

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

### **Decision notice**

**Date:** 17 June 2024

**Public Authority:** 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 a copy of a report assessing the risks associated with 'volumetric' modular construction. The Department for Levelling Up, Housing and Communities ('the DLUHC') refused the request by virtue of section 35(1)(a) (formulation of government policy) of FOIA.
2. The Commissioner's decision is that the request should have been considered under the EIR.
3. The Commissioner requires the DLUHC to take the following steps to ensure compliance with the legislation.
  - Reconsider the request under the EIR and either provide the requested information or issue a refusal notice citing a valid exception.
4. The DLUHC must take these steps within 30 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

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5. On 5 October 2023, the complainant wrote to the DLUHC and requested the following information:

“Please provide a copy of the report prepared by academics at Edinburgh Napier University and Harlow Consulting assessing the risks associated with ‘volumetric modular construction (also known as MMC)...”
6. The DLUHC responded on 20 October 2023. It stated that the information was exempt from disclosure under section 35(1)(a) of the FOIA, as it relates to government policy.
7. Following an internal review, the DLUHC wrote to the complainant on 28 February 2024, upholding its previous position. It stated that the report related to live policy development. The DLUHC added that it had carried out a public interest test and had concluded that the balance was weighted in favour of withholding the information in order to maintain the ‘safe space’ in which policy officials and Ministers are able to develop ideas and reach decisions away from external interference and distraction.
8. The DLUHC further informed the complainant that it has a default position of publishing all research over £12,000, and that the report would be released once the policy is no longer evolving.

## Reasons for decision

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9. This reasoning covers whether the DLUHC has considered this request under the appropriate legislation.

### Is the requested information environmental?

10. The Commissioner asked the DLUHC to consider whether some, or all, of the information would fall to be considered under the EIR, however it did not address this point in its submissions.
11. The Commissioner has therefore considered whether the request would constitute a request for environmental information, as defined by regulation 2(1) of the EIR.
12. In this case the request is for information relating to a report assessing the risks associated with ‘volumetric’ modular construction (VMC).

13. 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).
14. Having seen the withheld information the Commissioner notes that its immediate focus appears to be concerned with the production of safe pre-fabricated units, together with their safe assembly and maintenance. In his view, those parts of the report specifically concerned with safety, and in particular fire risks, are relevant to the state of human health and safety as defined by regulation 2(1)(f) of the EIR.
15. Further, in addition to safety, one of the stated aims of the report is to investigate any potential risks to performance of the building system associated with VMC. Performance, in this context, would include types of materials used in the production of VMC, which would almost certainly impact on the environment. This is consistent with the Commissioner's

decision in respect of FS50809516<sup>1</sup> which looked at the environmental performance of cladding. In that case the Commissioner stated that:

"Cladding is used to protect buildings from moisture and the penetration of air, for thermal insulation and to manage wind loads, as well as for aesthetic reasons."

16. The Commissioner went on to conclude that the withheld information was environmental on the basis that cladding fell within the definition of regulation 2(1)(f), and that a report on cladding would constitute a 'measure' as per regulation 2(1)(c) of the EIR.

17. Whilst it may be less straightforward with some parts of the report to determine whether they fall within the definition of environmental information, the Commissioner is mindful of the Court of Appeal (CoA) judgement in the case of Henney, which established that when considering whether information is environmental or not, it is necessary to go beyond the immediate subject of the information, and consider its wider context. Paragraph 43 of the judgement states:

"...It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself." <sup>2</sup>

18. In the case currently under consideration, the Commissioner notes that the context of the report is set against a background of the government's support for Modern Methods of Construction (MMC) as part of its policy to relieve the housing shortage by building 300,000 homes a year by the mid 2020s. This dates back to the Autumn budget of 2017<sup>3</sup> in which the government set out its commitment to reform the housing market, and was reaffirmed in the Conservative Party manifesto of 2019.<sup>4</sup>

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615094/fs50809516.pdf>

<sup>2</sup> [The Department for Business, Energy And Industrial Strategy v The Information Commissioner & Anor - Find case law - The National Archives](#)

<sup>3</sup> [Building the homes the country needs.pdf \(publishing.service.gov.uk\)](#)

<sup>4</sup> [Conservative Party Manifesto 2019 \(conservatives.com\)](#)

19. Additionally, in its submission to the Commissioner, the DLUHC stated that the report relates to a wide number of government policies including a specific commitment to support MMC in meeting housing needs and affordable social and private housing. It informed the Commissioner that:

“MMC provides an important opportunity to improve the quality of new homes, deliver more energy-efficient homes, reduce construction waste, improve productivity and address the shortage in construction skills.”
20. The DLUHC added that it is also relevant to its Affordable Homes Programme and Levelling Up Home Building Fund. It further stated that the report could have wider implications for other types of buildings using MMC, not just in the private sector, but across the public estate including schools, hospitals and prisons.
21. In the Commissioner’s view, the report was commissioned as part of the government’s overall policy objective to remove the obstacles to the use of MMC, and in particular VMC, as a means to meet its policy objective of building 300,000 new homes per annum. This will inevitably affect the environment. The Commissioner also considers it could have wider implications for both private and public sector construction in general, with the potential to affect the environment significantly.
22. In his consideration of how important the information is to the above policies, the Commissioner acknowledges that VMC is just one type of MMC which the government is exploring as a means of meeting the need to build more homes.
23. However, the Commissioner understands that it seems to be generally accepted that VMC appears to be a relatively quick method of construction. Ultimately therefore, it has the potential to enable the building of more new homes, if the perceived risks associated with it are addressed, and therefore contribute to the objective of building 300,000 new homes per year.
24. The Commissioner has also considered to what extent disclosure of the report would enable public participation in environmental decision-making.
25. The Commissioner considers that whilst the information is relevant to debating the safety and efficiency of VMC, particularly in respect of fire safety, and the ‘environmental’ performance of the building system associated with VMC, it would also inform discussion regarding the contribution VMC could make to meeting the government’s house building target.

26. In conclusion, taking the wider context of the report into consideration, the Commissioner is of the view that it would be very difficult to argue that the report would not have implications for the government's commitment to MMC and its target of building 300,000 homes per year by the mid 2020s – both of which constitute a 'measure' as described in regulation 2(1)(c) of the EIR. As the report is therefore likely to have significant implications on the environment, the Commissioner considers that the context of the information falls squarely within the definition of environmental information provided by regulation 2(1)(c).
27. The DLUHC must now take the steps set out in paragraph 3, above.

## **Right of appeal**

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28. 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)

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Catherine Dickenson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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