

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

Date: 3 December 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 all the communications related to a letter Ed Davey, Secretary of State for Energy and Climate Change (DECC), sent to the Prime Minister asking him to remove responsibility for renewable energy from one of his ministers, together with the legal advice that underpinned that request. He also requested other communications relating to renewable energy and between Ed Davey, his Minister, the Treasury and the Prime Minister. The DECC withheld the information under regulation 12(4)(e) – internal communications and regulation 13 – personal data.
2. The Commissioner's decision is that DECC correctly applied regulation 12(4)(e) to the information. However in respect of some of the information he finds the public interest favours disclosing those communications. The Commissioner is satisfied that the personal data of junior civil servants can be withheld under regulation 13, however he also finds that information identifying the department which one official worked for should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the letter requested in part one of the request;
 - Disclose some of the information falling within the third and fourth parts of the request

4. The specific information that should be disclosed is identified in the confidential annex which accompanies this notice and has been provided to the public authority only.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 26 November 2012, the complainant wrote to the Department of Energy and Climate Change (DECC) and requested information in the following terms:

"Following on from revelations in this news story...

<http://www.guardian.co.uk/politics/2012/nov/23/lib-dems-tories-green-energy>

...please could you release all the communications (letters, emails etc related to:

Ed Davey (or via his secretary) asking the Prime Minister to remove responsibility for green energy from energy minister John Hayes.

The legal advice given to Davey, which "confirmed that Hayes's presence increased the danger of the department's decisions on renewable energy being exposed to judicial review"

The Treasury sanctioning Davey to "give advice to the National Grid on the need to prioritise renewable energy"

Any other exchange of letters, emails etc –since Hayes's appointment as energy minister – between Davey, Hayes, The Treasury and/or Downing St related to "green energy" (to include wind power)."

7. The DECC responded on 21 December 2012. It stated that the letter referred to in the first element of the request was exempt under section 35(1)(a) and (b) on the basis that it both related to the formulation of government policy and was a ministerial communication. The legal advice requested was withheld under section 42 on the basis that it was protected by legal professional privilege. The DECC considered that the information captured by the third and fourth elements of the request constituted environmental information and was exempt under regulation

12(4)(e) of the EIR on the grounds that they constituted internal communications. It argued that even if the information was not environmental information it would be exempt under FOIA by virtue of section 35(1)(a) and (b).

8. Following an internal review the DECC wrote to the complainant on 19 February 2013. It maintained its original decision to withhold the information.

Scope of the case

9. The complainant contacted the Commissioner on 21 February 2013 to complain about the way his request for information had been handled.
10. The Commissioner considers that all the requested information constitutes environmental information and therefore the requests should be dealt with under the EIR. In its submissions to the Commissioner the DECC did consider the potential for the information identified in parts one and two of the request to be environmental information and so did apply exceptions under the EIR to this information. In particular it applied regulation 12(4)(e) – internal communications, in respect of this information. It also applied regulation 13 to the names of some civil servants that featured in the communications captured by the third and fourth parts of the request, regulation 13 provides an exception for personal data.
11. The Commissioner considers that the matter which needs to be decided is whether the DECC was correct to withhold this information under the exceptions cited.

Environmental Information

12. The first thing to consider is whether all the requested information constitutes environmental information. There is no dispute that the information falling within the third and fourth parts of the request is environmental information. However the DECC originally withheld the information falling within the first and second elements of the request under FOIA. It is therefore useful to clarify why the Commissioner finds that this information also constitutes environmental information.
13. The definition of environmental information is contained in regulation 2 of the EIR. Regulation 2(c) extends the definition to include measures (including administrative measures), such as policies, plans affecting or

likely to affect the environment. The proposed removal of responsibilities for green energy from John Hayes's ministerial portfolio was to reduce the likelihood of legal challenge to the implementation of the Government's renewable energy policies and in particular those policies relating to the development of onshore wind farms. Clearly the implementation of renewable energy policies with the specific aim of reducing carbon emissions would affect the environment. It follows that any steps taken or proposed that are intended to ensure the smooth implementation of those policies or to avoid those policies being frustrated are also a measure likely to affect the environment. For this reason the Commissioner is satisfied that the letter requested in the first part of the request constitutes environmental information.

14. In respect of the legal advice requested in part two of the request the Commissioner accepts that the issue on which advice was sought could apply to any area of Government policy. Looked at in isolation there is a good argument that the advice itself is not environmental information. However the advice was sought to inform a decision on whether to seek the removal of responsibilities from a minister. The Commissioner is satisfied that as the proposed removal of certain responsibilities would affect the environment, the advice that informed that proposal should also be considered to be environmental information.

Reasons for decision

First part of the request withheld under regulation 12(4)(e)

15. The first part of the request was for the letter "Ed Davey (or via his secretary) sent asking the Prime Minister to remove responsibility for green energy from energy minister John Hayes". The information was withheld under regulation 12(4)(e).
16. Regulation 12(4)(e) allows information to be withheld if it is an internal communication. Internal communications include those between different government departments, this is set out under regulation 12(8). The Commissioner is therefore satisfied that the information is an internal communication and so engages the exception. However regulation 12(4)(e) is subject to the public interest.

Public interest

17. The public interest test is set out in regulation 12(1)(b) and provides that even if information is covered by an exception, that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

18. Over the course of its handling of this request and the Commissioner's investigation the DECC has presented a number of public interest arguments in favour of maintaining sections 35(1)(a) and (b) as well as regulation 12(4)(e). The Commissioner accepts that, in this case, the arguments presented in favour of section 35 are also relevant to regulation 12(4)(e). The public interest arguments in favour of withholding the information relate to the adverse effect on the formulation of the Government's policy on renewable energy, the need to preserve the confidentiality of ministerial communications and the harm that disclosure would have on the principle of collective responsibility.
19. The DECC has argued that the formulation of the policy on the deployment of renewable energy is very much live and that government at the highest level should be allowed safe space in which to have a full and candid debate on the issues. The Commissioner agrees that while policy development is on-going, there is a significant public interest in allowing government to fully consider different options in private. However having examined the letter in question he is satisfied that it does not actually discuss policy options. It simply deals with the Secretary of State's concerns about the implementation of policy options should one of his ministers continue to be responsible for that area of work. As such the Commissioner does not accept that disclosing the letter would stifle the actual policy debate on renewable energy within Government.
20. The DECC has also argued that ministers should be free to exchange information in a free and frank manner and that to do so it is necessary for those discussions to remain confidential. This is particularly true in respect of sensitive issues. The Commissioner does not disagree with this principle. However the communication only warrants protection if its contents have not already been disclosed by those involved.
21. The request was prompted by an article in the Guardian newspaper. In that article the Secretary of State, Ed Davey explained that he had written to the Prime Minister and asked him to remove responsibility for renewable energy from one of his ministers, John Hayes. The article went in to say that this was because he considered John Hayes' public comments were not in line with coalition policy on onshore wind farms and, based on legal advice, this meant the decisions made by John Hayes on these matters were more susceptible to legal challenges. The Commissioner has therefore gone onto consider the extent to which the Secretary of State revealed the contents of that letter in his newspaper interview.
22. Having studied the letter and the article referred to in the complainant's request, the Commissioner is satisfied that the article covers the same

ground as the letter. This greatly diminishes the value in protecting the letter.

23. The Commissioner recognises that in the absence of the press article there would be weighty arguments in favour of withholding the information and that ministers would normally expect that the protection afforded to their communications would not be set aside lightly. The Commissioner has therefore gone on to consider whether the disclosure of this information would have a chilling effect. That is, would ministers feel less able to communicate with one another in a free and frank manner because they feared those communications would also be disclosed.
24. The Commissioner rejects the argument the disclosure of this letter could be interpreted as signalling the routine disclosure of ministerial communications. The very obvious background to this case, ie Ed Davey's press article, is sufficient to distinguish it from other cases.
25. The DECC has also argued that the release of the information could also damage the principle of collective responsibility. Collective responsibility is the longstanding convention that ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. Therefore it is important that ministers can argue points of policy and disagree in private without those discussions becoming public which would undermine their ability to present a united front.
26. The Commissioner, and the Tribunal, have placed great weight in the importance of collective responsibility. However the Commissioner notes that the actual issue at stake is not directly about policy matters. Furthermore, the newspaper article airing these issues had already been published. Therefore disclosing the actual letter which the Secretary of State discussed in that article is unlikely to cause any additional or significant harm to collective responsibility.
27. When looking at the public interest in disclosing the information, the Commissioner has considered the general public interest in increasing transparency and accountability. The information would help inform the public about the workings of government and in particular the appointment and management of ministers. This public interest is heightened at a time of a coalition government when there is an increased public interest in understanding the ability of politicians from different parties to work together.
28. The information in question does concern renewable energy and the government's ability to pursue coalition policy in this area. This is an important issue impacting both on the environment and on consumers in terms of the cost of these developing technologies.

29. The Commissioner notes that the harm disclosing this information would have on the confidentiality of ministerial communications and collective responsibility is minimised because much of its contents were revealed in the press article. For the same reason the public interest in disclosure is diminished to some extent by the press article.
30. However on balance the Commissioner finds that public interest in favour of disclosure still outweighs the limited public interest that remains in favour of withholding the information.

The second part of the request - the legal advice concerning the increased risk of judicial review – withheld under regulation 12(4)(e)

31. The DECC originally withheld this information under section 42 – legal professional privilege, when considering the request under the EIR. When presenting arguments under the EIR it opted to rely on regulation 12(4)(e) – internal communications to withhold the information. The advice is contained in a number of short email chains between civil servants at the DECC and DECC lawyers. The Commissioner is therefore satisfied that the information constitutes internal communications and so the exception is engaged.

Public interest

32. The email chains include the civil servants' emails seeking advice and the lawyer's response. As such the Commissioner is satisfied that the information is capable of attracting legal professional privilege. Legal professional privilege is often described as a set of rules and principles designed to protect the confidentiality of communications between a lawyer and their client. This confidentiality is important as it allows clients to place all the facts and issues in front of their adviser and in return receive candid advice, without fear of this information, including any weaknesses in the client's position, being disclosed. The protection of legal professional privilege is regarded as very important. If legal advice was routinely disclosed, clients would be discouraged from being as open with their legal advisers and this would undermine the ability to obtain reliable legal advice. This in turn would undermine the fairness of the legal system.
33. Under section 42 FOIA and regulation 12(5)(b) EIR – course of justice, great weight is placed on the value in protecting the principle of legal professional privilege in order to avoid undermining people's confidence that they can consult a lawyer in private. However when considering the public interest in maintaining regulation 12(4)(e) the Commissioner will

not give any weight to these broader arguments in favour of preserving the principle of legal professional privilege and its fundamental importance to the legal system. The focus of the public interest arguments must be on the harm to the internal deliberation and decision making process. That is, regard will be had to the need for safe space and the chilling effect that the disclosure would have.

34. Before looking at these two factors in more detail, the Commissioner notes that Ed Davey revealed what the headline advice was during his newspaper interview. Having examined the legal advice however, the Commissioner is satisfied that although brief, the withheld information is more detailed than that revealed in the press article or contained in Ed Davey's letter to the Prime Minister.
35. With regard to safe space arguments it is necessary to consider the space required to deal with the perceived problems arising out of John Hayes's public statements and the safe space needed to implement the Government's renewable energy policies.
36. Some weight is placed on the public interest in allowing the Government to manage its ministers' portfolios in terms of what responsibilities are allocated to different ministers. Although at the time of the press article Ed Davey had not received a response to his letter, it does not follow that the matter was closed. It is quite possible that the matter was still being considered. The Commissioner is therefore satisfied that the issue to which the advice relates was potentially still live at the time of the request. In light of this the Commissioner considers that there is a public interest in the Secretary of State and the Prime Minister having safe space in which to fully to consider these sensitive issues.
37. Clearly that safe space has already been substantially eroded by the press article. It was public knowledge at the time of the request that the Secretary of State had concerns over John Hayes retaining responsibility for the deployment of renewable energy and what, in broad terms, those concerns were. Nevertheless the full legal advice and email chain in which it is held, had not been disclosed. The Commissioner is satisfied that it is sufficiently more detailed than that which is already in the public domain, for there to be some value in it remaining confidential while the issue of John Hayes' portfolio responsibilities was under consideration.
38. The DECC has argued that safe space is required to allow full consideration and deliberation of policy options in respect of renewable energy. It correctly points out that at the time of the request these policy issues were live. However in respect of the actual legal advice there is no actual discussion of the merits of different policy options. Its focus is on the risk to the implementation of that policy posed by John

Hayes' public statements. As a result the Commissioner does not find any weight should be given to the public interest in withholding this information because its disclosure would hamper the formulation or development of renewable energy policy.

39. However the Commissioner has considered whether disclosing the legal advice could frustrate the implementation of the Government's policy on renewable energy by actually encouraging legal challenges. Having studied the withheld information the Commissioner is not convinced its contents would have such an impact. Furthermore since the headline advice has already been disclosed in the press article, the disclosure of the full advice would not increase any risk that did exist.
40. The Commissioner finds that greater weight should be given to the public interest in preventing the chilling effect that disclosing the legal advice would produce. This chilling effect is subtly different to the broader arguments in favour of preserving the principle of legal professional privilege and its fundamental importance to the legal system. These chilling effect arguments are focussed on the importance of DECC officials feeling free to seek appropriate advice when dealing with a high profile and sensitive issue as was the case here.
41. As explained by DECC, seeking and providing legal advice involves presenting arguments for and against a particular position and weighing their particular merits. It follows that there will be occasions when the disclosure of such advice can increase a public authority's vulnerability to legal action. Although the Commissioner is satisfied that ministers and officials would not stop seeking appropriate advice, he does consider there is a risk that they may be more circumspect in how that advice is sought and how it is given. Such an outcome is not in the public interest.
42. The chilling effect caused by disclosing this advice would be greater, because of the timing of the request. Responding to the request would mean the full advice was revealed when it was possible that the responsibilities of John Hayes was still being considered, or at the very least soon after the event. The chilling effect is also increased by the sensitivity of the issue, ie the unity of the coalition government. However balanced against this, the Commissioner acknowledges that the chilling effect is dampened by the fact that the headline advice had already been disclosed.
43. There is a public interest in disclosing the advice. As well as the general public interest in increased transparency and accountability disclosure would reveal whether Ed Davey reflected the legal advice accurately in his press interview. It would also help give a fuller picture of the workings of government at the highest level. It would also help the

public understand the issues ministers face when reconciling their personal and political views with their role in government and how their public statements can impact on their ability to carry out that role.

44. Although there is some value in disclosing this legal advice the Commissioner finds that the chilling effect on the quality of advice to ministers and officials in the future would harm the public interest. This harm outweighs the public interest in disclosure. The Commissioner finds that the public interest favours maintaining the application of regulation 12(4)(e) to the legal advice.

The third part of the request - withheld under regulation 12(4)(e) – internal communications

45. The third part of the request sought information relating the Treasury sanctioning Ed Davey to “give advice to the National Grid on the need to prioritise renewable energy”. The DECC has identified two documents which satisfy this element of the request. In its submission to the Commissioner dated 26 July 2013 the DECC labelled those documents as 2 and 3. These documents have been withheld under regulation 12(4)(e) - internal communications.
46. Document 2 is a communication between the Treasury and the DECC. It is clearly an internal communication. Document 3 is a draft of a written ministerial statement. Although a final version of the statement was ultimately published, the Commissioner accepts that an earlier draft of that statement, exchanged between the relevant parties as part of the clearance procedure, should still be regarded as an internal communication.
47. In respect of document 2 the Commissioner considers that the immediate issue which the communication addresses, ie the agreement to provide explicit advice to the National Grid on renewable energy sources, had been resolved by the time of the request. There is a strong argument therefore that the need for safe space was greatly reduced, or even that it no longer existed. However such agreements are clearly part of the wider policy on renewable energy and the considerations relating to that agreement also have a bearing on other aspects of that policy.
48. The DECC argued that the development of policy on renewable energy was still very much a live issue at the time of the request. Furthermore it argues that it is a very sensitive issue. The Commissioner accepts that this is the case and that safe space was still required to discuss the matters set out in the communication. In light of this the Commissioner also considers that disclosing the document would have a marked

chilling effect on future internal discussions about renewable energy and carbon emissions.

49. Renewable energy is an important area of Government policy. There is an interest in people understanding how these policies are developed because of their impact. There are concerns both over whether the policies are sufficient to combat global warming and on the cost of energy to customers. It is a matter of genuine concern to the public. There is therefore a significant public interest in understanding how such policies are developed and what considerations are taken into account. On top of this is the more general public interest in understanding the workings of government and how ministerial decisions are taken.
50. There are strong public interest arguments both for and against disclosing document 2. However on balance, because of the sensitivity of the issues and the need for continued safe space in which to hammer out properly considered policies on renewable energy, the Commissioner finds the public interest favours withholding the document.
51. Document 3 is a draft ministerial statement. The majority of that draft was contained in a final version of that statement which had been published at the time of the request. As the Commissioner can see no reason why those parts of draft that had been published are sensitive, or that there is any sensitivity around the process by which such drafts are approved, he finds that the public interest favours disclosing this information.
52. In respect of the information that did not form part of the final statement the Commissioner notes that this appears to be of a different character. It does not appear to have been intended for publication. Instead it appears to set out different options for how the Government should proceed when implementing its renewable energy policies in the future. These issues were still live at the time of the request. As such the Commissioner is satisfied that the need for safe space and the risk that any disclosure would have a chilling effect on related policy debates in the future, means that there is a significant public interest in withholding the information. When these are weighed against those same public interest factors in favour of disclosure as were discussed at paragraph 49 above the Commissioner finds that the public interest favours withholding the information.

The fourth part of the request – withheld under regulation 12(4)(e)

53. The fourth element of the request was for, "Any other exchange of letters, emails etc –since Hayes's appointment as energy minister – between Davey, Hayes The Treasury and/or Downing St related to "green energy" (to include wind power)." The DECC has identified a

limited number of documents falling within the scope of the request to which it has applied regulation 12(4)(e). These were labelled as documents 1, 3 and 4 in the DECC's submission to the Commissioner dated 26 July 2013.

54. The Commissioner is satisfied that they are all clearly internal communications and that they engage the exception provided by regulation 12(4)(e).
55. The information labelled document 1 addresses a particular issue which had been resolved and made public by the time the request was received. However as with document 2 the subject it considers cannot be looked at in isolation. A decision in one area of the renewable energy policy impacts on other areas. Therefore as with document 2 the Commissioner finds that the public interest in providing safe space and avoiding the chilling effect outweigh the public interest in disclosure.
56. The information labelled by the DECC as documents 4 and 5 relate to the issuing of a press release. Essentially they involve one department briefing another about that press release and providing them with lines to take and prepared responses to questions that may arise.
57. The press release was issued but the DECC does not have any record of the prepared responses, or lines to take being used.
58. The Commissioner has carefully considered the information in question. He recognises that government departments need to be able to respond to news stories and enquiries from journalists by issuing press statements. He also appreciates that those press statements have to be carefully prepared so that they accurately reflect Government policy and that departments need to be fully briefed and present a unified front.
59. The DECC has argued that disclosing this information could reveal issues which a department felt was vulnerable to challenge or which might attract adverse criticism in the press. There is an argument that officials should be free to discuss such issues candidly and to brief their ministers on them. Ultimately this aids the smooth implementation of policies in the public interest. The Commissioner accepts that managing news stories and ensuring the government is able to effectively put across its position on issues is an important feature of modern government. The Commissioner recognises that the ability to manage such stories would be compromised if officials did not feel able to provide full and frank briefings, including the identification of problem issues. In light of this the Commissioner does give some weight the public interest in preserving the safe space necessary to prepare such press releases and avoiding the chilling effect that disclosure could cause.

60. The DECC has also argued that disclosing prepared responses, or lines to take, that had not been used could give a misleading impression. The Department seems to consider these responses and lines to take as drafts. However from the context in which they are presented they seem to have been provided by one department to another following the issuing of the press statement to which they relate. It is therefore safe to assume that they were intended for use and should not be regarded as being drafts.
61. Since it appears to the Commissioner that the prepared responses and lines to take were intended for use, he considers that they had been considered appropriate for public consumption at the time they were written. The Commissioner considers this greatly reduces the weight given to the arguments in favour of preserving safe space and avoiding the chilling effect. However as it is assumed they were only intended to be kept in reserve and only used if needed the Commissioner still places some weight on the value in protecting the government's ability to prepare and deliver press statements effectively. Even so the Commissioner does not consider the lines to take, or prepared responses, reveal anything particularly controversial or that is capable of undermining the operation of government or the delivery of its policy on renewable energy.
62. There is a public interest in disclosing the information. It would help inform the public on how the government manages its relationship with the press and the steps it takes to ensure its position is effectively communicated. The information itself is informative and provides a more detailed picture of the government's position on renewable energy.
63. In light of this the Commissioner finds that the limited harm the disclosure would cause to the public interest is outweighed by the public interest in favour of disclosure. It follows documents 4 and 5 should be disclosed.

Regulation 13 – personal data.

64. The DECC has applied regulation 13 to a limited amount of information contained in documents 3, 4 and 5. Regulation 13 provides that information can be withheld if it is the personal data of someone other than the requestor and that disclosing the information would breach any of the data protection principles set out in the Data Protection Act 1998 (DPA).
65. The exception has been applied to the names and contact details of officials below the grade of senior civil servant. The DECC has argued that disclosing the details of these junior members of staff would be unfair and in breach of the first data protection principle. The first data

protection principle provides that personal data should only be processed, which includes disclosing it to other parties, if that processing is fair and lawful and at least one of a number of conditions set out in Schedule 1 of the DPA is satisfied.

66. The Commissioner is satisfied that junior officials would not expect that their details would be disclosed to the public. Nor is the disclosure of this personal data necessary in order to understand or provide context to the rest of the information. Therefore the Commissioner accepts that the personal data identified in documents 3, 4 and 5 can be withheld under regulation 13. There is one exception to this however and that is in respect of document 3. The DECC has redacted the name of the department that the official sending the communication works for from the end of that document. The Commissioner finds that it would not be unfair to disclose the department from which the communication is sent and that it is necessary to provide this information in order to give context to that document.

Right of appeal

67. 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

68. 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.
69. 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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