ICO, following long delays and several denials from Defra.
15. The Commissioner has reviewed all decision notices issued since 2008 but cannot locate any that seem to relate this matter.
16. Defra had previously advised that these TMRs were disclosed for the purpose of a Judicial Review. However, the complainant provided a copy of an email chain between a Defra Official and an NCC Official. One is dated 7 October 2011 timed at 12:29 and states:

"Subject: Sept TMR

Is attached for you to share with NCC OFFICIAL. Changes to the August report (not many) in red.

A response of the same date timed at 21:10 states:

"Thanks for sending through the latest Transactors report.

The date to hear if there is a JR to consider is 5 December, and I can report that my time on this project is nearer 40% than 10%.

REDACT: REGULATION 12(5)(E), when the banks timetable is early November?

I would appreciate seeing your report every month, as I value your perspective."

17. The Commissioner sought further clarification from Defra on this matter. He asked if it could provide copies of any covering emails/ correspondence that indicate who the reports were shared with.
18. Defra explained that it does not normally file covering emails. It also provided a copy of the email referred to above. This email is in relation to one of the three reports (specifically the September 2011 report) which were shared with NCC and subsequently released as part of another case. Defra also provided copies of the three reports.

19. Defra stated that although NCC asked to see future reports they were never shared with the council, and only these three were ever shared with anyone outside of the Department. Defra explained that it had not mentioned the three reports in its earlier response to the Commissioner as they do not fall within the scope of the complainant's request. However, Defra did explain the situation in its internal review response to the complainant as she had commented on them in her request for an internal review.

"In your email of 4 August you question whether the TMRs that have not been checked by NCC are accurate. This is not true. The transactor works closely with the project team in the procurement and post close stages, and as such is aware of progress and milestones and other details of the project. Only issues outside of the normal project process (i.e. the Judicial Review in this instance) may need to be clarified with the project team, hence the sharing of the three TMRs."

20. Defra explained that the transactors are seconded under contract into Defra's Waste Infrastructure Delivery programme ("WIDP") team from Local Partnerships - an organisation jointly owned by Treasury and the Local Government Association.
21. Whilst the transactors have different roles to Defra's WIDP team, they have complementary roles and, as such, are working together in partnership to implement the WIDP. Transactors provide advice to local authorities on the conduct of the procurement; reviewing project documentation; assisting with the analysis of commercial negotiating positions; and general trouble shooting activities in support of the authority's efforts to progress the project. The transactors work with, and support their Defra colleagues in the WIDP team by bringing specific commercial, financial and legal expertise to assist in project delivery.
22. Whilst seconded to Defra the transactors are based in Defra offices, have Defra email addresses and other contact details, and for all intents and purposes work for Defra.
23. Defra therefore considers the transactors to be working for Defra and as such "embedded" within Defra's commercial team in order to implement the WIDP. This is further reinforced by the Memorandum of Understanding between Norfolk County Council and Defra's WIPD team.
24. Defra has established the WIDP in order to support Local Authority procurement and delivery of infrastructure needed to treat residual municipal waste. WIDP has established a pool of experienced transactors drawn from Local Partnerships and Infrastructure UK with access to expertise and advice from specialists in relevant areas."

25. Defra stated that the TMRs are produced by transactors and shared only with Defra's WIDP team to monitor the implementation of the WIDP. As such they are internal documents, and are covered by regulation 12(4)(e). It accepted that had the TMRs been shared between the transactors and any of their specialist advisers the report would not be an internal communication.
26. The Commissioner has considered the withheld information and is satisfied that the exception is engaged. The Commissioner has therefore gone on to consider the public interest test as required by Regulation 12(1)(b). When doing this he has taken into account the presumption towards disclosure specified in Regulation 12(2).

Public interest test

27. The test set out in Regulation 12(1)(b) is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. If the public interest in maintaining the exception does not outweigh that in the information being disclosed then the exception cannot be applied.

Arguments in favour of the exception being maintained

28. There is an argument to allow public authorities safe space to debate issues and reach decisions away from external distractions. The Commissioner considers that this argument is greatly enhanced when it relates to a live issue, that is, a matter that is still on-going where a definitive decision has not been made.

Is the policy a live issue?

29. Defra explained that the WIDP includes a portfolio of waste management projects that are supported by Defra through private finance initiative or public private partnership. The projects are either under development (at various phases from planning determination, construction, commissioning to 'post financial close') or are operational.
30. Defra further explained that (NCC) has recently agreed a revised project plan with the contractor and is currently awaiting a call-in decision from the Secretary of State for Communities and Local Government on the planning application for the residual waste treatment facility, and so this is very much still a 'live' issue. This is therefore a very sensitive period as rejection of the planning application could lead to termination of the contract and potentially millions in (tax payer-funded) compensation payments being made by Norfolk County Council to the contractor.
31. Defra considered that disclosure of this information whilst it is still a 'live' issue would have a significant impact on its candid internal

reporting processes on projects, undermining the safe space needed to consult in private and to hold frank discussions on the projects involved.

32. Defra also stated that it is important to note that at the time of responding to the request, dated 4 July 2013, NCC were within the statutory time period allowed for applications for judicial review of the decision by the Secretary of State for Environment Food and Rural Affairs to remove Waste infrastructure Grant on 18 October 2013. That time period has now passed, and the project is no longer financially supported by WIDP. Hence, successful delivery of a multi-million project like this for NCC is a highly important (and 'live') issue.
33. Defra argued that in order for policies to be developed and implemented effectively, civil servants must be given the space to consider and discuss issues in private. With a high profile issue, it is important that policy officials are able to consider and produce advice without fear that every step of the process will be open to scrutiny before decisions have been finalised. If the Defra staff felt that their opinions could be disclosed then they may feel inhibited in their discussions – leading to potentially poorer decision making and implementation of policy.
34. It is important that transactors are able to provide frank assessments of projects, without fear that these assessments will be disclosed to the local authority or the general public. This enables Defra to effectively oversee the procurement and post close stages using accurate and unbiased information. The transactors' ability to perform their role effectively would be compromised if their written feedback were to be disclosed. They would no longer be in a position to provide the feedback which may identify risks or opportunities in the local authorities or projects.

Public interest arguments in favour of disclosing the requested information

35. Defra acknowledge that there is a strong public interest in disclosure of information surrounding waste policy – particularly where decisions are taken in central government that affect the award of contracts by, and funding provided to, local authorities.
36. There is also great public interest in the transparency of Government Departments – both in ensuring that the work of civil servants is carried out within statutory and policy boundaries and decisions are based on clear evidence. Also, it is important that the public are kept informed of the development and implementation of policies.

37. The information in question concerns waste management. This is an important issue impacting both on the environment and on consumers in terms of the cost of developing the most appropriate sites and methods.
38. The complainant argued that withholding the TMRs and the information they contain is only in the interest of certain Defra civil servants, the contractor and those at NCC involved in this proposal and that this is to the detriment of public funds and Norfolk.
39. The complainant further stated that *"for over three years we have seen how much government departments have been allowed to cover up the illegitimate deals behind excuses given for non-disclosure in the public interest. Far from leading to a poorer service and less value for money for public funds, disclosure would potentially lessen future secrecy, lessen the 'behind closed doors' deals, enable proper competition to take place, and thereby create far better value for money, which has already come from the taxpayers."*

Balance of the public interest

40. The Commissioner recognises there is a public interest in transparency, openness and accountability in relation to decisions made by Defra to instigate change. In this case he considers the local public interest is strong due to the involvement of the public in protests against the proposals.
41. The Commissioner also considers there is a public interest in the public being informed on this issue to enable them to engage in debate and discussion. The argument that legislative changes can best be made by informed contributions from interested parties based on the full knowledge of the evidence base behind policies and consultations is a valid argument which the Commissioner recognises and gives weight to.
42. The Commissioner acknowledges the 'safe space' argument and recognises that part of the reason for needing a safe space is to allow free and frank discussion; the need for a safe space exists regardless of any impact on the candour of debate. The Commissioner has therefore gone on to consider the safe space arguments relevant to this request.
43. The Information Tribunal in the DfE¹ case found that ministers and officials were entitled to time and space to agree policies by exploring safe and radical options without the threat of media involvement or

¹ Information Tribunal reference EA/2006/0006

external scrutiny. Therefore, the need for a safe space to debate and reach decisions without external comment is a valid argument.

44. The Commissioner recognises the public interest in preserving a safe space in which proposals can be put forward and discussed to allow the development of new legislation or policies.
45. He considers that to release internal notes detailing accounts of conversations and discussions with third parties which show their provisional positions with regard to a proposal may erode the 'safe space'. The Commissioner considers there is a public interest in a public authority maintaining a safe space to allow officials to develop ideas, provide clear views and to debate live issues arising from the discussions it has with third parties which may influence the development of policy and reach decisions away from external interference and distraction.
46. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008): "This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."
47. Public authorities may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this sort of safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.
48. In this case the request was made on 4 July 2013. As Defra have explained above this is still a live issue and therefore the Commissioner affords significant weight to this argument for withholding the requested information.
49. The Commissioner has carefully balanced the arguments for maintaining the exception against the arguments in favour of disclosure. He considers that there is a public interest in assisting the public in understanding decisions made by Defra and enhancing public debate on this issue. However, he also recognises there is a public interest in maintaining a safe space for proposals to be developed and discussed.

50. The Commissioner has therefore decided that the public interest in maintaining the exception outweighs the public interest in disclosure. Accordingly Defra has correctly applied this exception to the withheld information.
51. As Defra has applied regulation 12(4)(e) to all the withheld information the Commissioner has not gone on to consider the application of the other exceptions cited.

Right of appeal

52. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

53. 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.
54. 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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