

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

**Decision notice**

**Date:** 24 November 2015

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the public authority for copies of correspondence between Ministers and officials in relation to the Government's position on the European Union's (EU) proposals for a circular economy package.
2. The Commissioner's decision is that the public authority was entitled to withhold the information held within the scope of the request ("the disputed information") on the basis of the exception at regulation 12(4)(e) of the EIR.
3. No steps are required.

**Request and response**

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4. On 21 November 2014 the complainant submitted a request to the public authority for the following information:

*'Copies of correspondence between elected representatives and officials at the Cabinet Office and officials at the United Kingdom Permanent Representative to the European Union (UKRep) concerning the UK's position on each of the following:*

- *on the subjects of raw materials imports, supply chain resilience, resource scarcity and availability, resource efficiency, and related matters;*

- *regarding the "Raw Materials Initiative"*
- *regarding the "Circular Economy Package"*

*Please send copies for all such correspondence between January 2013 and the present or, if it exceeds the limits allowed, between the present and the earliest date permissible.'*

5. The public authority provided its response on 17 December 2014. It explained that the authority did not hold any records regarding the raw materials initiative<sup>1</sup> and confirmed that it held information relevant to the circular economy. The information held was however withheld on the basis of the exemptions at sections 35(1) (a) and (b) FOIA.
6. On 22 December 2014 the complainant asked the public authority to review its decision to withhold the information considered exempt on the basis of sections 35(1) (a) and (b).
7. The public authority wrote back to the complainant on 24 February 2015 with details of the outcome of the internal review. The review upheld the original decision. In response to some of the complainant's assertions, the public authority referred her to a number of websites it considered would clarify the Government's position.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 16 March 2015 in order to complain about the public authority's handling of her request. She challenged the application of the exemptions relied on by the authority on a number of grounds which the Commissioner has considered further below. She also invited the Commissioner to consider whether her request ought to have been considered under the EIR rather than the FOIA.
9. During the course of the Commissioner's investigation, the public authority explained to the Commissioner that it had subsequently interpreted the request as seeking correspondence between Cabinet Office officials and elected representatives at the Cabinet Office (ie Cabinet Office Ministers) and UKRep. The information within the scope of the request was therefore restricted to material comprising correspondence between Cabinet Office officials/Ministers and UKRep,

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<sup>1</sup> ie - the first and second parts of the request.

though none of the correspondence actually held is between Ministers and UKRep.

10. The public authority advised the complainant of its interpretation of the request as explained above on 4 November 2015.

11. The scope of the Commissioner's investigation therefore was:

- To determine whether the information referred to in paragraph 9 above ("the disputed information") is environmental information within the meaning in the EIR, and
- To determine whether the public authority was entitled to withhold the disputed information.

## Reasons for decision

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### Applicable information access legislation

12. The public authority considers that the disputed information is not sufficiently proximate to the definition of environmental information in regulation 2(1) of the EIR. It specifically argued that the information does not concern a measure affecting or likely to affect the elements of the environment and the factors referred to in regulation 2(1)(a) and (b) of the EIR.

13. The Commissioner does not share the public authority's view. He considers that the disputed information falls within the definition of environmental information in the EIR for the reasons set out below and in more detail in a confidential annex.<sup>2</sup>

14. Environmental information is defined in 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 elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity*

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<sup>2</sup> This has not been published along with this notice and has not been made available to the complainant. Some of the public authority's confidential submissions on the balance of the public interest have also been included in the annex.

*and its components, including genetically modified organisms, and the interaction among these elements;*

- b. factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, 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, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
  - d. reports on the implementation of environmental legislation;*
  - e. cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
  - f. the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);...*
15. The Commissioner's general approach will be to interpret 'any information... on...' fairly widely. The relevant Oxford English Dictionary definition of 'on' is 'In reference to, with respect to, as to, concerning, about.' The ICO view, in line with the purpose expressed in the first recital of the Directive<sup>3</sup>, is that 'any information ...on...' will usually include information concerning, about or relating to the measure, activity, factor, etc in question. In other words information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
16. The Commissioner accepts the public authority's contention that the exchanges (ie the disputed information) are not primarily focussed on the environment. However, for reasons explained in the confidential annex, he considers that the exchanges constitute *information on a*

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<sup>3</sup> Council Directive 2003/4/EC

measure (ie the circular economy) likely to affect the state of the elements and factors referred to in regulation 2(1) of the EIR above.

17. He therefore finds that the disputed information is environmental information within the meaning in regulation 2(1)(c) of the EIR.

### **Application of exceptions**

#### *Regulation 12(4)(e)*

18. Although the public authority does not consider that the disputed information is environmental information, it also alternatively relied on the exceptions at regulations 12(4)(e) and 12(5)(a) should the Commissioner find that the request ought to have been handled under the EIR.
19. Therefore, having found that the disputed information is environmental information within the meaning in the EIR, the Commissioner next considered whether the public authority was entitled to rely on regulation 12(4)(e) to withhold the disputed information.
20. Regulation 12(4)(e) states: '*.....a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.*'
21. The Commissioner accepts that the disputed information comprises of communications between central government departments which are expressly classed as *internal communications* by virtue of regulation 12(8) of the EIR.<sup>4</sup>
22. He agrees with the public authority that this includes communications directly with the UKReps who are in effect employed by the Foreign and Commonwealth Office.
23. The Commissioner therefore finds that the exception at regulation 12(4)(e) was correctly engaged by the public authority.

### **Public interest test**

24. All the exceptions in the EIR are subject to a public interest test. Therefore, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the

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<sup>4</sup> <http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made>

exception at regulation 12(4)(e) outweighed the public interest in disclosing the disputed information.

#### *Complainant's arguments*

25. The complainant's submissions in support of her position that there is a stronger public interest in disclosure are summarised below.
26. The United Kingdom's (UK) opposition to the circular economy places it at odds with the vast majority of comparable EU countries meaning a proper public understanding of Government behaviour on these issues easily supersedes the public interest in withholding the information requested.
27. The public interest in the policy implications of the UK's position and lobbying on the Circular Economy Package is significant in economic terms. The previous Commission President Barroso is described by media as saying that the circular economy Package would create 600 billion net savings, two million jobs and deliver 1% GDP growth. See <http://www.euractiv.com/sections/sustainable-dev/circular-economy-package-be-ditched-and-re-tabled-310866>
28. She also alleged that *'The UK is rumoured to have been alone amongst the EU15 countries by supporting the Commission's draft Work Plan intentions to scrap the Circular Economy Package.'*

#### *Public authority's arguments*

29. The public authority's submissions in support of withholding the disputed information are summarised below and in the confidential annex.
30. The thrust of the public authority's submissions that the Commissioner is able to reveal in the main body of this notice is that the disputed information relates to ongoing policy formulation on the circular economy. At the time of the request, the policy was, and is still, under development. Disclosure would therefore weaken Ministers' and officials' ability to discuss controversial and sensitive topics free from premature public scrutiny.
31. In response to the complainant's submissions, the public authority explained that the UK was supportive of the Commission's communication on the circular economy, published in July 2014. An Explanatory Memorandum on the Circular Economy Communication clearly shows that it supports much of what the Commission were saying in the document, publicly available at:

<http://europeanmemoranda.cabinetoffice.gov.uk/files/2014/07/11592-14.pdf>

32. Furthermore, a number of the main elements of the Circular Economy Communication were included in the subsequent Council Conclusions on Greening the European Semester and the Europe 2020 Strategy discussed at the October 2013 Environment Council. The UK signed up to these conclusions and remains committed to making better use of its resources.
33. The public authority also stated that it was its policy not to comment on the content of leaked correspondence or other material rumoured to express the Government's position.

*Balance of the public interest*

34. The Commissioner considers that disclosing the disputed information would enhance the transparency of the Government's position in relation to the EU proposals for a circular economy. If there are questions regarding the Government's commitment to the proposals, then the disputed information would assist the public in evaluating the Government's position.
35. Having carefully considered the disputed information along with some of the contextual explanation provided by the public authority in support, the Commissioner is satisfied that at the time of the request, policy formulation and development in relation to EU proposals on a circular economy were still *live*. The relevant discussions (some of which are quite frank) took place between September and October 2014. The request was submitted in November 2014. Therefore, under those circumstances, there was a particularly strong public interest in Ministers and officials having safe space to discuss the proposals free from the fear of premature public scrutiny. It is important and of significant public interest that Ministers and officials have the necessary safe space to formulate and develop policy options free from the pressure of having to publicly justify each and every option before they have been finalised.
36. The Commissioner also considers that disclosure at the time of the request is likely to have resulted in Ministers' and officials' expressing less candid views in relation to the EU proposals in future for fear that they might be subjected to ridicule and/or premature public scrutiny and that is not in the public interest. He has also attached significant weight to this public interest in view of the fact the issue is still *live*.
37. As far as the Commissioner can see, there is no compelling evidence to support the suggestion that the Government does not support the circular economy objective. If there are reservations on any aspect of the EU proposals, then Ministers and officials are entitled to have confidential discussions on how to resolve them and make the case for

the UK's position to the EU. Revealing the content of those discussions while the issue is still *live* could undermine the UK's negotiating strategy.

38. Therefore, the Commissioner finds that on balance, in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosing the disputed information.
39. In light of his decision that disputed information was correctly withheld on the basis of regulation 12(4)(e), the Commissioner has not considered the applicability of the exception at regulation 12(5)(a).



## Right of appeal

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40. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**