**Internal Review Request (received 14 July 2025) - Reference: DFI/2025-0268**

I write to request a formal internal review under Regulation 11 of the Environmental Information Regulations 2004 (EIR) in relation to the Department's response dated 11 July 2025 (Ref: DFI/2025-0268, DFI/2025-0269, DFI/2025-0270), regarding the Review of Old Mineral Permissions (ROMPs) under Schedule 3 of the Planning Act (NI) 2011.

This request is submitted on the basis that the Department has:

Wrongly withheld information under inapplicable or disproportionate exemptions.

Failed to comply with EIR and statutory governance duties.

Admitted to long-standing legislative and procedural omissions which raise issues of public accountability, legal risk, and environmental protection.

In light of binding case law and public law duties, I now request a full and urgent reconsideration of the Department's refusal.

1. EIR Exemptions Misapplied

Your response relies on:

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

Regulation 12(4)(e) (internal communications), and

Regulation 12(5)(b) (legal privilege/course of justice).

These exemptions are misapplied or disproportionate in the following respects:

A. Regulation 12(4)(d): Incomplete Information

The ROMPs framework has been on statute since 2011. A 14-year delay cannot plausibly constitute a "course of completion." The public has a right to understand why legally mandated environmental safeguards have not been implemented.

As per the ICO's guidance and case law (e.g., FER0822061), this exemption cannot be used to indefinitely withhold information where policy development is stalled, dormant, or strategically avoided.

B. Regulation 12(5)(b): Legal Advice

While you assert legal professional privilege, you:

Acknowledge the existence of advice on legal risks associated with implementing ROMPs.

Fail to provide a schedule of withheld documents, which the ICO requires to assess proportionality (see FER0676683).

Do not consider partial release (e.g., risk summaries or advice titles).

Provide no indication of contemporaneity, ongoing sensitivity, or litigation risk that justifies continued non-disclosure.

C. Regulation 12(4)(e): Internal Communications

This exemption has been applied too broadly. Internal communications must be identified document-by-document. Refusing to release ministerial submissions, briefings, or finalised interdepartmental correspondence – even where they do not contain legal advice – is excessive.

2. Statutory Governance Failures Admitted by the Department

Your response confirms:

No Section 75 equality screening, EQIA, Rural Needs Assessment, or Human Rights Impact Assessment has ever been conducted in relation to the Department's continued refusal to implement ROMPs.

No decision has been taken to abandon implementation, despite a known legal obligation under Schedule 3 of the 2011 Act.

This constitutes a procedural failure under:

Section 75 & Schedule 9, Northern Ireland Act 1998

The Rural Needs Act (NI) 2016

Human Rights Act 1998

The Planning (Environmental Impact Assessment) Regulations (NI) 2017

In light of these acknowledged failures, it is imperative that any decision not to commence ROMPs or to delay implementation indefinitely must itself be the subject of formal impact assessments. The Department's failure to do so may render it vulnerable to judicial review.

3. Precedent Case Law – Heightened Legal Risk

Your continued refusal to act on or disclose ROMPs-related information stands in direct tension with the following judicial authorities:

A. A5 Ruling (2025, High Court NI)

DfI was found to have failed to meet environmental and climate duties, rendering the A5 scheme unlawful. The Court emphasised the need for lawful environmental governance and transparent assessment frameworks — precisely what ROMPs is designed to ensure.

B. Derry & Strabane District Council v DfE [2023]

The High Court quashed prospecting licences issued under outdated legislation, citing absence of environmental assessment and consultation. Your own response confirms a similar failure in relation to Schedule 3.

C. Finch v Surrey CC [2023] UKSC 50

The Supreme Court held that lifecycle and downstream environmental impacts must be assessed under EIA law. ROMPs is the only legal mechanism to bring pre-1972 consents under modern EIA review. Failing to implement ROMPs denies the public the environmental protection that Finch requires.

4. Retained EU Law and Environmental Non-Regression

The failure to implement Schedule 3 and apply modern environmental standards may place Northern Ireland in breach of:

The Environmental Impact Assessment Directive, and

The non-regression principle under retained EU law (post-Brexit commitments).

The Department must consider whether its inaction:

Creates infraction risk under the UK Internal Market Act governance framework.

Exposes the Executive to challenge via the Office for Environmental Protection or international review mechanisms.

5. Formal Notice of Potential Judicial Challenge

Given the length of delay, the admitted absence of statutory assessments, and the disproportionate refusal to disclose information, I hereby place the Department on notice that, in the absence of a satisfactory review response, I reserve the right to:

Refer this matter to the ICO under EIR.

Escalate to judicial review for breach of statutory duty, irrationality, and procedural unfairness.

6. Requested Review Outcomes

I request that the Department:

1. Provide a schedule of withheld information (titles, authors, dates, exemptions applied).

2. Release any finalised ministerial briefings, interdepartmental correspondence, or communications not subject to legal privilege.

3. Confirm whether any equality, rural, or rights-based assessments were ever conducted and, if not, why.

4. Disclose any communications with DAERA, DfE, or the Executive Office concerning ROMPs.

5. Confirm the Department's legislative plan for implementing Schedule 3 via a future Planning Bill.

6. Clarify whether a senior official (e.g. the Chief Planner or Permanent Secretary) stands over the refusal to implement Schedule 3.

## Response (issued 09 September 2025)

You wrote to me on 14 July 2025 requesting an internal review of the handling of your Environmental Information Regulations 2004 (EIR) request for information regarding legal advice held in relation to the Review of Old Mineral Permissions (ROMPS), received in the Department on 16 June 2025. You had received a response to your request on 11 July 2025, from the Chief Planner, Ms. Rosemary Daly, under the reference DFI/2025-0268.

As Departmental Information Manager, my role in carrying out an 'Internal Review' following a complaint or 'appeal', is pursuant to the Secretary of State for Constitutional Affairs' Code of Practice [which now comes under the responsibility of the Secretary of State for the Department of Justice] on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000 and, by extension, the Environmental Information Regulations. Section 39 of the Code of Practice requires "a fair and thorough review of the handling issues and of decisions taken pursuant to the [Freedom of Information] Act, including decisions taken about where the public interest lies in respect of exempt information." Under the Environmental Information Regulations, this review of the handling of your request for information is a "reconsideration", a public authority obligation contained within Regulation 11 (Representations and Reconsideration). I have no role or locus with regards to any issues arising out of the substance of any information sought or the resolution of complaints, which may be the subject matter of the information.

I have examined the information relating to your request and completed my review. I can now inform you that, having reviewed the handling of your request, the Department did fulfil its obligation under the Environmental Information Regulations 2004. I would like to take this opportunity to explain my decision.

I will first stress that, as mentioned in previous correspondence, my role in carrying out this internal review is to consider only how the Department processed your information request under EIR. I cannot address any of the wider issues you raise in relation to the Department's role in planning matters.

I appreciate that this internal review response will involve very similar considerations of the public interest in disclosure to those for DFI/2025-0269 and DFI/2025-0270. While your original three requests were addressed in a single response, I feel it appropriate to deal with each internal review separately.

However, as your three requests were closely linked in terms of subject matter and the Department's consideration of possible exceptions, you will note that there is a degree of overlap between my responses to your three internal review requests. In order to reduce any confusion that you may experience as a result of any repetition; I would suggest that the three internal review responses be read in their numerical order.

You have asked for copies of legal advice held by the Department for Infrastructure in relation to the Review of Old Mineral Permissions under Schedule 2 & 3 of the Planning Act (Northern Ireland) 2011. As you are aware, the Department has not yet commenced ROMPs. While there may be a number of reasons for this, any factors underlying the current position on the commencement of ROMPs is beyond the scope of this review.

In addition, you raised a number of desired outcomes in your internal review request, however, as those outcomes do not relate to the subject matter considered in this review, I will not address them in this internal review response. My responses regarding these outcomes will be included in the responses for the internal reviews of DFI/2025-0269 and DFI/2025-0270.

In its response to your original request, the Department informed you that it was being refused, relying upon three EIR exceptions. The exceptions were Reg. 12(4)(d): material in the course of completion, unfinished documents & incomplete data, Reg. 12(4)(e): internal communications and Reg. 12(5)(b): the course of justice & inquiries. It should be noted that, under EIR, while exceptions may be used individually to withhold information, they may also be aggregated into a combined reason for non-disclosure. In either circumstance, it is essential that a public interest be carried out to determine whether or not the requested information may be disclosed or note.

- Reg. 12(4)(d): material in the course of completion, unfinished documents & incomplete data

  This exception is generally relied upon by the Department in relation to records created as part of policy development and/or draft documents. Under the exception, for example, a draft document, because it always remains a draft, may continue to be withheld even after a final version has been completed. It is also the case, however, that a final version of a record may be withheld because it forms part of wider “material” that is incomplete at the time of the request.

As with all EIR exceptions, it may only be used where the balance of public interest arguments favours withholding the requested information. It is often, as in this case, applied in conjunction with Reg. 12(4)(e), as similar arguments apply in relation to the creation of Departmental policies, including planning for any associated legislation that may be required. Both Reg. 12(4)(d) and Reg. 12(4)(e) allow officials an opportunity to prepare information in the process of policy development, without fear of inappropriate disclosure.

As the ICO guidance on this exception makes clear, the idea of public authorities needing ‘to have a “safe space”, or “space to think in private” was recognised in the original proposal for the [EU] Directive on public access to information, which the EIR implement’. Such arguments normally involve internal discussions within the public authority, hence the close connection with Reg. 12(4)(e) for policy development, but the “safe space” may also be extended to include third parties who have been invited to participate in the public authority’s decision-making processes.

In this case, the legislation under which the Review of Old Mineral Permissions, as part of the Planning Act (Northern Ireland) 2011, has not yet been commenced, as the Department is aware that primary and subordinate legislative amendments will be required to allow for the proper implementation of ROMPs, and needs the “safe space” to fully develop policies as part of the ROMPs Review. It is the Department’s intentions, subject to Ministerial direction and available resources, to progress ROMPs legislation as soon as practicable.

At present, the process of policy development remains “live”, in such a situation there is a potential for disclosure of information to have a “chilling effect” on those involved. The “chilling effect” is, as the ICO points out, the belief that disclosing information prepared as part of ongoing policy development would serve to dissuade officials ‘*from being frank and candid in giving their views or presenting information in the future*’. While the Department does accept that there may be occasions where the possibility of a “chilling effect” may arise, this is rare where the information sought relates to a completed process of policy development.

With both FOI and EIR having been in force for more than 20 years, there is a reasonable expectation on the part of officials, or other advisors, that comments they may have made or advice they may have given or other involvement they may have had in a process of policy development will be disclosable under the legislation.  It is reasonable for official to expect that such disclosure will happen at an appropriate time.

While the delay in bringing forward the Review is regrettable, it does mean that, at this stage, the information that the Department holds in relation to ROMPs will clearly fall within the scope of information in the course of completion.  It is clearly, therefore, eligible for consideration of both the public interest factors regarding disclosure in the case of the requested information and whether application of Reg. 12(4)(d) would be appropriate in this case.

As with many EIR exceptions, Reg. 12(4)(d) is often affected by the timing of a request. When a matter remains "live", with policy still in the process of being developed, or in the early stages of implementation, the public interest arguments favouring withholding that information will be strong.

Where a process of policy development, and the materials prepared for that purpose, has been completed, and the policy has been fully implemented, the public interest favouring withholding information under this exception will be greatly reduced.  The public interest arguments favouring withholding draft materials will remain stronger for a longer period of time, but the passage of time will also diminish those arguments.

I can appreciate your frustration regarding the Department's progress in relation to the Review of Old Mineral Permissions, but the position remains that the Department has not completed the process of policy development for ROMPs, the requested information clearly falls within the definition of material in the course of completion.  As a result, the Reg. 12(4)(d) exception is applicable, and I am satisfied that the public interest, particularly when aligned with Reg. 12(4)(e) and Reg. 12(5)(b), supports withholding the information you had requested under Reg. 12(4)(d).

- <u>Reg. 12(4)(e): internal communications</u>

  This exception, like Reg, 12(4)(d), is most often applied in circumstances where policy is in development.  Internal communications, under the legislation, will normally cover any form of communication within the public authority or, where that public authority is a Government Department, between it and other Departments.  As the information held relates to a policy that remains in development, it is clearly subject to some considerable sensitivity.

  As previously advised, there is a general need, in relation to policy development and implementation, to allow public authorities a "safe space" within which to formulate such policies, with official allowed freedom in their activities, safe from the "chilling effect" of inappropriate or untimely disclosure. Naturally, much of the information that is created as part of policy development will be in the form of communications between officials.

In this case, as the policy remains in development, the public interest arguments about the material that has been communicated, are very similar, and linked, to those relevant to the application of Reg. 12(4)(d). As with Reg. 12(4)(d), this is not an absolute exception, it may only be applied where the exception is engaged and where the public interest support withholding information.

The Department can only make a decision on disclosure on the basis of the situation that exists when a request is made. Information around policy and legislative development will retain an element of sensitivity, and a strong public interest favouring non-disclosure, whilst that policy development is actively ongoing. The Department for Infrastructure has a clear role, in terms of planning policy development, carried out on behalf of all of Northern Ireland's planning authorities, and this role requires officials to always be free and frank in their discussions, willing to consider a wide range of policy options on an equal footing in order to arrive at the best possible outcome.

In this case, while a considerable amount of time has passed since the Planning Act (Northern Ireland) 2011 came into effect, the Department is currently engaged in the development of policies, legislation and procedures by which planning authorities in Northern Ireland will be able to properly manage the process of both reviewing mineral permissions that have been granted some time ago and periodically reviewing all permissions moving forwards.

While I appreciate you will be disappointed with my decision, I am obliged to consider the wider public interest regarding disclosure, beyond your own interest in progress regarding made in relation to ROMPs. I am satisfied that, at this time, the greater part of the public interest favours continuation of the

It is also worth noting that, a further important consideration for the application of Reg. 12(4)(e), is contained in the decision of the First Tier Tribunal, in Chris Ames v the Information Commissioner and the Department of Transport (EA/2015/01283), which stated that an:

> *internal communication… that… consists substantially of legal advice… is subject to legal professional privilege. There is a strong public interest in maintaining the confidentiality of internal communications of this kind, so that Government will not be inhibited in seeking and being given frank legal advice.*

This brings me on to the third exception relied upon by the Department in its original response.

- Reg. 12(5)(b): the course of justice & inquiries

  In your request, you specifically requested records of the legal advice held by the Department. As a result, the Department also refused your request under the exception provided by Reg. 12(5)(b) of EIR. Reg. 12(5)(b) expressly provides protections for information that is deemed to be subject to Legal Professional Privilege, in addition to various forms of court or inquiry, including investigations, records.

  Legal Professional Privilege is a long-standing convention underpinning the Common Law system, which provides for privileged interaction between a lawyer and their client, their communications must be treated as confidential and may not be disclosed without the consent of the client. It applies to all circumstances where a legal officer or other lawyer is providing the benefit of their professional expertise to a client. This may be associated directly with litigation or may fall more broadly within the scope of legal advice.

  Under EIR, like FOI, there is a protection provided for records that are subject to Legal Professional Privilege, because of the harm that disclosure would do to both the individual lawyer-client relationship and, as identified by the Upper Tribunal in DCLG v Information Commissioner & WR [2012] UKUT 103(AAC) [Case No. GIA/2545/2011], to the broader principle of Legal Professional Privilege. In that case, the Upper Tribunal judgement is clear about disclosure of information covered by Legal Professional Privilege, in the absence of very compelling arguments in favour of disclosure, stating that:

  > *if disclosure were to be directed… the loss of confidence in the efficacy of LPP in respect of environmental information would necessarily be considerable*

  It is important to make clear that, while the public interest factors involved when considering the application of Reg. 12(5)(b), clearly place a very strong emphasis on protecting Legal Professional Privilege, it is not an absolute exception from the general public right of access to recorded environmental information.

  However, it is equally important to make clear that, when the public interest supports application of this exception, the protection provided by Reg. 12(5)(b) covers not only the direct advice provided to the client (in this case the Department) but also any further discussions of that advice by Departmental officials. In any process of policy development this is likely to include a significant volume of the records that are retained as part of the official record.

Legal Professional Privilege will attach to legal advice for as long as it remains "live" (i.e. for however long that advice is relied upon by the public authority). It is worth highlighting that legal advice may remain "live" for some considerable time, including for significant periods of time after the completion of the public authority's work for which the advice was originally sought. Provided that the legal advice remains valid and is of use to a public authority it will continue to be relied upon and that advice and any associated discussions of that advice will therefore be subject to consideration of Reg. 12(5)(b), should it be the subject of an EIR request.

You have specifically asked for the legal advice held by the Department, which is likely to be subject to Legal Professional Privilege. The Department's Review of Mineral Permissions forms a current policy development relating to the implementation of legislation. In such a case, there will clearly be a large element of official discussions in relation to legal implications of potential policy choices, including in relation to the potential need to draft further legislation, in the records held by the Department.

In such a circumstance, the Department is obliged to consider whether the requested information may be disclosed or whether it must be withheld under the Reg. 12(5)(b) exception. I have reconsidered the original decision to engage this exception, in the light of the information held by the Department and have determined that the use of Reg. 12(5)(b) is appropriate.

Whilst there is always as public interest in favour of disclosure, I regret to say that, in this case, because of the nature and status of the policy development in relation to ROMPs, I am satisfied that the public interest clearly favours withholding the legal advice, and any associated records held that discuss that advice, that the Department holds.

I believe that the public interest considerations taken into account for the application of Reg. 12(5)(b) alone would be sufficient to warrant withholding the requested information. The additional public interest arguments associated with Reg. 12(4)(d) and Reg. 12(4)(e) serve to strengthen the argument against disclosure in this case. I am satisfied that the Department acted correctly in withholding the legal information that you had requested. There may be other routes by which an interested party may lawfully be provided with access to this information, but this is not possible of practical under EIR.

I hope you find this helpful.