

**Request for Internal Review (received 19 November 2021) - Reference:
DFI/2021-0332**

RE: request made under the Environmental Information Regulations 2004.

Reference: DFI/2021-0332.

We refer to the above matter and to the response received from DFI Roads on 4th October 2021.

We write to request an internal review on the basis that full disclosure has not been made.

Response (issued 18 January 2022)

You wrote to me on 19 November 2021 requesting an internal review of the handling of your Environmental Information Regulations 2004 (EIR) request for information in relation to correspondence and other records about two development sites with planning permission on Watson's Road/Doran's Hill, Newry, received in the Department on 06 September 2021. You had received a response to your request on 04 October 2021, from Mr. Mark McPeak, Divisional Roads Manager for DfI Roads Southern Division.

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 not entirely fulfil its obligation under the Environmental Information Regulations 2004.

In responding to your request, the Department did not fully comply with its duty, under Regulation 9, to provide advice and assistance. While Mr. McPeak stated that some information was withheld because of an ongoing process of litigation, there was insufficient explanation of how the two exceptions were engaged and of the public interest considerations that favoured non-disclosure.

However, I am satisfied that all information that should have been provided under the legislation was made available. I would like to take this opportunity to explain my decision.

Your original request was for copies of any correspondence and associated records between DfI officials and those representing the Council or a particular Developer, as well as records of meeting and internal discussions within DfI about the development sites.

The response provided by Mr. McPeak identified that much of the information that fell within the scope of your request had previously been disclosed in response to an earlier query, our reference [DFI/2021-0048](#), and was publicly available online. He also provided some additional records that had not been included with the previous response, while advising that some further information held by the Department was withheld.

Please note: if the link contained within this response, above, does not work, please simply go to [Home | Department for Infrastructure \(infrastructure-ni.gov.uk\)](#) and enter the reference number in the Search box.

When you requested an internal review (a reconsideration under EIR), you stated that you believed that the response provided to your original request did not offer full disclosure of all relevant information held by the Department not subject to an EIR exception.

I have looked at the information that was withheld, relating to litigation brought against Department and subsequent appeal proceedings, and have asked those involved in processing your request if any additional information had been overlooked in their handling of request, or whether any information, withheld at that time, could now be disclosed. In addition to this process, I considered the exceptions applied by the Department in its response to your request, and determined whether the consideration of the public interest underpinning the decision to withhold some information was valid.

The Environmental Information Regulations 2004 established, for environmental information, broadly similar, though slightly greater, public rights of access to information held by public authorities to those created by the Freedom of Information Act 2000 (FOI). Environmental information is specifically excluded from the provisions of FOI by s39 of that Act.

The public rights of access mean that public authorities must be both motive and applicant blind when processing requests for information. Information may either be disclosed to

absolutely anyone, anywhere in the world, and is considered to have been published, or it must be withheld under one of the exceptions laid out in the legislation.

While I am obliged to be both motive and applicant blind, I am conscious that Carson McDowell has been representing a party involved in the current litigation process, and I wonder if EIR is the best way of accessing all the material to which you may be entitled.

My consideration of the response provided follows below. I will address each element of the response's provision of information in turn.

Reg. 6: form and format.

In the first part of the response Mr. McPeak directed you to an earlier information request for substantially the same information, via a link to the Dfl website.

When Mr. McPeak advised that most of the information that fell within the scope of your request was already in the public domain, he was referring to a significant quantity of information, provided along with the response for DFI/2021-0048, amounting to some 209 pages in total.

Insofar as this element of the handling of your request is concerned, Mr. McPeak was operating in line with the requirements of the legislation. Reg. 6(1)(b) of the Environmental Information Regulations 2004, which deals with the form and format of the information to be provided, requires that a public authority make environmental information available in response to a request, unless "the information is already publicly available and easily accessible".

Mr. McPeak was clearly complying with the requirements laid out by Reg. 6(1)(b), in directing you to the information that had already been placed in the public domain, albeit without referring to the Regulation in his response. The response should have made clear that Reg. 6(1) was being relied upon when directing you to the previous response provided.

Reg. 12(4)(e): internal communications.

Mr. McPeak relied on two exceptions to withhold information that the Department holds, because "all communication with our Legal Representatives are exempt as a legal case is pending". The first of the exceptions was Reg. 12(4)(e), which excepts internal communications from the duty to disclose, subject to a consideration of the public interest.

The exception provides a safe space within public authorities for staff to consider options in terms of decision-making, policy development, policy implementation, etc. This safe space is an essential requirement for public authorities, as it allows staff to put forward,

without fear or favour, the widest possible range of possible potential actions or decisions, even if unpalatable, when dealing with issues facing the public authority. The freedom to think about and suggest ideas out of the glare of the public arena is an essential part of good decision making.

As with all EIR exceptions, the public interest arguments favouring non-disclosure will normally diminish with the passage of time, so that what is correctly withheld today might well, depending on circumstances, be disclosed in 6 months' or a year's time. However, where a subject remains "live", the arguments in favour of disclosure at that time will be reduced.

In the context of this request, the Reg. 12(4)(e) was applied, to ensure that the Department's internal deliberation and decision-making processes relating to the legal advice provided and the specifics of this case were protected. I am satisfied that this exception should be applied, because the public interest requires a safe space within which the Department's staff are able to discuss and make decisions in relation to legal advice and potential litigation.

The Reg. 12(4)(e) exception can, as in this case, be applied in conjunction, on its own merits, or aggregated in a single test of the public interest in favour of disclosure, with the exception in Reg. 12(5)(b). Reg. 12(5)(b) excepts information if its disclosure would adversely affect the course of justice. This includes protection for Legal Professional Privilege.

Reg. 12(5)(b): the course of justice and enquiries.

The second of the two exceptions on which Mr. McPeak relied was Reg. 12(5)(b), as he was satisfied that the information that was being withheld was subject to Legal Professional Privilege. Legal Professional Privilege is, as you doubtless will be aware, is a long-standing convention within the Common Law system.

In *Bellamy v The Information Commissioner & the Secretary of State for Trade & Industry*, an early Information Tribunal hearing (EA/2005/0023), the following definition of Legal Professional Privilege was provided:

a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.

The Department normally claims Legal Professional Privilege in relation to confidential legal advice provided to it, e.g. on its “legal rights, liabilities, obligations or remedies”, in relation to decisions that it has to make, by the Departmental Solicitors’ Office. Legal advice will retain privileged status for as long as the advice remains “live”, which can often be the case for legal advice provided to DfI Roads about a particular type of activity relating to the public road network, particularly where that activity happens on a regular basis. Advice privilege extends beyond the actual provision of the advice by legal advisers to encompass discussions about that advice within the public authority.

The Information Commissioner’s Office guidance on Legal Professional Privilege makes clear what is included within the scope of litigation privilege for those considering using the exception:

Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.

The substance of the information that was withheld by the Department when processing your request for information related directly to the upcoming appeal being brought by Finnegan Contracts Ltd. regarding the Department’s refusal to release the Road Bond for a development at Watson’s Road, Newry, in full.

It seems clear to me that it would not be in the public interest for the Department to disclose the legal advice that it had received, whether in relation to the specific case, or more general legal advice that DfI Roads relies upon in fulfilling its role with regards to adopting roads and accesses within residential housing developments.

Disclosure of the legal advice would undermine the Department’s legal position in the upcoming Appeal and would serve only to make it impossible in the future for it to effectively ensure that roadways and accesses at developments are brought up to standard in good time and without unnecessary and interminable negotiations.

It is clearly in the public interest that DfI Roads can manage the process of adopting roads within developments into the public road network effectively and efficiently, and

with the least possible cost to the public purse. I am, therefore, satisfied that the public interest in this case supports the application of this Reg. 12(5)(b) exception, both individually and aggregated with Reg. 12(4)(e).

Reg. 12(3) & 13: personal information.

Mr. McPeak attached a number of additional records, which were redacted to remove third party personal information, under Reg. 12(3) & 13. In contrast to the two previous exceptions, a reasonable, if brief, explanation of the reasoning behind the application of the exception, and the public interest considerations, was provided.

I have examined these records, and I am satisfied that, while the reasoning presented for the application of the exception was reasonable, it had been extended to include a number of individuals who would have no expectation that their names would be withheld. I have arranged for an amended version of these documents to be prepared, when staff from the business area can get in to the office to access the file(s), making these names accessible, and I will then forward them to you as soon as possible.

I appreciate that you will be disappointed with my decision in this case, and I apologise that the revised version of the information disclosed in the original response is not available now. However, I am satisfied that the public interest does support withholding information held by the Department for the reasons outlined above.

I do not believe that the Department has withheld information from the public that should have been disclosed under the Environmental Information Regulations, but, at the same time, I am unconvinced that the use of that legislation is the appropriate means for you to gain access to such information as you require in advance of the Appeal involving your clients.