

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

Date: 26 March 2013

Public Authority: Department of Energy and Climate Change
Address: 3 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested correspondence about emissions performance standards between the Department of Energy and Climate Change ("DECC") and various third parties, including two government departments, a non-departmental government agency and a number of energy companies. DECC disclosed some information but withheld the remainder under regulations covering internal communications (regulation 12(4)(e)), unfinished documents (regulation 12(4)(d)) and unfair disclosure of personal data (regulation 13). It upheld its position at internal review.
2. The Commissioner's decision is that DECC conducted adequate searches for the information described in the requests and is entitled to rely on regulation 12(4)(e) and regulation 13
3. No steps are required.

Request and response

4. The complainant made 3 requests on 5 April 2012. He requested 3 sets of information in the following terms:

Request 1

"Please provide correspondence between

- a. Senior staff
- b. Ministers
- c. Relevant policy teams

at DECC and representatives of

- Shell
- BP
- Centrica
- RWE
- Scottish and Southern Energy
- Scottish Power
- E.ON

in relation to proposals for the introduction of new emissions performance standards for fossil fuel power stations

My request is for information in the time period starting on 01/01/2012 and continuing up to the present moment, or as close as possible to it. I request that information relating to meetings include, but not be limited to:

- i) Time
- ii) Date
- iii) Place
- iv) Names, job titles and organisations of those in attendance
- v) Minutes
- vi) Agendas
- vii) Or any other form of notes taken at the meetings specified above.

Please ensure you have searched for relevant correspondence in:

1. Emails and attachments
2. Letters
3. Briefing documents or equivalents (sent and received)
4. Notes taken in relation to phone calls
5. Any other form of correspondence used by either party related to the parties specified above."

Request 2

"Please provide correspondence between

- a. Senior staff
- b. Ministers
- c. Relevant policy teams

at DECC and the Environment Agency in relation to in relation to [sic] proposals for the introduction of new emissions performance standards for fossil fuel power stations

My request is for information in the time period starting on 01/10/2011 and continuing up to the present moment, or as close as possible to it. I request that information relating to meetings include, but not be limited to:

- i) Time
- ii) Date
- iii) Place
- iv) Names, job titles and organisations of those in attendance
- v) Minutes
- vi) Agendas
- vii) Or any other form of notes taken at the meetings specified above.

Please ensure you have searched for relevant correspondence in:

1. Emails and attachments
2. Letters
3. Briefing documents or equivalents (sent and received)
4. Notes taken in relation to phone calls
5. Any other form of correspondence used by either party related to the parties specified above."

Request 3

"Please provide correspondence between

- a. Senior staff
- b. Ministers
- c. Relevant policy teams

at DECC and the department for

- I. Business, Innovation and Skills
- II. Her Majesty's Treasury

in relation to in relation to [sic] proposals for the introduction of new emissions performance standards for fossil fuel power stations

My request is for information in the time period starting on 01/10/2011 and continuing up to the present moment, or as close as possible to it. I request that information relating to meetings include, but not be limited to:

- i) Time
- ii) Date
- iii) Place
- iv) Names, job titles and organisations of those in attendance
- v) Minutes

- vi) Agendas
- vii) Or any other form of notes taken at the meetings specified above.

Please ensure you have searched for relevant correspondence in:

1. Emails and attachments
 2. Letters
 3. Briefing documents or equivalents (sent and received)
 4. Notes taken in relation to phone calls
 5. Any other form of correspondence used by either party related to the parties specified above."
5. In relation to all three requests, DECC first wrote to the complainant on 8 April 2012 to advise that it would need to extend the time for response by 20 working days and would be in a position to respond by 7 June 2012. It explained that it needed this extension due to the complexity and volume of the request. On 7 June 2012, DECC wrote again to the complainant to advise of a further short delay.
 6. DECC responded to Request 3 on 2 July 2012. It withheld the information relying on regulations 12(4)(e) and 12(4)(d).
 7. DECC responded to Request 2 on 6 July 2012. It provided some information and withheld other information by relying on regulation 12(4)(e).
 8. DECC responded to Request 1 on 12 July 2012. It provided some redacted information relying on regulations 12(3) and 13 of the EIR in respect of the redactions.
 9. Following the complainant's request for an internal review of all three responses together, dated 19 July 2012, DECC responded on 5 October 2012 upholding its initial responses.

Scope of the case

10. The complainant contacted the Commissioner on 10 October 2012 to complain about the way his requests for information had been handled. He complained about the use of exceptions and the extent of the searches undertaken by DECC to locate the information described in his requests.
11. This decision notice will consider whether DECC has conducted adequate searches for the information described in the requests and whether it is entitled to rely on the exceptions it has cited.

Reasons for decision

Regulation 2

12. This regulation defines what environmental information is. The Commissioner must first, therefore, consider whether the information falling within the scope of the requests is environmental in accordance with this definition and so whether the DECC correctly dealt with this request under the EIR.
13. Environmental information is defined within regulation 2(1) of the EIR as follows:
"any information in written, visual, aural, electronic or any other material form on –
(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...
(b) factors, such as substances, energy, noise, radiation or waste, emissions...affecting or likely to affect the elements of the environment referred to in (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures designed to protect those elements.
....."
14. The complainant requested information concerning proposals for the introduction of new emissions performance standards for fossil fuel power stations. The Commissioner believes that any information relating to this matter would be environmental information by virtue of regulation 2(1)(c). The introduction of new emissions performance standards ("EPS") for fossil fuel power stations is a policy that would affect the state of the elements of the environment such as air and atmosphere that are noted in regulation 2(1)(a).
15. Therefore, the Commissioner considers the requested information in this case to be environmental as it is information on a measure that would affect the air and atmosphere and so the DECC was correct to respond to the request under the EIR.

Regulation 12(4)(e) – Requests 2 and 3

16. DECC applied this exception in relation to information within the scope of Requests 2 and 3. This section of the notice therefore addresses whether DECC is entitled to rely on this exception in relation to the information caught by the scope of those two requests.

17. Regulation 12(4)(e) provides that a public authority may refuse a request for environmental information if the request involves the disclosure of internal communications. Consideration of this exception is a two-stage process; first it must be considered whether the request would involve the disclosure of internal communications. Secondly, this exception is qualified by a public interest test. This means that the information must be disclosed if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure.
18. As to whether this request would involve the disclosure of internal communications, regulation 12(8) is specific that internal communications for the purposes of the EIR includes communications between government departments. The information in question here consists of either emails within DECC, or between DECC and other government departments, and attachments to those emails. The Commissioner's view is that this information clearly constitutes internal communications and so the request would involve the disclosure of internal communications. The exception provided by regulation 12(4)(e) is, therefore, engaged.
19. Turning to the balance of the public interest, in forming a conclusion on the public interest here the Commissioner has taken into account the general public interest in improving the openness and transparency of DECC and in central government more widely. He has also taken into account the specific factors that apply in this case and in relation to this information. This includes factors suggested by the complainant and by DECC.
20. Covering first those factors that favour disclosure of the information, the Commissioner considers the subject matter of the policy making in question here to be highly significant. The steps taken by government to limit the progress and mitigate against the impact of climate change are of the most fundamental public interest. Disclosure here would improve transparency in this area and public knowledge of the steps being taken by the Government. The Commissioner thinks that the subject matter of this information is a valid factor in favour of disclosure of this information of very significant weight.
21. When requesting an internal review, the complainant advanced a number of arguments in favour of disclosure. He drew attention to the controversy that surrounds the Government's energy policies and, in particular, the EPS.
22. The complainant emphasised the importance of policy development in this area and the variety of stakeholders who could make use of the information in question. The cumulative effect of these arguments was

essentially the same as the arguments advanced above and the Commissioner agrees with the complainant that there is a strong public interest in the disclosure of this information given its subject matter.

23. DECC also recognised the importance of enhancing the public's understanding of the Government's position on energy policy and on measures taken to introduce the EPS to fossil fuel power stations. It set out, by way of background, one of the commitments of the Coalition Agreement by which the present Government was established: "We will establish an emissions performance standard that will prevent coal-fired power stations being built unless they are equipped with sufficient carbon-capture and storage to meet the emissions performance standard".¹
24. Turning to those factors that favour maintenance of the exception, DECC argued about the importance of the preservation of a 'safe space' in which to allow policy development to be carried out. It argued that there was a public interest in preserving this safe space for good policy making.
25. It also referred to information to which regulation 12(4)(e) applied which also constituted ministerial communications. It gave particular emphasis to the importance of preserving the constitutional convention of collective responsibility and argued that this would be undermined through disclosure in this case.
26. The Commissioner notes that the policy making to which this information relates was 'live', that is, it was ongoing at the time of the requests. The draft Energy Bill which refers to the EPS was not published until May 2012 (a month after the requests).
27. The Commissioner considers it is clearly in the public interest for government to be capable of making policy effectively. He also recognises that this could be made more difficult where information about a live policy is disclosed. When taking into account arguments about harm to the policy making process, the Commissioner will consider how closely the arguments relate to a specific process. If, for example, arguments are advanced about harm to the policy making process in general, these arguments will carry significantly less weight

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http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf (Paragraph 10 "Energy and Climate Change")

than where arguments are advanced about harm to a specific policy making process.

28. In this case, the arguments relate to the specific, ongoing policy making process to which this information relates. Of further note is the importance of this policy making area. Having found above that this is a strong factor in favour of disclosure of the information, the Commissioner must also recognise that this importance adds weight to arguments about harm to policy making in this area.
29. Taking into account that this policy making process was ongoing at the time of the request and the evidence that officials did contribute to this process in a free and frank manner, the view of the Commissioner is that disclosure could result in harm to this policy making process. When also taking account the importance of this area of policy, the Commissioner finds that this is a factor in favour of maintenance of the exception of very significant weight.
30. In conclusion, the Commissioner has recognised a very significant public interest in favour of the disclosure of this information based on its subject matter. However, it is also necessary to take that subject matter into account when considering the arguments against disclosure. The view of the Commissioner is that the public interest factors in this case are finely balanced and that the presumption in favour of disclosure described in regulation 12(2) must also be taken into account. When considering how closely the arguments concerning harm to the policy making process relate to the process recorded in this information, the Commissioner finds that the public interest in the maintenance of the exception outweighs the public interest in disclosure. DECC is not, therefore, required to disclose this information.
31. As this conclusion has been reached on regulation 12(4)(e), it has not been necessary to go on to consider the application of regulation 12(4)(d) in relation to the same information.

Regulation 13

32. The requirement to disclose environmental information upon request is also subject to Regulation 13(1). This provides that, to the extent that the information requested includes personal data of which the applicant is not the data subject and the disclosure of the information to a member of the public would contravene any of the data protection principles set out in the Data Protection Act 1998 (DPA), a public authority shall not disclose the personal data.

33. The first principle of the DPA requires that the processing of personal data is fair and lawful and that at least one of the conditions for processing in Schedule 2 is met.
34. The information being withheld under regulation 13(1) of the EIR is the names of individuals whom DECC has described as junior officials. This information is found in other information caught by the scope of all three requests. The information caught by the scope of the first request also includes the name and contact details of an individual not employed by DECC or other government departments or agencies.
35. The Commissioner has firstly considered whether the disclosure of this information would be fair. In order to reach a view on this he has considered what would be the reasonable expectation of the individuals whose personal data is held by DECC, ie would they have any expectation of their personal data being provided to a third party under the EIR.
36. In deciding whether disclosure of the information being withheld under regulation 13(1) would be fair the Commissioner has taken into account a range of factors including the potential consequences of disclosing the information, ie what detriment, if any, would the individual suffer if the information was disclosed? He has also balanced the rights and freedoms of the data subject with any legitimate interest in disclosure.

Is the information personal data?

37. The Commissioner is satisfied that information showing where a person works, how they can be contacted there and what projects they were involved with at work is information which relates to them and is biographically significant about them.
38. The Commissioner is satisfied that, in the context of this case, the names of individuals that have been withheld fall within the description of personal data set out in the previous paragraph. This personal data is therefore subject to the provisions of the DPA.

Would disclosure of the names be unfair?

39. The Commissioner's guidance on personal information states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them and what junior staff should expect to be disclosed. The rationale for this is that the more

senior a person is the more likely it is that they will be responsible for making influential policy decisions.²

40. DECC has argued that the individuals whose names have been redacted do not have public facing roles and that they are not sufficiently senior to warrant disclosure of their names. The Commissioner accepts that none of the individuals would expect their names to be disclosed in this case.
41. Having reached this conclusion, the Commissioner has gone on to consider whether such an expectation is reasonable in the circumstances of this case. Where it is not reasonable, disclosure may be fair.
42. The Commissioner has concluded that this expectation is reasonable in this context. He is satisfied that the individuals in question do not have senior public-facing roles.
43. Furthermore, while the Commissioner agrees that there is a legitimate interest in greater transparency about the decision making process on such an important topic, he does not agree it would be served by the disclosure of these names. Where information has been disclosed with names redacted, disclosure of the names would add nothing further of significance to aid the public's understanding of the decision making process. Similarly, the disclosure of names in isolation (where the substantive material is excepted from disclosure under regulation 12(4)(e)) would shed no further light on the decision making process described in the requests.

Regulation 13 – Conclusion

44. The Commissioner is therefore satisfied that, in the circumstances of this case, the disclosure of the names of the individuals in question would be unfair and in contravention of the first data protection principle of the DPA. These names are therefore exempt from disclosure under Regulation 13(1) of the EIR.
45. He has had particular regard for the fact that disclosure of the names of individuals here would add very little to the information that has already

²http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_S TAFF_INFO_V2.ashx&src=IE-Address

been disclosed. Similarly, disclosure would not add any useful detail where substantive information has been properly withheld.

Adequacy of searches

46. The complainant raised specific concerns about the adequacy of DECC's searches for the information described in his requests. He queried whether DECC had searched its records management systems with sufficient thoroughness to include all relevant centralised electronic document repositories and records management systems. He also queried whether DECC had searched in specialised information storage units such as shared hard drives in relevant policy units.
47. The Commissioner wrote to DECC on 28 February 2013 to raise these specific points and to ask more general questions about the searches DECC had undertaken. DECC provided a detailed response on 14 March 2013 about the searches it had undertaken and also provided a copy of its policy on storing corporate records.

Adequacy of searches - Conclusion

48. Having considered the detail of DECC's response, the Commissioner is satisfied that DECC conducted sufficient and adequate searches for all the information described in the request. He is satisfied that, on the balance of probabilities, no further information within the scope of the requests is held.

Right of appeal

49. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

50. 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.
51. 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

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