

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

Decision notice

Date: 17 July 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 details of schools included in a pilot scheme relating to selling surplus school land for housing. The Department for Education (DfE) refused the request under the exceptions at regulation 12(4)(d) and 12(5)(e) of the EIR.
2. The Commissioner's decision is that the DfE has correctly applied the regulation 12(4)(d) exception and the balance of the public interest lies in maintaining the exception. She requires no steps to be taken by the DfE.

Request and response

3. On 18 July 2019 the complainant made a request to the DfE in the following terms:

"I would please like details of any schools included for potential inclusion in the LocatED-run scheme 'Surplus School Building and Land' – a scheme to sell school buildings and land for housing. I believe there has been a long list and a short list. Ideally, I would like details of all schools on both the long list and short list. For each entry I would like details of what is considered for sale. For instance, the entire site, the school field, the car park etc. If possible, I would also like the business case for including each school on the list. If this information is considered confidential I would be prepared to accept, instead of the full list, the

total number of schools on the long list and the short list. And the total number of schools on the long and short list from the following LA areas – Norfolk; Suffolk and Essex. Please sent separate figures for each county. If possible, I would like to know the total estimated value of the schools in each of these areas.”

4. The DfE responded on 1 August 2019 and confirmed the information was held but was being withheld under regulations 12(4)(d) and 12(4)(e) of the EIR where the information is unfinished documents or internal communications. The DfE also cited regulation 12(5)(e) where disclosing the information would adversely effect the confidentiality of commercial information. The DfE stated it was applying these exceptions to any list of proposed sites including the number of sites appearing on any list and the individual details of any particular site.
5. The complainant requested an internal review on 2 August 2019. The complainant queried whether the request should have been dealt with under the FOIA or the EIR as the request was focused on what is happening to local schools rather than the environmental impact of developing on land.
6. The complainant argued that if the EIR was the correct regime then regulation 12(4)(d) would not apply as he was not seeking internal communications and although he did ask for the case for including the schools on the list, if this was considered an internal communication the complainant stated he could manage without this.
7. The complainant reiterated that he would be prepared to just know the number of schools from his area on the list and argued there was no reason why this could not be provided as there would not be financial information or information to identify particular schools.
8. The internal review was conducted and the DfE responded on 20 August upholding its original decision but did not add any further detail.

Scope of the case

9. The complainant contacted the Commissioner following the internal review on 10 September 2019 to complain about the way his request for information had been handled.
10. During the course of the Commissioner’s investigation the DfE clarified it was no longer relying on the regulation 12(4)(e) exception but maintained its used of the other exceptions under the EIR.

11. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld information within the scope of the request on the basis of any of the cited exceptions – regulation 12(4)(d) and 12(5)(e).

Is the information environmental?

12. The complainant queried whether the EIR was the correct access regime to consider the request under. The DfE had stated that as the request related to the potential development of land it was considered to have an environmental impact.

13. Environmental information is defined within regulation 2(1) of the EIR as:

“any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes ... and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”

14. In this case the withheld information relates to a pilot being run by the DfE and LocatED which is a government-owned and DfE sponsored property company responsible for buying and developing sites for new schools in England. The small-scale pilot explores how to reconfigure a selection of school properties with surplus buildings or land in order to release land for housing.
15. The aim of the pilot is to unlock funds to support additional capital investment in school buildings and, in turn, release land for homes. All projects are intended to include improvements to sports facilities and any works or decision to dispose of land will be made by the school and the landowners.
16. The withheld information itself is the list of schools interested in the pilot, along with what is considered for sale and the business case. The complainant did suggest he would be satisfied just receiving the number of schools in specific Counties that had expressed interest.
17. The information, whilst not immediately obviously environmental information, does clearly relate to proposed plans which would inevitably impact on an element of the environment by changing the use and purpose of land. The information is directly linked to this as it details what land would be sold and reconfigured. The Commissioner therefore

considers the information would be a 'measure' likely to affect an element of the environment.

Reasons for decision

Regulation 12(4)(d) – material still in the course of completion

18. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
19. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.
20. If engaged, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. The exception sets out three distinct categories, or limbs, and the information must fall within one of these for the exception to be engaged.

Is the information material in the course of completion?

22. The Commissioner has considered whether the withheld information comprises material in the course of completion. The ICO's published guidance on this exception explains that, in some cases, information which is being gathered in the process of a public authority formulating its policy, or deciding how to proceed in relation to a particular matter, can be said to form part of that overall, larger, "end product" which is in itself still in the course of completion.
23. The DfE states the information in the scope of the request is 'live' in the sense that no final decision has yet been taken as to which interested schools listed within the withheld information will actually be part of the finalised pilot. Schools can be removed or added to the list of interested parties before the decision and the information in scope is therefore 'unfinished' as the list will change before a decision is reached by ministers.

24. The DfE has also explained that in the case of this pilot the development has been 'top down' i.e. it defined an initial pool of schools that might be eligible based on housing need and school condition and came up with a list prior to any schools applying and showing interest in being involved and as such some of the schools on the list would not have been notified or be involved in the pilot at this stage.
25. The DfE has pointed to one of the pieces of withheld information – referred to as the withheld school list – that includes lists of schools that have shown an interest in the pilot. It argues this list is 'live' from the perspective of the ongoing nature of the pilot and forms part of a wider document reflecting current ministerial steers and priorities as well as discussions with landowners, schools and local authorities during which schools and sites may come and go from the list.
26. It is clear that the lists do not represent final decision on schools being part of the pilot and the final decisions are made only after discussions with landowners and other parties. As a result of this there is a case for stating that the 'live' nature of the lists and associated information as they are part of changeable documents that are in the course of completion and unfinished.
27. Issues relevant to this case were considered by the Upper-tier Tribunal (Information Rights) in *Highways England v IC and Henry Manisty* (2018) GIA/1589/2018 ("Manisty"). The Upper Tribunal stated that the exception may apply where the requested information *relates to* material in the course of completion, as well as where the request is, in itself, *for* material in the course of completion. In doing so, the Upper Tribunal emphasised that any relevant incomplete project or larger piece of work must in itself be "material".
28. The Upper Tribunal concluded that, while the exception may still apply where the requested information *relates to* material in the course of completion, rather than only being *for* information which is in itself in the course of completion, the EIR require a judgement to be made. This judgement involves consideration of whether the requested information can be considered as separate from any continuing work.
29. In this case the Commissioner is satisfied that the list of schools (along with details of what land is available and any business case) would be part of and therefore *relate to* material in the course of completion i.e. the pilot programme.
30. The Commissioner's guidance on the exception, which was acknowledged by the Upper Tribunal, explains that "*the fact that a public authority has not completed a particular project or other piece of*

work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception.”

31. The guidance also suggests that this limb of the exception relates to a public authority's need for a thinking space for policy development, in line with the wording of the original proposal for EU Directive 2003/4/EC on public access to environmental information, which the EIR implement.
32. The DfE has pointed to the fact that the sale and disposal of school land is often a subject that involves significant local sensitivities and must therefore be handled carefully with information being presented at the appropriate time. The DfE considers there is a real and significant risk of prejudice to the pilot scheme if the information were placed into the public domain. The DfE has provided the Commissioner with an example of an incident involving the leaking of a potential school's involvement in the list into the public domain and the subsequent consequences of this (the school withdrawing from the pilot and the pilot itself being set back). The Commissioner accepts that this demonstrates that there is a need for some thinking space around this pilot to allow for schools to be considered and to engage with the process if they choose to before a final decision is reached.
33. The lists of schools, what is for sale and any further information on this does *relate to* material in the course of completion but moreover it is in itself material in the course of completion as it is a changing and evolving list which will have a defined final version once schools, landowners and local authorities have been engaged. As such the Commissioner is satisfied this falls within the scope of the first limb of this exception.

Public interest test

34. As with the other exceptions under the EIR, when regulation 12(4)(d) is engaged, the public authority must still carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.
35. The DfE has emphasised the negative impact the leaking of one school's involvement had on the school in question, the pilot and the overarching policy behind it. It considered it would be unfair to schools named on the list to have their identities revealed and open them up to scrutiny from numerous interested parties when they may not end up being part of

the pilot or the negative attention may lead to them withdrawing from the pilot.

36. The DfE argues that schools withdrawing from the pilot and reducing the overall number of schools taking part, due to opposition based on incomplete information and data, would weaken its ability to understand the issues, both positive and negative, when considering policies around schools being able to release surplus land for the development of housing in areas of housing shortages. The DfE therefore argues it cannot be in the public interest to reduce the impact of the pilot and thus the associated evidence base on which the policy will be considered.
37. The DfE further argues that schools, just through association with the withheld information, could face reputational damage with, for example, parents and teachers, incorrectly assuming that there may be financial pressures associated with the school considering selling a portion of its land. Misinformation could also lead to individuals prematurely speculating on the actual type of build on the land that may occur if it is sold. This in turn could lead to parents being reluctant to send their children to these schools and even recruitment problems, with schools being unable to recruit staff if potential staff are unduly concerned about a school's financial health. Such unnecessary disruption and potential damage cannot be in the public interest, nor in the interest of pupils, parents and the wider school community.
38. The DfE, as well as arguing above that a 'safe space' is required to finalise the list of schools, also argues there would be likely to be a 'chilling effect' on discussions with key government organisations, including the Greater London Authority and Homes England, in the lead up to publicly launching this and other pilots. The fear of premature release is likely to lead to officials being more guarded around what and when information is shared with key partners, which in turn could stifle or delay important discussions in the lead-up to the full detail surrounding pilots being agreed and launched.
39. The DfE states it intends to be transparent and will publish a final list of schools in the pilot once all decisions have been taken, the projects are confirmed to be going ahead as part of the pilot, and the final development for each site is clear. There will also be a local consultation in keeping with the policy requirements for the Secretary of State's consent, allowing members of local communities to engage fully in the consultation process at the appropriate time.
40. The DfE does recognise there is a need for openness about the process and delivery of this pilot and that disclosure may lead to greater accountability, an improved standard of public debate and improved

trust. Specifically, in this case, it would assist the public understanding of the potential use of surplus school land to support housing provision.

41. The complainant argued that he was not seeking unfinished documents but rather information on which schools were being considered for a pilot scheme, particularly if the DfE and local authorities were considering the sale of schools and school land in his area. He argued there was significant public interest in this as people in the area, particularly parents would want to know if a government department was considering taking decisions about the future of schools.
42. The complainant again stressed that he would be prepared to know just the number of schools from his area on the list if this is all the information that can be disclosed.
43. In determining where the balance of the public interest lies, the Commissioner has given due weighting to the general presumption in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions having a community impact.
44. With regard to the DfE's argument that a safe space is needed to develop the list of schools for the pilot, the Commissioner acknowledges the process is ongoing and that disclosure of the information would provide a distraction that would invade this space and inhibit the DfE's ability to carry out the pilot and engage with schools. This is the very activity the exception is formulated to protect.
45. The Commissioner recognises the complainant's arguments that there will be members of local communities and parents who are keen to know if any school in their area is involved in the pilot and the Commissioner acknowledges that these interested parties should have the opportunity to engage with and consult on the process at the appropriate time. However, the Commissioner is mindful that whilst the pilot is still in its early stages it would not serve the public interest to damage the DfE's ability to develop this. Whilst she acknowledges the concerns of the local community carry weight she cannot ignore that the DfE has provided specific examples of negative impacts on schools whose involvement or reported involvement in the scheme has had negative repercussions.
46. The complainant's suggestion he would be willing to accept just numbers of schools in his area that are on the lists has not been specifically addressed by the DfE or treated as a new, refined request so this notice only addresses the broader request as originally made. That being said, the Commissioner is not convinced there would be a significant weight of public interest in knowing numbers of schools in an area that might be involved in the pilot as it would provide very little insight or detail.

47. The Commissioner also recognises that in addition to a consultation process that will take place once the pilot has progressed the DfE has also published information on the surplus land pilot on LocatED's website and information on land disposals and the protection of playing fields on its own website. The Commissioner does not consider that interfering with the future consultation process by disclosing information that is still in the course of deliberation and change at this time would serve the public interest.
48. In light of the above the Commissioner is satisfied that regulation 12(4)(d) has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.

Right of appeal

49. 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

50. 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.
51. 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

Jill Hulley
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