

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

### **Decision notice**

**Date:** 15 May 2023

**Public Authority:** The Department for Levelling Up, Housing and Communities

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

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

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1. The complainant requested information from the Department for Levelling Up, Housing and Communities (DLUHC) relating to a specific planning application.
2. The Commissioner's decision is that the DLUHC was entitled to rely on regulation 12(4)(e) (internal communications) of the EIR to refuse to provide the requested information.
3. The Commissioner does not require the DLUHC to take any steps.

#### **Request and response**

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4. The complainant made the following information request to the DLUHC on 13 December 2022:

"Under the Freedom of Information Act 2000 I would like to request any internal reports by the Department for Levelling Up, Housing and Communities sent to the Secretary for State for consideration regarding his decision to grant planning permission for application APP/H0900/V/21/3271069."

5. The DLUHC provided the complainant with links to where some information within the scope of the request is available within the public domain. However, it also withheld some information within the scope of the request citing regulation 12(4)(e) (internal communications), regulation 12(5)(b) (course of justice) and regulation 13 (personal information) as its basis for doing so.
6. The DLUHC applied regulation 12(4)(e) and regulation 12(5)(b) to all of the withheld information, and regulation 13 to some of the withheld information.

## **Reasons for decision**

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### **Regulation 12(4)(e) – internal communications**

7. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
8. In its submissions to the Commissioner, the DLUHC stated that it has withheld internal advice from its Planning Casework Unit (PCU) to ministers about a planning application. The DLUHC considers the withheld information to constitute an internal communication as the information was sent by the PCU, a division staffed by civil servants which sits within the Planning Directorate of the DLUHC, to ministers.
9. The Commissioner has viewed the withheld information. He is satisfied that advice from officials, in this case the PCU, to ministers constitutes a communication for the purposes of regulation 12(4)(e) of the EIR.
10. Based on the DLUHC's submissions, it is unclear to the Commissioner whether the withheld information was provided by the PCU to ministers within the DLUHC. However, as communications between central government departments are expressly included as internal communications in regulation 12(8) of the EIR, the Commissioner is satisfied that even if the withheld information was sent to ministers outside of the DLUHC, the information would still constitute internal communications. Therefore, he finds that regulation 12(4)(e) is engaged and will now go on to consider the public interest test.

### **Public interest test**

11. With regards to the public interest test, in its submissions to the Commissioner, the DLUHC outlined the factors it had identified in favour

of disclosing the withheld information. The DLUHC acknowledged that there is a general public interest in the disclosure of information held by public authorities as it increases public participation in decision making and aids the transparency and accountability of government. The DLUHC also acknowledged that there is a public interest in the planning process and the decisions made through that process.

12. The DLUHC also outlined its arguments in favour of maintaining its reliance on regulation 12(4)(e). In its submissions to the Commissioner, the DLUHC explained that the request relates to the granting of planning permission for a new underground metallurgical coal mine and associated development, a new coal loading facility and railway sidings, and a new underground coal conveyor. The DLUHC stated that in March 2021, the Secretary of State directed the planning application be referred to him instead of being dealt with by the local planning authority and planning permission was granted by the Secretary of State in December 2022.
13. The DLUHC explained that in relation to the planning application, there has been a public inquiry, a comprehensive inspector's report and in granting planning permission, the Secretary of State has also issued his own reasoned decision drawing on the inspector's report. It therefore considers that the public interest in disclosing the withheld information has already been met to some extent through the decision making process.
14. The DLUHC considers that there is a strong public interest in maintaining a safe space for government to develop ideas, debate issues and reach decisions away from external interference and distraction. The DLUHC explained that the planning application which the request relates to was still live at the time of the request. Whilst planning permission had been granted, the six week period for appealing this decision had not yet passed when the request was made. Furthermore, the DLUHC explained that the decision to approve the planning application has since been challenged and so is currently subject to live litigation in the High Court. If the High Court quashes the decision, the decision will need to be remade which may result in a planning inquiry. Therefore, the DLUHC considers the planning application to still be a live issue.
15. The DLUHC explained that the decision to approve the planning application is highly controversial and involved making a judgement call on highly technical evidence and balancing competing considerations which members of the public have strong views about. The DLUHC therefore considers that the Secretary of State needs to be able to have full and frank discussions and to receive frank advice on all options from officials.

## **The Commissioner's position**

16. The Commissioner recognises that there is a public interest in the openness and transparency of the decision making process regarding the decision to approve the planning application. He also recognises that there is a public interest in the accountability of government regarding that decision.
17. However, the Commissioner also notes that information relating to the planning application and the decision to approve the planning application is already available within the public domain for example, the Secretary of State's decision and an inspector's report relating to planning application is available within the public domain. The Commissioner therefore considers that the public interest in disclosing the withheld information has already been met to some extent.
18. Furthermore, the Commissioner notes that the Secretary of State had approved the planning application at the time of the request. However, as the six week appeal period to appeal the decision had not passed, he considers that the planning application was a live issue when the request was made and is still a live issue as the decision to grant planning permission has now been appealed and is subject to litigation at the High Court. The Commissioner therefore accepts that the DLUHC needs to maintain a safe space to develop ideas and debate issues relating to the planning application without external interference. He also accepts that the Secretary of State needs to be able to have free and frank discussions with officials about the planning application.
19. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*:

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).
20. In this case the Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

21. As the Commissioner has found regulation 12(4)(e) to have been correctly applied to all of the withheld information, he has not gone on to consider the Council's application of regulation 12(5)(b) or regulation 13.

## Right of appeal

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22. 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)

23. 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.
24. 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 .....**

**Victoria James**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**