

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

Date:

Public Authority: Department for Infrastructure

**Address: Clarence Court
10-18 Adelaide Street, Belfast
BT2 8GB**

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Infrastructure ("the Department") regarding work in relation to weed control and Japanese Knotweed. The Department provided the complainant with some information, refused to disclose some information citing regulation 12(5)(e) of the EIR as a basis for non-disclosure, and applied regulation 12(4)(b) to the remaining requested information.
2. The Commissioner's decision is that the Department has correctly applied the above sections of the EIR to the complainant's request. Therefore the Commissioner requires no steps to be taken.

Request and response

3. On 30 May 2019 and various subsequent dates the complainant made a request for information relating to names of contractors and work regarding weed control and Japanese Knotweed. That request was made to the Department and encompassed the Southern, Eastern, Western and Northern divisions of the Roads Service, which is part of the Department. The full text of the request can be found in the Annex to this Notice.
4. The Department responded at various points in July and August 2019, providing some information to the complainant in respect of each division. Each division applied regulation 12(5)(e) to part of question 7 of the complainant's request. The complainant sought an internal review of the respective decisions within each division not to disclose some of the requested information, citing regulation 12(5)(e) as a basis for non-disclosure. The internal review request also highlighted that the complainant was not satisfied with the information disclosed to him by each division in response to questions 2 and 8-10 of his request and also asked various supplementary questions in relation to these responses.
5. Following an internal review the Department wrote to the complainant on 14 November 2019. In respect of each division, it stated as follows:-
 - Northern division – the Department stated that this division had disclosed all records held by it which were within the scope of the complainant's request, including those identified by additional searches, other than those to which it had applied regulation 12(5)(e), i.e. question 7 of the complainant's request. It upheld its application of that regulation.
 - Southern division – the Department stated that it understood that the complainant was dissatisfied with the response from this division and provided some clarification regarding the identity of the sub-contractors. It upheld its application of regulation 12(5)(e) to question 7 of the complainant's request.
 - Eastern division – the Department stated that this division did not hold any records within the scope of the complainant's request. It was awaiting confirmation from Road Safety Contracts regarding the sub-contractors and information held. It also upheld its application of regulation 12(5)(e) of the EIR.

- Western division – the Department stated that this division took 50 working days to respond to the complainant and apologised for the response not being issued within the statutory time limit of 20 working days. It also upheld its application of regulation 12(5)(e) of the EIR.

In relation to the various supplementary questions, which it divided into sub-headings, the Department applied the exception as set out at regulation 12(4)(b) of the EIR. Those questions can be found in the Annex to this Notice.

Scope of the case

6. The complainant contacted the Commissioner on 19 November 2019 to complain about the way his request for information had been handled.
7. The Commissioner has considered the way in which the Department has handled the complainant's request, in particular its application of regulations 12(4)(b) and 12(5)(e) of the EIR.

Reasons for decision

Regulation 12(4)(b) of the EIR – manifestly unreasonable request

8. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either because it is considered to be vexatious, or on the basis of the burden that it would cause to the public authority.
9. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden in terms of the amount of time and resources that a public authority has to expend in responding to a request. In effect, it is similar to section 12 of FOIA, where the cost of complying with a request exceeds the appropriate limit.
10. Under the FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") specify the appropriate limit for the amount of work required (£600 for central government departments, £450 for all other public authorities) beyond which a public authority is not obliged to comply with a request.

11. The Fees Regulations provide that the costs associated with the activities involved in dealing with a request (determining whether the requested information is held; finding the information, or records containing the information; retrieving the information or records; and extracting the requested information from records) should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
12. However, the EIR differ from the FOIA in that under the EIR there is no specific cost limit set for the amount of work required by a public authority to respond to a request.
13. While the Fees Regulations relate specifically to the FOIA, the Commissioner considers that they nevertheless provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that would be incurred in dealing with a request. However, the Fees Regulations are not the determining factor in assessing whether the exception applies. Furthermore, this EIR provision is subject to a balance of public interest test.
14. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly" unreasonable, rather than simply being "unreasonable" per se. The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.
15. The Commissioner's guidance on regulation 12(4)(b) states that public authorities may be required to accept a greater burden in providing environmental information than other information.
16. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
 - the proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
 - the nature of the request and any wider value in the requested information being made publicly available;

- the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
 - the presumption in favour of disclosure under regulation 12(2) of the EIR; and
 - the requirement to interpret the exception restrictively.
17. The Department applied this exception in relation to two elements of the complaint, as part of its internal review of its handling of the complainant's original requests. The exception was not engaged as part of the original responses issued by the individual Divisions. In his request for an internal review/reconsideration, the complainant asked some supplementary questions, including some that made directions with regard to how the Department should conduct its internal review.
18. In respect of one of the complainant's complaints about the response provided by Northern Division, he made specific reference to the then Department for Regional Development's (DRD) compliance with the First Tier Information Tribunal's direction in [EA/2015/0051](#). The internal review request, as written, would have effectively required that the Department take the same, labour intensive, approach to his EIR request as had been ordered by the First Tier Information Tribunal, when it allowed 3 months for the DRD to comply.
19. The Department for Regional Development complied with the First Tier Information Tribunal's requirement that the Department "review its records and disclose... such information as it holds as to weed control applications per section in its Northern Area for the years 2010 to 2013". The Tribunal was clear that its decision "may impose a substantial burden on the Department to find and supply what information they have about the applications per section for the relevant years", and allowed three months in which to respond.

20. The Department informed the Commissioner that, when complying with the Tribunal decision, it took staff across the Northern Division 2-3 weeks to identify everything it held that was "some sort of record" in relation to weed control for the years 2010-2013 (though the records identified did not amount to records of individual applications of chemicals that the Tribunal had been told was held for previous contract). The collation, including those requested from the Environmental Maintenance contractor, and preparation of these records for issue took some considerable time. It is worth noting that the Department provided the information that it held, but did not hold the weekly contractor reports that the complainant asserted were required. Despite this, the complainant remains unconvinced by the Department's repeated explanations of how it operates its Environmental Maintenance Term Contracts.
21. Meeting this specific request contained within the complainant's request for an internal review would not have taken the same time for staff in each section across Northern Division to identify the information requested, but would clearly, by itself, have required the diversion of significant staff resources.
22. However, in addition to the specific request, the complainant's internal review request also asked the following, for all four DfI Roads Divisions:

"This review request seeks all records of schedules held by each Section regarding the "Contractors confirmed completion of the weed control schedules after the initial treatment for part payment" and all recorded schedules/emails/ diary entries and/or other records held which identified the reporting and or requesting of further weed control applications/sprays by the Contractor following payment for 1st completed application/spray through their "routine cyclical inspections" reported to be carried out on the ad-hoc reactive basis, detailing and or recording 2nd sprays or remedial spraying within each section contract area."
23. This supplementary request did not refer to any contract years, and was interpreted, therefore, to be for each year mentioned in the original request. The Department is satisfied that this additional request is so broad in scope that it, in effect, mirrors what was directed by the First Tier Information Tribunal's decision notice, however this would be replicated across all four Roads Divisions of the Department.

24. The Department has informed the Commissioner that it does not require, for the purposes of the Term Contract, details of individual applications, but that it will hold some information, for example in public complaints, that relates to “requesting weed control applications”. Such complaints would include significant quantities of personal data that would require redaction. Identifying this “*ad-hoc*” information, for each Section Office in all four DfI Roads Divisions, would clearly require further diversion of significant staff resources, which IMU was satisfied could not be justified within the legislation.
25. The Commissioner had asked that the Department conduct a detailed estimate of the burden associated with providing the information that fell within the scope of the complainant’s request. The Department states that it is difficult, in the current climate, to be exact, as some information will be held in physical form, and only accessible in the individual Section Offices or in diaries. However, given the previous experience that the Department had when collating information in response to the First Tier Information Tribunal, IMU is confident that the time required for the process of identifying information for redaction would be extensive.
26. When considering the supplementary requests contained within the complainant’s requests for internal review, the Department was satisfied that the burden that would be placed upon its staff by these new requests was manifestly unreasonable. The time that would have to be taken by staff across DfI Roads, simply to identify what might be held, would be excessive, while much of the third party correspondence or complaints information would demand redaction and it would take further time to identify this, although redaction itself cannot be included in any cost estimate. The amount of redaction required would also be likely to diminish the value of the residual information which would be able to be disclosed.

Public interest arguments

27. The Department states that it was, and remains, satisfied that the public interest, in the case of the supplementary requests, favoured non-disclosure because of the impact that it would have on staff and the burden it would place upon the Department. It stated that, while the complainant is interested in disclosure of the information that he believes is held by the Department, there is little evidence of a wider public interest.
28. The Commissioner recognises that there is an explicit presumption in favour of disclosure in the EIR and that information should be disclosed unless there is a legitimate basis for non-disclosure.

29. The Commissioner also recognises that there is a public interest in openness and transparency regarding the decision-making processes of public authorities, particularly where public funds are being spent.
30. The Commissioner, having considered the background and context of the request, and the Department's arguments as to the impact responding to the request would have on it, considers that there is no evidence that the information would be of any significant wider public interest. She accepts that it would be of interest to the complainant, however she does not consider that this carries sufficient weight for the balance of public interest to be in favour of disclosure, given the burden that disclosure would cause to the Department.
31. The Commissioner is therefore satisfied that the Council is entitled to rely on regulation 12(4)(b) as its basis for not responding to the supplementary questions raised by the complainant in his request for internal review.

Regulation 12(5)(e) of the EIR

32. EIR regulation 12(5) states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – ...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

33. The Commissioner's published guidance on the regulation 12(5)(e) EIR exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law? Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

34. The Commissioner considers information to be commercial in nature if it relates to a commercial activity, either of the public authority or a third party, such as the provision of goods or services. The complainant, in his request for an internal review, stated "that no commercial or industrial rates or measurements have been requested and the information sought is only the accumulated total of annual spends for each service operation it is not obvious as to the commercial and or industrial information being argued as confidential".
35. However, the Department stated that, because it makes payments to contractors based upon 100% weed kill, disclosing the actual amount paid under the current Term Contracts, which were live at the time of the request would, allied to the schedules for each contract, effectively place the Environmental Maintenance Contractors' rates into the public domain as, in the Commissioner's understanding, the schedule would disclose the amount of time taken to achieve 100% weed kill, by which the total cost could then be divided. It is therefore clear to the Commissioner that the information being withheld under regulation 12(5)(e) of the EIR is commercial in nature.

Is the information subject to confidentiality provided by law and is the confidentiality provided to protect a legitimate economic interest?

36. The Department informed the Commissioner that it did not supply the complainant with a breakdown of the individual payments made for the specified activities under its current Environmental Maintenance Term Contracts, i.e. those from 2016-17, 2017-18, 2018-19 and 2019-present. It stated that it was satisfied that the legitimate economic interests of both the Department and its Environmental Maintenance Contractors would be best served by non-disclosure.
37. The Department explained that the current Environmental Maintenance Contractors had succeeded in winning tender competitions for each of the contracts, in the same way as had contractors for other Term Contracts awarded by the Department. They, and all the tenderers, had submitted their rates on the understanding that these rates would remain confidential (feedback on performance in the tender competition is provided, without specific rates being disclosed). These tender competitions are often very competitive, with extremely tight margins between successful tendering and failure. The information about the rates submitted as part of the tender process is neither trivial nor in the public domain, and the Department contends that it is subject to a common law duty of confidence in relation to the rates submitted during the competition.
38. This decision to withhold payment for individual activities under the Term Contracts was particularly important with regard to weed control,

where payment is made by the Department on the basis of 100% weed kill. The areas to be treated are identified by the Section Offices and transmitted to the Contractor in a series of schedules. Weed Control, while a relatively minor activity as far as DfI Roads is concerned, remains generally similar from year to year, with similar schedules, and is an important element when companies are costing their tenders when competing for the Department's Environmental Term Contracts.

39. In the Department's view it is clear, therefore, that competitors would use this public information, in future competitions, in all likelihood to marginally undercut the current rates, rather than to provide best value for money to the Department. It is the Department's contention that that would be to the detriment of both the Department and the current Environmental Maintenance Contractors.
40. Therefore the Commissioner is satisfied that the information is subject to confidentiality provided by law, which protects a legitimate economic interest, i.e. that of the Department and its Environmental Maintenance Contractors.

Would the confidentiality be adversely affected by disclosure?

41. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. She acknowledges that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.
42. As the exception under regulation 12(5)(e) is engaged, the Commissioner has gone on to consider the balance of the public interest regarding disclosure of the requested information.

Public interest test

43. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information
44. When carrying out the test, the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2) of the EIR.

Public interest in favour of disclosing the information

45. The Department recognises that the argument in favour of disclosure is to promote transparency and accountability of public authorities and inform the public regarding their decision-making processes.
46. The Commissioner acknowledges the public interest in openness, transparency and accountability. The purpose of the EIR is to encourage members of the public having access to information to enable them to understand why certain decisions are made and how these will affect them. There is also a public interest in allowing the public to fully scrutinise how public funds are spent and to evaluate for themselves whether value for money is being obtained.

Public interest in favour of maintaining the exception

47. The Department believes that disclosing the information withheld under regulation 12(5)(e) would harm its own legitimate economic interests and those of its current Environmental Maintenance Contractors. It said that competitors would use their knowledge of the current Contractors' rates in order to undercut these rather than to provide best value for money to the Department, which would detrimentally affect both the Department and the Contractors.

Balance of the public interest arguments

48. In determining where the balance of the public interest lies, the Commissioner has given due weighing to the general presumption in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions made by public authorities.
49. The Commissioner has considered the competing arguments. She accepts that there is a public interest in disclosure in promoting transparency and accountability around decisions made by public authorities. The Commissioner acknowledges that there is a public interest in allowing the public to better understand how these decisions are reached. There is particular public interest in information relating to the expenditure of public money, transparency and increased participation over decision-making where environmental issues are involved, and also informing public debate.

Conclusion

50. The Commissioner has concluded that there are compelling reasons in the public interest, to protect certain information that is obviously commercial, the disclosure of which would cause detriment to the public authority and other parties, and may result in less value for public money. In the circumstances of this case, the Commissioner is persuaded that the balance of the public interest favours maintaining the exception. This conclusion has in part been formed by the fact that the Department did disclose individual rates for specified activities for the contracts which were not live or current at the time of the request, and that it disclosed the total annual expenditure in relation to those contracts which were current, it just did not break these down into individual amounts for specified activities. The Commissioner considers that the information which was disclosed would have gone a long way towards informing the public about the Department's expenditure on a particular group of activities for those years.

51. 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. The Commissioner's view in this case is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. Therefore, the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that regulation 12(5)(e) was applied correctly. The Department was not obliged to disclose the requested information it withheld under regulation 12(5)(e).

Right of appeal

52. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

On 30 May 2019 and various subsequent dates the complainant made the following requests to the Department:-

The information requested is as follows

1. Provide the name of the principal contractor for the works operating in the contract for and within each section.
2. Provide the name of any sub-contractor operating **weed-control operations** within the contract on behalf of the principal contractor and the record of all weed control applications as recorded for and within each section
3. Provide the name of any sub-contractor operating **urban or rural grass-cutting** works within the contract on behalf of the principal contractor and the number of cuts provided for and within each section.
4. Provide the name of any sub-contractor operating **gully emptying operations** within the contract on behalf of the principal contractor within each section area.
5. Provide the name of any sub-contractor operating **tree/hedge cutting operations** within the contract on behalf of the principal contractor for and within each section.
6. Provide the name of any sub-contractor providing weed-control for the purpose of operations specific to **Japanese Knotweed** for and within each section.
7. Full disclosure of the amounts paid to the principal contractor for the above specific five 'highlighted works/operations' within financial years 2013-2014 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019 to date.
8. Provide the names of all contractors used for the five 'highlighted works/operations' within the section area, which have been contracted outside the scope of the above contract for years 2014-2019 and thereafter the subsequent amount paid annually for each operation (Eastern and Northern Divisions).
9. Provide the names of all contractors used for the five 'highlighted works/operations' within the section area, which have been contracted outside the scope of the above contract for years 2013-2019 and thereafter

the subsequent amount paid annually for each operation. (Southern Division).

10. Provide the names of all contractors used for the five 'highlighted works/operations' within the section area, which have been contracted outside the scope of the above contract for years 2012 to this date 2019 and thereafter the subsequent amount paid annually for each operation (Western Division)

Internal review request

The complainant made a request for internal review to each division of the Department, which stated:-

- This review request seeks the objective definition and classification held and used by the Eastern Division regarding a "*100% weed free environment*" within the context of the previous 2013-2014, 2014-2015, 2015-2016, and current 2016-2019 Contract operations and or a subjective interpretation used by Eastern Division Sections if no contract classification was or is held for the current 2015-2019 Contract.
- This review request seeks the objective definition and classification held and used by the Northern Division regarding a "*100% weed free environment*" within the context of the current 2015-2019 Contract operations and or a subjective interpretation used by Northern Division Sections if no contract classification is held for the current 2015-2019 Contract.
- This review request seeks the objective contract definition and classification held and used by the Southern Division sections regarding a "*100% weed free environment*" within the operations of the EM Contracts - **EMS 1 2010 & 2014 Contract**/ EM Contracts **EMS2 2013** and / EM Contracts **EMS2 2015** and or a subjective interpretation and application used by Southern Division sections if no contract classification was or is held.
- This review request seeks the objective contract definition and classification held and used by the Western Division sections regarding a "*100% weed free environment*" within the operations of Londonderry and Strabane, Mid Ulster, Fermanagh and Omagh - or a subjective interpretation and application used by Western Division sections if no contract classification was or is held for the EM contract 2012-2019.
- This review request seeks clarification on which above weed-control sub- contractor operated under and for which above principal contractor within the operations of each EM contract area on each of

the contract years i.e 1) EMS1 – 2013, 14, 15, 16, 17, 18 and 2019; Principal Contractor M Flynn A Sons Ltd (weed control) sub-contractor employed? 2) EMS2 2016, 17 and 2018 Principal Contractor- Services DGN Ltd (weed control) sub-contractor employed and 3) EMS2 – 2013, 14, 15, 16, 17, 18 & 2019 Principal Contractor Roads Safety Contracts (weed control) sub-contractor employed?

- Open Source (OSINT) analysis within Companies House website - (<https://beta.companieshouse.gov.uk/company/NI001586>) provides that 'Patrick Bradley Limited' Company number NI001586 nature of business as being -

" 08110 - Quarrying of ornamental and building stone, limestone, gypsum, chalk and slate - 08990 - Other mining and quarrying not elsewhere classified - 43999 - Other specialised construction activities not elsewhere classified "

It can therefore be assumed that this work was sub-contracted to a specialised and/or qualified tree cutting and environmental maintenance contractor/s. This internal review request seeks to be provided (1) the identity/name/s of the sub-contractor/s used and the amount paid to that sub-contractor/s for the works and (2) a copy of the form of the tender for these works and/or the documentation/criteria or framework documents/competent contractors list of which qualified and selected 'Patrick Bradley Limited' for the Departments "Small Scale and Responsive Works Contract" works for tree cutting and maintenance.

Supplementary questions to which the Department applied regulation 12(4)(b) of the EIR.

1. In reviewing Q1 item 1 of the Northern Division response - the IMU should consider the sub-contractor 2010-2013 withheld information that was subsequently released by the IMU specific to that Northern Division 2010-2015 Contract, following the enforcement decision of the First-Tier Information Tribunal (EA/2015/0051) which was contained within the CD provided by the IMU on the 03 June 2016 (see attached). This review request therefore seeks the further release of the sub-contractor information held for 2014 until conclusion of that specific Northern Division Contract in or around April 2015 within each Section contract area.

2. In reviewing QI item 2 of the Northern Division response - the IMU should consider the records of 1st and 2nd sprays held within the 2010-2013 withheld information that was subsequently released by the IMU specific to that Northern Division 2010-2015 Contract, following the enforcement decision of the First-tier Information Tribunal (EA/2015/0051) which was contained within the CD provided by the IMU on the 03 June 2016 (see attached). This review therefore requests the further release of the 1st and 2nd sprays information held for 2014-2015 weed control operations until conclusion of that specific Northern Division Contract in or around April 2015 within each Section contract area.
3. This review request seeks all records of schedules held by each Western Division section regarding the "*Contractors confirmed completion of the weed control schedules after the initial treatment for part payment*" and all recorded Western Division DRD/DFI schedules/emails/diary entries, complaints from members of the public/elected representatives and/or other records held which identified the reporting and/or requesting of further weed control applications/sprays by the Contractor following payment for 1st completed application/spray through their "*routine cyclical inspections*" reported to be carried out on the ad hoc/reactive basis, detailing and/or recording 2nd sprays or remedial spraying within each section contract area.