

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

**Decision notice**

**Date:** 4 April 2022

**Public Authority:** Department for the Economy

**Address:** Netherleigh  
Massey Avenue  
Belfast  
BT4 2JP

**Decision (including any steps ordered)**

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1. The complainant has requested information about Northern Ireland's minerals and petroleum licensing policy review. The Department for the Economy (DfE/'the Department') has disclosed some information and is withholding the remainder under regulation 12(4)(d), regulation 12(4)(e) and regulation 13 of the EIR, which concern material still in the course of completion, internal communications and personal data, respectively.
2. The Commissioner's decision is as follows:
  - At the time of the request, DfE correctly applied regulation 12(4)(d) of the EIR to the information it withheld, and the public interest favoured maintaining this exception.
3. The Commissioner does not require DfE to take any corrective steps.

**Background**

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4. In its submission to the Commissioner, DfE provided the following background. The Department is responsible for licensing mineral and petroleum exploration and development in Northern Ireland (NI).

5. Northern Ireland is the only area of the UK which has a mineral licensing regime, and the existing regimes were established in the 1960s. The Mineral Development Act (NI) 1969 has remained unchanged and the Petroleum Production Act (NI) 1964 has had some limited amendment.
6. In February 2019 the Department's Minerals and Petroleum Branch undertook a wide ranging review of the NI minerals and petroleum licensing regimes with a view to assessing their effectiveness and impact on sustainability and the UK's net zero carbon commitments, and with the intention of informing the development of proposals for a modern, future proofed licensing regime.
7. This work began with a high level internal review by Departmental officials to scope out the issues impacting on petroleum licensing, and the initial findings of this review were set out in a submission to the Department's Permanent Secretary dated 19 November 2019. This submission recommended independent research into the impacts of petroleum licensing to inform the next steps.

## **Request and response**

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8. On 29 July 2020, and in relation to minerals and petroleum licencing, the complainant wrote to DfE and requested information in the following terms:

"Pursuant to 2003/4 EC, and any and all of the Complex UK Environment legislation re 2003/4 EC, & Aarhus Convention

In answer to an Assembly Question AQW 2527/17-22 you indicated that a high level internal review was undertaken by the Department in relation to Licensing Policy.

Please forward to me all documents, correspondence, meeting minutes, pieces of paper known to you that in all way and any way relate to this Licensing Policy Review.

Do not phone me in relation to this matter. I prefer to receive information electronically where possible.

PLEASE NOTE : THIS IS NOT A FREEDOM OF INFORMATION REQUEST. DO NOT TREAT IT AS A FREEDOM OF INFORMATION REQUEST."

9. On 14 August 2020 DfE responded. It disclosed some information and withheld some under regulation 12(4)(e) and regulation 12(4)(d) of the EIR. DfE also withheld personal data under regulation 13.

10. The complainant wrote to DfE on 23 September 2020. They considered that the information DfE had provided was not what they were seeking and requested information in the following terms:

"In essence I was looking for the internal review which the Minister mentioned in her answer

eg "In September last year, my Department completed a high level internal review of licensing policy."

I think it may be simplest to treat this as a new information request - given an internal review is granted 40 days to consider the appeal and given the tender research candidates are being assessed. I would also have thought such a review, which fed into the tendered research would be a candidate for publishing on the Department's website again under the EIR regulations which state that as much information should be published as is feasible."

11. On 20 October 2020 DfE responded to the refined request. It disclosed the covering submission to the Permanent Secretary discussed at paragraph 6, with personal data redacted. DfE withheld the associated draft strategic context and scoping paper ('Annex A') and a draft strategy discussion paper ('Annex B') under regulation 12(4)(d) of the EIR.
12. The complainant requested an internal review on 20 October 2020 (and wrote to DfE again about its response on 2 November 2020).
13. DfE provided an internal review on 14 December 2020. It addressed concerns the complainant had raised and upheld its application of regulation 12(4)(d) to some of the requested information. DfE confirmed that it also considered the information could be withheld under regulation 12(4)(e) of the EIR.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 7 April 2021 to complain about the way their request for information had been handled.
15. Having confirmed the scope of their complaint with the complainant, the Commissioner's investigation had focussed on DfE's application of regulation 12(4)(d) of the EIR to some of the information requested on 23 September 2020, and the balance of the public interest. If necessary, he will consider DfE's application of regulation 12(4)(e) to that information.

## Reasons for decision

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### **Regulation 12(4)(d) - material still in the course of completion**

16. Regulation 12(4)(d) of the EIR says 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.
17. The explanatory memorandum to the EIR (COM/2000/0402) states that  
“...the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into.”
18. Regulation 12(4)(d) 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. However, 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.
19. DfE has explained to the Commissioner that it is the submission of 19 November 2019, referenced at paragraph 6, which is the subject of the request. DfE has provided the Commissioner with a copy of this information, which includes the two Annexes that it is withholding.
20. DfE has stressed that its review of NI minerals and petroleum licensing regimes and policy development continues to be a live issue. The policy remains in development.
21. DfE has told the Commissioner that it withheld the submission annexes, and information within the submission itself that describes the annexes, under regulation 12(4)(d) because, although the initial scoping stage of the policy review had been undertaken leading to the recommendation to commission independent NI-specific research, the policy review as a whole was still ongoing and the policy was still under development. This continues to be the case. The elements of the submission discussing the broad issues under consideration and the recommendations were released. The elements withheld reflected early thinking on policy direction and were, and continue to be, subject to change and development following consideration of the commissioned research and further analysis which is in progress.

22. In their complaint to the Commissioner the complainant has said that they are particularly interested in the conclusions from the Department's policy review. They noted that, as quoted in their request, the Minister had said that her Department had "**completed** [Commissioner's emphasis] a high level internal review of licensing policy" The complainant therefore disputes that the withheld information can be categorised as material still in the course of completion
23. However, the fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. In his published guidance, the Commissioner notes that an example of this could be where a public authority is formulating and developing policy.

### **The Commissioner's conclusion**

24. The Commissioner is satisfied that the withheld information can be categorised as material in the course of completion. He accepts that the withheld information in the submission forms part of an ongoing minerals and petroleum licencing policy review. That review had not been completed at the time of the request and has not been concluded at the date of this notice. As such, the Commissioner has decided that DfE was entitled to apply regulation 12(4)(d) of the EIR to the information it is withholding. He has gone on to consider the associated public interest test.

### **Regulation 12(1)(b) - public interest test**

#### **Public interest arguments in favour of disclosure**

25. DfE says it is keen to be as open and transparent as possible and acknowledges the EIR presumption in favour of disclosure. It recognises the extent of public interest in petroleum and mineral licensing policy – in particular issues related to health, environmental and safety standard.
26. The issue is still current; the public consultations on two potential petroleum licences in 2019 attracted a large number of responses and DfE continues to receive a range of Assembly Questions, general correspondence and media queries on both petroleum and mineral licensing which indicates continued interest in the area.
27. Disclosure would provide more detailed insight into DfE's initial policy thinking and DfE recognises that the public needs as much information as possible in order to engage in meaningful debate.

28. In their request for an internal review, the complainant said that there is a good reason for the issue of petroleum licensing policy still being current. They noted that despite overwhelming opposition and despite the public interest as ratified by the Northern Ireland Assembly being in favour now of keeping oil and gas in the ground and abandoning petroleum licensing altogether the Minister and her Department were taking a different view. The complainant argued that the public interest as recognised by the Assembly is at odds with what the Department believes the public interest to be.

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

29. DfE argues that it needs a 'safe space' in which to formulate policy and reach decisions and to do this away from public scrutiny. Disclosing the requested information would harm that safe space which is needed to develop policy based on further research and stakeholder engagement.
30. Releasing this information may, in DfE's view, cause a 'chilling effect' which would more likely than not lead officials to be less frank and candid in the future when giving their initial policy views and presenting information. This would be detrimental in that the advice provided by officials, and therefore the decision making process in general, would be stifled and negatively impacted.
31. Disclosure of initial policy thinking, which may be subject to change, would more likely than not cause unnecessary public concern or debate prior to the Minister reaching a firm policy position on which the Department would then consult. DfE told the Commissioner that its disclosure of the covering submission provides a summary of its rationale for commissioning the research and how that research would inform the development of policy options.

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

32. DfE considers that the likelihood of the adverse effects described above being directly caused through releasing the information at such an early stage in the policy development process was substantial and that the impact would be severe. It has confirmed that this continues to be the case as the policy remains in development and is subject to change.
33. Finally, DfE says it fully appreciates the arguments in favour of releasing the withheld information and the EIR presumption in favour of disclosure. However due to the sensitivity of petroleum and mineral licensing policy in Northern Ireland, its position remains that the need to protect its safe space to develop this policy, to prevent a chilling effect amongst officials and to avert unnecessary public concern or debate before a firm policy position is reached outweigh the arguments in

favour of disclosure. DfE has also noted the relevant information that it has released, which addresses the public interest in this particular licencing policy.

34. The Commissioner is aware that there is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. He recognises that, as the public interest can cover a wide range of values and principles relating to what is the public good, or what is in the best interests of society, there are always arguments to be made on both sides.
35. In reaching a decision in this case, the Commissioner has considered the arguments put forward by the complainant and by the public authority. He has also consulted his guidance 'How exceptions and the public interest test work in the Environmental Information Regulations'.
36. In that guidance, he notes:

"The factors determining the weight of the arguments for and against disclosure can include: the likelihood and severity of any adverse effect; the age of the information; how far disclosing the information would serve the public interest; and what information is already in the public domain".
37. In the Commissioner's guidance, he also states:

"When dealing with a complaint that information has been wrongly withheld, the Commissioner will consider the situation at the time the authority dealt with the request or internal review".
38. In determining where the balance of the public interest lies in this case, the Commissioner has given due weight to the presumption under regulation 12(2) in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions that may have widespread effects on the community.
39. He has taken into account the subject matter of the withheld policy review information and the potential for this policy area to have a widespread or significant impact on the public.
40. However, the Commissioner also recognises the strength of the public interest arguments in favour of maintaining the exception.
41. He acknowledges DfE's argument that public bodies need space and time to fully consider their policy options before moving to the next step in the process. In that respect, the Commissioner is mindful that DfE

42. confirmed that, at the time of the request, the policy review process was yet to be finalised. DfE has notes in its submission to the Commissioner that the petroleum policy process is, however, now further along in its development, as can be seen from the recent Ministerial statement to the Assembly<sup>1</sup> (beginning at p.92) and subject to the agreement of a future Executive. DfE says it will undertake a full public consultation setting out the conclusions of its policy review in due course. But the minerals policy review is still at an early stage and the research has not yet completed.
43. The Commissioner acknowledges the opportunities for public scrutiny within the review and consultation process, which provide transparency and openness and inform public debate. This goes some way to satisfying the public interest that would otherwise be served by disclosure.
44. The Commissioner also recognises that DfE has released some information within scope of the request – the majority of the covering submission to the Permanent Secretary. This provided an update on, and broad summary of, the minerals and petroleum licencing policy review at November 2019.
45. Having reviewed the withheld information and considered the public interest arguments and their relative weight, it is the Commissioner's opinion that, in all the circumstances of this case, disclosing information relating to material in the course of completion would frustrate the process of reviewing and developing policy options and inhibit DfE's ability to carry out this work. This is the very activity which the exception is formulated to protect.
46. While he recognises the complainant's concerns, the Commissioner gives more weight to the need for 'safe space' in which to develop policy, in this case.
47. In light of the above, and mindful of the timing of the request, the Commissioner is satisfied that regulation 12(4)(d) was applied appropriately and that the public interest in maintaining the exception outweighs the public interest in disclosure. As such, it has not been necessary to consider DfE's application of regulation 12(4)(e) to the information.

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<sup>1</sup> <http://data.niassembly.gov.uk/HansardXml/plenary-08-02-2022.pdf>



## Right of appeal

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48. 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)

49. 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.
50. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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