

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

**Date:** 3 May 2016

**Public Authority:** Department for Communities and Local Government ('DCLG')

**Address:** 2 Marsham Street  
London  
SW1P 4DF

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of advice given to Ministers within DCLG following a consultation exercise on 'Planning Performance and Planning Contributions'. The Commissioner's decision is that DCLG has correctly applied the exception for internal communications at Regulation 12(4)(e) of the EIR to the requested information. He does not require DCLG to take any steps to ensure compliance with the legislation.

**Request and response**

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2. On 6 August 2015, the complainant wrote to DCLG and requested information in the following terms:  
  
"I would like to request information provided to Ministers within DCLG, specifically, advice given on 9 June 2014.  
  
The advice which was issued to ministers followed a consultation exercise called 'Planning Performance and Planning Contributions' and summarizes the local impacts of applying a thresholds-based exemption for affordable housing."
3. DCLG responded on 1 October 2015 and refused to provide the requested information citing the exemption at section 35(1)(a) of the FOIA.

4. The complainant requested an internal review on 4 October 2015.
5. DCLG provided an internal review response on 26 November 2015 in which it maintained its original position.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 4 November 2015 to complain about the way his request for information had been handled.
7. Upon receipt of DCLG's response to his enquiries, including a copy of the withheld information, the Commissioner considered the information to be environmental by virtue of Regulation 2(1)(c) of the EIR because it is information regarding a policy that affects housing development. The Commissioner requested that DCLG review the case and consider disclosing the information. He informed DCLG that if it is not prepared to disclose the information it should specify which exception of the EIR it is relying on and submit a full rationale as to why the exception applies. The Commissioner also informed DCLG that if it wishes to maintain that the request for information in this case should be dealt with under the FOIA, it should provide a full explanation as to why it believes the withheld information does not constitute environmental information falling within the scope of the EIR.
8. DCLG responded to the Commissioner stating that, on reflection, it agrees that there is an environmental element to the information and it has reconsidered the request under the EIR. DCLG stated that it is applying the exception at regulation 12(4)(e).
9. The Commissioner has therefore considered whether the exception for internal communications at Regulation 12(4)(e) has been correctly applied to the withheld information.

### **Background**

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10. DCLG provided the Commissioner with the following background information to set out the context of the request:

"In March 2014, the Coalition Government published a consultation on "Planning Performance and Planning Contributions". This consultation took forward the Government's 2013 Autumn Statement commitment to consult on a proposed new 10 unit threshold for section 106 affordable housing contributions within national policy, to reduce planning costs to developers.

The government believes that such charges can place a disproportionate burden on small scale developers, including those wishing to build their own homes, and prevent the delivery of much needed, small scale housing sites. Following the public consultation exercise, and after taking extensive advice as to the issues concerned, the government then delivered a tailored policy intervention in November 2014. Essentially, Ministers decided that developments of 10 units or 1000 sq m or less would be excluded from affordable housing levies and tariff based contributions.

This decision was quashed following a legal challenge in July 2015 by two local authorities and led to the removal of two paragraphs in the National Planning Practice Guidance related to small development policy. The judgement stated that the guidance contravened the Planning & Compulsory Purchase Act 2004's presumption in favour of the development plan, and that the consultation process had been unfair. DCLG was given leave to appeal the judgement in 2016."

## Reasons for decision

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### Regulation 12(4)(e)

11. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
12. The Commissioner has published guidance<sup>1</sup> on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
13. 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 acknowledges 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.
14. The Commissioner is satisfied that the advice from officials to a government Minister properly constitutes a 'communication' for the

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_internal\\_communications.ashx](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx)

purpose of the exception. He has therefore next considered whether the withheld information constitutes 'internal' communications.

15. There is no definition contained in the EIR of what is meant by 'internal'. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between the sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, an internal communication is one that stays within one public authority.
16. The Commissioner notes that the advice was sent to a Minister outside of DCLG and that a number of other Ministers, Permanent Secretary's, Advisers and Officials were copied into the communication.
17. Communications between central government departments are expressly included as internal communications by virtue of regulation 12(8). The Commissioner therefore considers that the withheld information constitutes an internal communication and the exception is engaged.
18. As the Commissioner considers that the exception is engaged, he has gone on to consider the relevant public interest arguments in this case.

### **The public interest test**

19. Where the exception in Regulation 12(4)(e) is engaged it is subject to a public interest test required by Regulation 12(1).
20. The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

### **Public interest in favour of disclosing the requested information**

22. DCLG said that there is always a degree of benefit in making information held by public authorities available as it increases public participation in decision making and aids the transparency and accountability of government. It said that this in turn may serve to increase public trust and confidence in the policy decisions made by Ministers and in good governance. In relation to the specific information in this case, DCLG said that disclosure would help to demonstrate that impartial, relevant and comprehensive advice was available to Ministers to inform their considerations and decisions on matters of policy that affect housing supply.

### **Public interest in favour of maintaining the exception**

23. In essence the public interest considerations relating to regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
24. As stated in his aforementioned guidance on the subject, there is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
25. DCLG said that the submission of 9 June 2014 contains the initial policy advice provided to Ministers following the closure of the consultation on the threshold proposal. It said that further consideration, discussion and policy advice took place over the following five months as the final policy was then developed and the advice of 9 June 2014 presents an early and restricted view of the policy at that time. As explained in paragraph 10, the thresholds policy was introduced in November 2014, was quashed following a legal challenge in July 2015, and DCLG has been given permission to appeal the judgement. Dependent on the outcome, policy options could be reviewed and might include revisiting earlier advice. DCLG submitted that it would therefore not be appropriate to disclose information related to this policy whilst this process is under way.
26. DCLG state that there is there is a strong public interest in ensuring that there is an appropriate degree of safe space in which officials are able to gather and assess information and provide advice to Ministers which will inform their eventual policy decisions. In turn Ministers must feel able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from distraction that such information will be made public. It said that without this safe space it is likely that individuals would feel constrained in their ability to provide Ministers with continuing information and advice freely and frankly and, as such, Ministers would not be able to consider, before taking decisions on a policy, all possible courses of action and their implications.
27. It said that these safe space considerations carry most weight where the decision on policy has yet to be taken and the process is still live. It explained that the logic tends to be that once the thinking around a particular policy has been completed, the risk of prejudicing the process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight. It said that it is clear that this set of circumstances did not apply in this case, and

do not as yet, as the detail of the Section 106 affordable housing contributions is still subject to Ministerial decision subject to the findings of the appeal court.

28. In addition to the safe space arguments, DCLG said that the need not to adversely affect the policy itself is another important consideration. It said that this is a high-profile area of the Government's policy, attracting much public and media attention, and that its effectiveness and success is of real importance to fiscal efficiency and crucial social issues that face our society. It submitted that nothing should detract from Ministers' ability to take policy decisions that will help to tackle those issues and that disclosure of the requested information would inevitably attract national media coverage and public speculation which would be harmful as it would give the public, including local authorities, a potentially inaccurate and misleading impression about the ultimate, decided approach to section 106 agreements with developers.
29. DCLG explained that this could damage buy-in to the policy on the part of the local government sector as a whole, and individual local authorities in particular, if they believe that government would be putting forward a particular policy approach which would adversely affect them. It said that whilst it can be argued that the information may be misinterpreted is not itself reason not to disclose it, there are powerful arguments to the contrary in this case. It submitted that to try and avoid significant potential adverse repercussions, Ministers and officials would need to focus effort on explaining the various options. It said that such unnecessary effort is avoidable and, even if deployed, might not be successful in correcting misunderstanding and its consequences as it is possible that such an unhelpful state of affairs may even lead officials and Ministers, under media and public pressure, to consider attaching less or more weight to certain factors, otherwise necessary to ensuring that objective, reliable analyses could be arrived at. It concluded that these are all factors that would serve to undermine the policy aims and delivery.
30. Finally, DCLG said that it is also a factor to consider that the public interest will be served by there being transparency, at the appropriate time, around information that has informed Ministers considerations and decision on the policy, and by Ministers and the Government then being accountable for the decisions they have taken.

### **Balance of the public interest**

31. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.

32. He considers that, in general, once a decision has been taken the private thinking space which is required is diminished and the sensitivity of the information is reduced. The timing of the request will therefore be an important factor.
33. The Commissioner does not consider that safe space arguments automatically carry much weight in principle. The weight accorded to such arguments depends on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.
34. The Commissioner considers that although a decision on the issue had been made in November 2014, before the request for information was made in this case, it is clear that the policy was at the time of the request, and is currently, subject to a legal appeal process and reconsideration of the policy is underway. Therefore the issue in hand was still live at the time of this request, and is still live.
35. The Commissioner asked DCLG to provide further details as to why the specific information needs to be revisited as part of Ministers giving further consideration to the future for policy in this area. He asked whether there is anything in particular in the court ruling of July 2015, or in the appeal, that relates to the specific information requested in this case. DCLG said that dependent on the outcome of the appeal, policy options could be reviewed and this will include revisiting earlier advice.
36. In the specific circumstances of this case, the Commissioner considers that disclosure of the withheld information could reduce DCLG's thinking space and the ability to have full and frank discussions without fear that the information will be disclosed. This could detrimentally affect the decision making process. He has therefore given the safe space argument significant weight.
37. The Commissioner has considered the argument that disclosure would give the public, including local authorities, a potentially inaccurate and misleading impression about the ultimate approach to section 106 agreements which could damage buy-in to the policy on the part of the local government sector, and may lead officials and Ministers, under media and public pressure, to consider attaching less or more weight to certain factors, both of which would undermine the policy aims and delivery. Generally, the Commissioner does not accept arguments that information should not be disclosed because it would be misleading. A public authority should be able to publish some context or explanation

with any information it releases. However, as stated in the Commissioner's guidance on the public interest test<sup>2</sup>, the argument in relation to the information being misunderstood may only be used if it is not possible to provide this explanation, or if the explanation would not limit any damage caused. DCLG has said that explanations might not be successful in correcting misunderstanding but has not provided further details as to why this would be the case. Therefore the Commissioner has given this argument very little weight.

38. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. He also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making processes. However, due to the specific circumstances of this case, particularly that the policy is currently subject to a legal appeal process, the Commissioner has placed significant weight on the safe space argument. He finds that the public interest in maintaining the exception is not outweighed by the public interest in favour of disclosure.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)



## Right of appeal

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39. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

40. 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.
41. 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** .....

**Deborah Clark**  
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**Information Commissioner's Office**  
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