

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

**Date:** 4 December 2023

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

**Decision (including any steps ordered)**

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1. The complainant has requested information associated with so-called 'defeat devices.' The Department for Transport (DfT) provided some information and relied on regulation 12(5)(c) of the EIR (intellectual property rights) and 13 (personal data) to withhold the remaining information.
2. The Commissioner's decision is that DfT has failed to make the case that regulation 12(5)(c) is engaged. DfT also breached regulations 5(2) and 14(2) of the EIR as it failed to disclose all the environmental information that it held or issue a complete refusal notice within 40 working days.
3. The Commissioner requires DfT to take the following steps to ensure compliance with the legislation.
  - Disclose to the complainant the information being withheld under regulation 12(5)(c) of the EIR. This should include the information discussed at paragraph 12 of this notice which DfT has confirmed it will disclose.

4. DfT 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.

## Background

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5. The Court of Justice of the European Union judgment in Case C-693/18CLCV and Others, in 2020, concerned the placing on the market of vehicles equipped with software capable of distorting the results of type-approval tests for emissions of gaseous pollutants.
6. The Court concluded that it's prohibited to install a defeat device, which systematically improves the performance of the vehicle emission control system during approval procedures, and so obtains approval of the vehicle.

## Request and response

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7. On 17 October 2022, the complainant wrote to DfT and, referring to a previous letter, requested information in the following terms:
  - "1. Paragraphs 9-14 of your letter refer to market surveillance programmes having been carried out by the DfT's Market Surveillance Unit (the 'MSU') in 2019, 2020 and 2021, and suggest that the 2019 report will be published in "autumn 2022" with the 2020 and 2021 reports to be made available by April 2023. We are now well into autumn 2022, but as far as ClientEarth is aware no further market surveillance reports have been published by the MSU. Please provide:
    - a. copies of any information held by the DfT regarding the current estimated timeframe for the completion and publication of the 2019, 2020 and 2021 MSU vehicle market surveillance reports, and if any of these have now been finalised, please provide copies;
    - b. copies of any annual overview of the DfT's planned market surveillance checks prepared pursuant to Article 8(6) of Regulation 2018/858; and
    - c. copies of any reports the UK Government has submitted to the Forum pursuant to Article 8(7) of Regulation 2018/858.
  2. Table 1 of your letter sets out the overall number of cars, vans, HGVs and PSVs that have been subject to the MSU's emissions testing programmes since 2016. With respect to the 2019, 2020 and 2021 programmes, please:
    - a. confirm which specific vehicle types were tested by the MSU, including the specific make, model, engine type and type approval number of each of the individual vehicles that have

been subject to analysis; and b. provide the results of any emissions tests already carried out by the MSU on each vehicle.

3. Paragraph 15 of your letter refers to “reports from independent testing or intelligence obtained from other market surveillance authorities or third parties” having been considered as part of the Department’s selection of vehicles for testing by the MSU. Please provide copies of the “reports” and “intelligence” to which this paragraph alludes.

4. Paragraph 20 of your letter refers to the DfT having written to “all manufacturers who have placed vehicles on the UK market on 28 April 2022 to understand what action they are taking to ensure vehicles are compliant” in light of the CJEU judgment in case C693/18. Please provide copies of: a. the correspondence that the DfT has sent to vehicle manufacturers (as referred to in paragraph 20 of your letter), and any responses received; and b. the minutes of any meetings held between the DfT (or other government departments or agencies) and vehicle manufacturers relating to the issues raised in such correspondence.

5. Paragraph 32 of your letter states that the DfT does not hold a full dataset on the number of vehicles to which an emissions related fix has been applied. Your letter instead provides indicative recall figures at Table 2. The figures are expressed by broad manufacturer groups, rather than individual vehicle makes or types. The table is also stated as including recall figures for “vehicle manufactures listed within Annex 1”, with no indication of whether the “VW Group” numbers also include recall numbers for those Skoda vehicle types listed in Annex 2. Please therefore: a. confirm whether the Table 2 figures also include recalls of those Skoda vehicle types listed in Annex 2 as being subject to VCA approval and notification; and b. provide any information held by DfT as to the breakdown of the recall figures set out at Table 2, including in particular the numbers of affected, updated and outstanding units of each individual vehicle type listed in Annex 1 and Annex 2 (identified by make, model and engine type), as well as the relevant type approval numbers of the vehicles affected. If your answer to a) above confirms that the Skoda vehicles were not included in the Table 2 figures, please provide equivalent recall numbers for the Skoda vehicle models identified in both Annex 1 and Annex 2.

6. Annex 1 of your letter is said to set out a “full list of known vehicle types deemed to have been containing prohibited defeat devices”, comprising “notifications from other EU type Classification: Confidential 3 approval authorities where a prohibited defeat device has been identified” (as explained at paragraph 16 of your letter). In

relation to this Annex 1 information: a. Please provide copies of the 1st and 3rd notes from the KBA which are missing from Annex 1. b. From the cumulative list of vehicles set out at pages 71 to 84 of Annex 1, it is not possible to identify which individual vehicle types are covered by which specific KBA or VCA-issued notice(s). Please provide an amended version of this cumulative list with an additional column containing reference to the specific KBA or VCA-issued note(s) relevant to each specific vehicle type listed. c. In relation to the above-mentioned cumulative list of vehicles at pages 71 to 84, please explain why some of the cells of the table are highlighted in green and some of the listed type approval numbers are listed in blue text. No key has been provided to explain this colour-coding. d. The cumulative list of vehicles at pages 71 to 84 records the following five Skoda vehicles as having received "clearance by VCA" (as noted in the final column of the table). However, such vehicles do not appear in the notification from the VCA to EU approval authorities dated 5 May 2017, as appended at Annex 2 to your letter. Please provide any additional notification(s) sent by the VCA to EU approval agencies that relate to these five Skoda vehicles. Make Model Capacity (l) Power (kW) Engine code Emission level SKODA Yeti 2 125 CEGA EU5 SKODA Yeti 2 125 CFJA EU5 SKODA Skoda Yeti 2 103 CBDB EU5 SKODA Skoda Yeti 2 81 CFHA EU5 SKODA Skoda Yeti 2 81 CFHF EU5 e. The Skoda vehicles listed in pages 4 to 7 of Annex 2 do not appear in the cumulative list of vehicles at pages 71 to 84 of Annex 1, indicating that this cumulative list is incomplete. Please verify that there are no further omissions from this list and if necessary provide an updated, complete version of the cumulative list. f. Please provide a copy of the English translation of the 27th note from the KBA, which is currently missing from Annex 1.

7. Paragraph 16 of your letter states that "[w]hilst the letters contained in [Annex 1] include confirmation of the presence of prohibited defeat devices and confirmation that the prohibited defeat devices are no longer present within the fix applied, full details of the relevant emission strategies are not typically provided by the granting type approval authority" (emphasis added). Please provide any further information that is held by the DfT about the approved defeat device fixes listed in Annex 1, including copies of: a. any updated emissions approval issued by the relevant type approval authority; b. any extended documentation package documents submitted by the manufacturer to support any such approvals; and c. any further technical information about the operation of emission control strategies within the vehicle, including the results of any updated emissions tests carried out on the vehicle.

8. Annex 2 of your letter contains copies of notifications sent by the VCA to the approval authorities of EU member states in relation to

fixes approved for a number of Skoda vehicles. The relevant notices contain no clear description of the approved fixes, but simply include the relevant emissions approval numbers and software number codes. Please provide any further information held by DfT about the nature of the approved technical fixes listed in Annex 2, including copies of any: a. updated emissions approvals issued by the VCA; b. extended documentation package documents submitted by the manufacturer to support the VCA's approval of the relevant fixes; and c. any further technical information about the operation of emission control strategies within the vehicle, including the results of any updated emissions tests carried out on the vehicle..."

8. DfT first responded on 14 November 2022. It provided some information, relied on regulation 12(4)(c) of the EIR (request formulated in too general a manner) to refuse some parts of the request and stated that it needed an additional 20 working days to provide the remaining information due to the volume and complexity.
9. DfT then disclosed various pieces of information over the course of the next four months. It also held a meeting with the complainant to discuss the underlying concerns behind the request.
10. The complainant requested an internal review on 7 March 2023. They acknowledged that they'd received a large volume of information. However, the outstanding matters still to be satisfactorily resolved were part 4a (correspondence with Mazda and Stellantis about action they're taking to ensure vehicles are compliant in light of the CJEU judgment in case C693/18) and part 8c of the request (information about approved technical fixes for certain Skoda vehicles - the operation of emission control strategies within the vehicle, including the results of any updated emissions tests carried out on the vehicle).
11. Following an internal review DfT wrote to the complainant on 2 May 2023. Its final position was to rely on regulation 12(5)(c) and regulation 13 of the EIR to withhold information within scope of the above two parts of the request. The withheld information comprised:
  1. Information in a spreadsheet associated with Mazda
  2. Information in correspondence with Stellantis
  3. Information in a presentation associated with VW
12. In its submission to the Commissioner, DfT advised that, on re-consideration, it considered that redacted information in a column of the spreadsheet, and in pages 3 and 25 of the presentation, could be disclosed.

## Reasons for decision

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13. DfT's redaction of personal data doesn't appear to be a concern for the complainant. This reasoning is therefore focussed on parts 4a and 8c of the complainant's request and whether DfT is entitled to rely on regulation 12(5)(c) of the EIR to withhold information within scope of these two parts: information in a spreadsheet, information that formed part of a correspondence and information in a presentation. DfT has provided the Commissioner with copies of the information it's withholding.
14. Under regulation 12(5)(c) of the EIR, a public authority may refuse to disclose information to the extent that its disclosure would adversely affect intellectual property rights.
15. Intellectual property rights (often referred to as 'IP rights') arise when someone is granted exclusive rights to certain intangible assets (ie an asset that you can't physically touch). This means that others are prevented from reproducing or reusing that asset without the permission of the person who owns the IP rights.
16. The complainant has argued that the technology or software that is likely to be discussed in the withheld information is already being (or has already been) used in vehicles. Therefore if any competitor were interested in copying it, they would already have been able to get their hands on a vehicle and reverse-engineered the technology or software to determine its design.
17. For VW group in particular, the complainant has argued that as the 'fix' being applied is necessary because of so-called 'defeat devices' having previously been deployed, the fix would be of no use to other manufacturers – unless they had themselves deployed similar defeat devices.
18. The complainant has also noted that the information already disclosed to them contains information about the engine function of the various vehicles concerned. They consider it's difficult to see why this information could be disclosed without adversely affecting the manufacturers' intellectual property rights, but the remaining information cannot.
19. The main IP rights relevant to EIR requests will usually be copyright, database rights and copyright in databases.
20. Relating to Mazda vehicles, the spreadsheet concerns the auxiliary emissions strategy deployed in certain vehicles. The information being

withheld in the spreadsheet details when changes to exhaust gas recirculation were deployed.

21. In its submission to the Commissioner, DfT has said that Mazda advised it that,

“Mazda believe that these documents contain highly confidential and commercially sensitive information that would constitute a trade secret and allow competitors to understand strategic elements of how Mazda engineer and Type Approve their vehicles, thereby prejudicing Mazda's commercial interests if the information or documents are disclosed.”

22. DfT explained that it subsequently received a further representation from Mazda who noted that disclosing the redacted information:

“... could potentially "adversely affect" Mazda's "intellectual property rights". Without wishing to set out in great detail, Mazda's designs... adopt a significantly different approach to engine design to other manufacturers. Once information is disclosed under EIR, control is lost over how the information is re-used... In particular, disclosure of the redacted information in Document 8 would provide competitors with information on and help them understand strategic elements of how Mazda engineer and Type Approve their vehicles. It may well not be possible for Mazda to prevent any harm or loss by enforcing its IP rights.”

23. Mazda hasn't clearly addressed here the question of what IP rights apply to the withheld information but has referred to the information being a 'trade secret.'

24. In his published guidance on regulation 12(5)(c)<sup>1</sup>, the Commissioner advises that trade secrets don't automatically attract IP rights. A trade secret is a form of confidential, commercial or industrial information given additional protection under the common law. A trade secret may be protected by IP rights (such as copyright), but a public authority can't rely on this exception just because information is regarded as a trade secret. The authority must demonstrate that a particular IP right applies to the information.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-5-c-intellectual-property-rights/>

25. Trade secrets are likely to engage regulation 12(5)(e) (or regulation 12(5)(f) – interests of the person who provided the information). However, regulation 12(9) places restrictions on the exceptions that can be applied to information that concerns emissions, as in this case. Neither regulation 12(5)(e) nor regulation 12(5)(f) can be applied to information about emissions.
26. Mazda has also set out a case that its commercial or industrial confidentiality would be adversely affected through disclosure. However, as above, regulation 12(5)(e) covers commercially sensitive information but can't be applied to information about emissions.
27. The information in the correspondence with Stellantis that's being withheld includes diagrams/illustrations and other technical information. In its submission DfT has described the information as "detailed information setting out the specific conditions in which certain emission control software is deployed. This covered primarily software labelling and the calibration values at which that software or other emissions strategy is deployed." DfT has told the Commissioner that Stellantis has advised it that,
- "(The release of these documents would result in...) loss of ownership of the calibration strategies unique to (Stellantis) which can result in loss of control (partially or fully) of the IP (breach of IP rights);
- Loss of IP rights belonging also to third parties (for example Bosch)
  - Damage to brand or product reputation and generally Stellantis' commercial image;
  - Loss of possible residual commercial and economic exploitation with third parties of IP rights on control emission strategies;
  - Loss of possible business in UK, European and US markets"
28. Stellantis has made a reference to loss or breach of IP rights here but, again, hasn't clearly confirmed what IP rights apply to the withheld information.
29. The information in the VW presentation that's being withheld includes dates, diagrams/illustrations and other technical information. In its submission DfT has described this information as "details of the application of different emissions control elements intended to alter emissions performance and detailed graphical information showing exact calibration levels and performance." DfT has told the Commissioner that VW advised it that,
- "The pages we have identified contain highly confidential information and protected IP rights, namely diagrams concerning the technologies used in EA189 and EA288 vehicles (Reg 12(5)(b)). This information



was provided to the DfT voluntarily and the disclosure of it would prejudice the commercial interests and right to a fair trial of Volkswagen Group UK and the Volkswagen Group (Regs 12(5)(c) and (f))..."

30. In its discussion of the public interest test, VW said that harm would be caused from the disclosure of its trade secrets.
31. DfT explained that it subsequently received a further representation from VW who noted that the redacted information:

“...does not relate to final software updates but rather technical options for developing such updates. This information is highly confidential and is protected intellectual property and therefore should not be disclosed.”
32. The Commissioner has noted VW’s reference to other EIR exceptions, but DfT is withholding the information under regulation 12(5)(c) only. He’s also noted that VW has indicated that the information is confidential and protected by IP rights and that the IP right VW has referred to is trade secrets.
33. Elsewhere in its submission, DfT has itself described the withheld information as containing a mixture of “copyrighted information and trade secrets.” Regarding the Mazda information held in a spreadsheet, the Commissioner notes that DfT hasn’t made any reference to database rights or copyright in databases in relation to this information or any other information.
34. DfT says that its claims of potential intellectual property infringement were reviewed by technical experts within the Department and the Vehicle Certification Agency (VCA). The VCA is an Executive Agency of the Department for Transport and exists to improve vehicle safety and environmental protection by providing robust testing and certification to internationally recognised standards.
35. The VCA experts assessed the claims based on what information is already available to the public and specifically, what information a technically capable audience could use and reverse engineer to imitate vehicle designs.
36. The Commissioner understands DfT to mean that the VCA experts were satisfied that IP rights – copyright and trade secrets - applied to the withheld information.
37. DfT’s position then, is that the IP rights that apply to the withheld information are a mixture of trade secrets and copyright.

38. To the degree that any of the withheld information constitutes trade secrets – which, from their submissions to DfT, appears to be the information associated with Mazda and VW - the Commissioner isn't persuaded that regulation 12(5)(c) can be applied to that information. DfT has stated the information comprises copyright **and** trade secrets. This indicates that it considers an IP right other than copyright applies to the trade secrets, but it hasn't detailed what this is. Trade secrets have no specific intellectual property protection of their own and DfT hasn't presented a compelling case that a particular IP right applies to that specific information.
39. Regarding copyrighted information, the Commissioner recognises that the information may be subject to copyright protection as it's original information. However copyright protection doesn't prevent the disclosure of information under the EIR.
40. An initial disclosure under the EIR doesn't infringe copyright because the Copyright, Designs and Patents Act 1988 (CDPA) provides that acts authorised by statute, such as a disclosure under the EIR, are permitted.
41. Copyright does however prevent the further use of the information where that use would be in breach of the copyright. If information which is subject to copyright is disclosed in response to a request, the copyright is maintained and individuals receiving that information are legally required to ensure that any use of that information doesn't breach the owner's copyright. Copyright breaches are remedied via the courts.
42. To engage regulation 12(5)(c) a public authority must be able to demonstrate that an adverse effect would occur to its IP rights. The First-tier Tribunal has found that this means that harm should flow from an infringement of the IP right by disclosing the information.
43. The Commissioner notes that in this instance it wouldn't be an infringement of their copyrighted information which would cause harm to the manufacturers and any other third parties. Harm would be caused by disclosing information they consider to be commercially sensitive; particular engineering strategies.
44. However simply communicating potentially sensitive information to someone doesn't in itself engage the exception. The harm that's envisaged isn't caused by the manufacturers losing control over the future use of the information but because competitors would become aware of the engineering strategies used by the manufacturers. As mentioned above, this is caused by the initial disclosure, which itself wouldn't infringe copyright as the CDPA provides that acts authorised by statute, such as a disclosure under the EIR, are permitted.

45. In effect, the argument isn't that competitors would copy the disclosed information but that they would use the information to potentially gain a competitive advantage. It is however the information as presented, as a 'literary work,' which would be protected by copyright, not the engineering strategies that the information describes. Competitors wouldn't breach copyright by copying the strategies described in the information, and as the initial disclosure by DfT is specifically allowed under the CDPA, that information would already be in the public domain.
46. In the Commissioner's published guidance on regulation 12(5)(c), he advises that if the right holder could take legal action to prevent any harm, their rights will not be adversely affected, and the exception will not apply. In its submission, DfT has said that "...given the similar types of technology in use across the industry, proving any infringement of copyright is likely to be challenging and time-consuming for a manufacturer and is unlikely in reality to be able to undo any competitive damage caused."
47. The Commissioner doesn't consider that through this short statement DfT has presented a compelling case that the car manufacturers wouldn't be able to prevent the commercial harm they've envisioned. It may be challenging and time-consuming, but DfT hasn't suggested it would be impossible.
48. Based on the submission provided to him therefore, the Commissioner is satisfied that any copyright protection isn't affected by disclosing the information under the EIR. His decision is that DfT wasn't correct to apply regulation 12(5)(c) to this information and to any of the information to which it applied this exception.

## **Procedural matters**

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49. DfT breached regulation 5(2) of the EIR because, despite relying on regulation 7 to extend the time for compliance from 20 to 40 working days, it still failed to provide all the environmental information it held within 40 working days.
50. DfT breached regulation 14 of the EIR because, despite relying on regulation 7 to extend the time for compliance from 20 to 40 working days, it still failed to issue a complete refusal notice, stating all the exceptions being relied upon, within 40 working days.

## Right of appeal

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51. 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: 0203 936 8963  
Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

52. 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.
53. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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