

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

Decision notice

Date: 31 January 2012

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

Decision (including any steps ordered)

1. The complainant has requested information relating to discussions between the Department for Transport ("DFT") and Jaguar Land Rover ("JLR") about European car efficiency legislation. The DFT applied the commercial interests and information provided in confidence exemptions under the FOIA to withhold some of the information and the commercial interests and adverse affect to the voluntary supply of information exceptions under the EIR to withhold the rest of the information.
2. The Commissioner's decision is that all of the withheld information is covered by the EIR and he has not upheld the application of any of the exemptions under the FOIA. The Commissioner also considers all of the withheld information relates to emissions and therefore the exceptions claimed by the DFT do not apply by virtue of regulation 12(9).
3. The public authority correctly withheld the names and contact details of officials and JLR staff on the basis of the exception at regulation 13.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information with minor redactions for the information constituting the personal data of DFT and JLR staff and their contact details.
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

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 18 November 2010, the complainant wrote to the DFT and requested information in the following terms:

“correspondence (including electronic), any minutes of meetings and other documents relating to discussions between officials, advisers or Ministers and Landrover about the UK’s derogation for Landrover as part of the European car efficiency legislation. I would like this request to extend from 7th May 2010 until now. I would also like any documents/correspondence/papers relating to this matter sent between BIS and DfT for the same time period”.

7. The DFT responded on 16 December 2010. It stated that information was held in relation to the request but would not be disclosed. The DFT confirmed that the information was covered by both the FOIA and the EIR.
8. The DFT clarified it was withholding the information covered by the FOIA on the basis that it was information provided in confidence (section 41) and disclosure would prejudice the commercial interests of any party (section 43). In terms of the information covered by the EIR; the DFT stated it was withholding the information on the basis that disclosure would adversely affect legitimate business interests (regulation 12(5)(e)) and releasing the information would affect the future voluntary supply of information to the DFT (regulation 12(5)(f)).
9. The complainant requested an internal review on 9 February 2011. In this request the complainant stated their belief that all the information requested would be environmental and therefore any exemptions claimed under the FOIA could not be relied upon and as the information related to emissions the exceptions listed in regulation 12(5)(d) – (g) in the EIR could not be used as a basis for withholding the information.
10. Following an internal review the DFT wrote to the complainant on 7 March 2011. It stated that the withheld information consisted of two emails from JLR representatives to DFT officials and some power point slides. The DFT explained that it considered this information to be covered by the EIR and the FOIA as it related to procedural aspects of the legislation rather than fuel efficiency targets. It therefore upheld its application of the exemptions under both the FOIA and the EIR to this request.

11. The DFT also stated its understanding that information on emissions for the purposes of regulation 12(9) of the EIR only includes information about actual emissions and not information about future or planned emissions.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way their request for information had been handled. In particular the complainant asked the Commissioner to consider whether all of the information is environmental information and should be considered solely under the EIR and whether regulation 12(9) of the EIR applies as the information relates to emissions.
13. The Commissioner considers the scope of his investigation to be to determine the access regime(s) under which the request should be dealt and whether the nature of the withheld information is such that it relates to emissions and engages regulation 12(9). The Commissioner may then consider the application of the other exemptions under the FOIA and the EIR cited by the DFT in its responses to the complainant and its submissions to the Commissioner, particularly in relation to personal data.

Background

14. Under new European car efficiency legislation CO₂ emission levels for passenger cars have been set. Under the new legislation small-volume (less than 10,000 cars per year) and niche vehicle manufacturers may apply for specific CO₂ reduction targets compatible with their vehicles' emissions reduction potential and corresponding to the characteristics of the market for the types of cars concerned. There are procedures that manufacturers must observe when applying for this derogation.

Reasons for decision

Access regime

15. The Commissioner is of the view that the requested information in this case is environmental information within the meaning of regulation 2 of the EIR. This is because the information, specifically the power point presentation which is on the subject of the impact to JLR of EU CO₂ emissions targets and the niche manufacturer derogation, relates to CO₂ emission targets.

16. In reaching this view, the Commissioner has considered the nature of the information held, rather than the reasons for holding it. The Commissioner does not consider it necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. Rather, the information should be *"any information on"* something falling within regulation 2. In this case the information relates to new EU legislation on CO₂ emission targets for vehicles. The Commissioner considers this would fall under the definition of environmental information under regulation 2(1)(c) which states that environmental information is:

"any information in any material form on:

- 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;"*

17. In light of the above, the Commissioner has gone on to consider the DFT's arguments in relation to the EIR but not the FOIA.

Regulation 12(9) – information on emissions

18. Regulation 12(9) provides a broad scope by covering information relating to information on emissions rather than just information on emissions as set out in regulation 2(1)(b). It also states that public authorities cannot rely on the exceptions at regulations 12(5)(d) – (g) if the information relates to information on emissions.
19. The DFT has argued that information on emissions only extends to information about actual emissions, those that have already been emitted. The DFT stated that *"legislation on fuel efficiency for new cars (which contains targets for future years expressed in terms of the average number of grammes per kilometre of carbon dioxide emitted by new cars) relates to emissions that have not yet taken place. In other words, the emissions are not actual emissions and, in my view, Regulation 12(9) does not therefore apply"*.
20. The Commissioner understands from this that the DFT is not disputing that the information relates to emissions but that regulation 12(9) does not cover future emissions which this information relates to. The Commissioner's view is that emissions are not limited to emissions that have already taken place and can include future emissions. His view is based on consideration of the wording of the EIR, the European Directive (2003/4/EC) which implements the EIR, and the Aarhus Convention. The Commissioner is satisfied that the wording of these

documents does not limit the definition of emissions to those which have already occurred. In particular Article 7 of the Aarhus Convention emphasises the importance of information about future plans relating to the environment being available. This view is reflected in several decision notices served by the Commissioner.¹

21. Both of the documents identified by the DFT as being within the scope of the request have been withheld on the basis of the exceptions at regulation 12(5)(e) and (f) of the EIR. As the Commissioner considers that all the withheld information is on a measure likely to affect the environment and he has established that all the withheld information is information on emissions as it relates to EU legislation on fuel efficiency and CO₂ targets; the DFT cannot rely on any of the EIR exceptions listed in regulation 12(5)(d) – (g). The Commissioner offered the DFT the opportunity to consider if any other exceptions may be engaged in relation to the withheld information but the DFT maintained its position that regulations 12(5)(e) and (f) applied.
22. As such, the Commissioner has determined that any information to which the DFT applied regulations 12(5)(e) and/or (f) to withhold should now be disclosed. This applies to all of the information in the power point presentation which was previously being withheld under sections 41 and 43 of the FOIA and 12(5)(e) and (f) of the EIR. The information withheld under the EIR must now be released as these exceptions cannot be relied on as the information relates to emissions. In terms of the FOIA exemptions claimed, all the information is environmental so these exemptions are not applicable.

Regulation 13 – personal data

23. The second piece of withheld information is two emails from JLR representatives to DFT officials. During discussions with the Commissioner the DFT had agreed to release the content of these emails with some redactions for information which it considered was personal data and therefore exempt under regulation 13 of the EIR. Information is exempt from disclosure on the basis of regulation 13(1) if it is personal data of which the applicant is not the data subject i.e. third party personal data, and either the first or second condition at regulation 13(2) is satisfied.

¹ Case reference numbers FER0066052 and FER0073984 available to view via www.ico.gov.uk

Do the names and contact details withheld constitute personal data?

24. Personal data is defined in section 1(1) of the Data Protection Act 1998 ("DPA") as:

"...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller;"

25. The names and contact details of officials at the DFT and representatives at JLR would clearly constitute personal data within the meaning of the DPA.

Would the disclosure of the names and contact details contravene any of the Data Protection Principles?

26. For regulation 13(1) to apply, either the first or second condition in regulation 13(2) must be satisfied. The first condition in regulation 13(2) states that the disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.

27. The first data protection principle states that personal data must be processed fairly and lawfully and not processed unless at least one of the conditions listed in Schedule 2 of the DPA is met (and Schedule 3 if processing sensitive personal data).

28. The Commissioner notes that disclosure under the EIR represents disclosure to the wider world. When considering the reasonable expectations of the data subject, he has considered whether they would be likely to expect that their personal data would be disclosed to anyone who requested it.

29. The Commissioner notes that the withheld names and contact details for the staff of the DFT relate purely to their occupational capacity. However, the Commissioner is of the view that such staff would reasonably expect their details to remain private as they would not anticipate any requirement for them to be made public in order for them to fulfil their occupational role.

30. The Commissioner acknowledges that legislation affecting fuel efficiency in the UK and information relating to it is in the public interest and as such should be as transparent as possible to allow the public to be fully informed on progress. However the Commissioner accepts that in this case the named employees may not ultimately have been the decision makers.

31. This particular piece of withheld information is not information upon which any decisions would have been made or information which would have had a significant impact on any decision. The Commissioner recognises that the interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms of the data subjects in considering how the factors balance. In doing so, the Commissioner has come to the conclusion that the disclosure of the names and contact details would be unfair to the data subjects. The content of the withheld information and its likely low impact on any decisions made was an important factor in this decision. As the Commissioner has decided that disclosure would be unfair he has not gone on to consider the other elements of the first data protection principle.

32. As regards the name and contact details of the representative of JLR, the Commissioner finds that there is no evidence that they did, or would if asked, give their consent to the public dissemination of their personal data. In the context of this issue their function appears to have been to liaise with the public authority regarding the CO₂ derogation. Their role is therefore not public facing and the Commissioner accepts from this that they would be unlikely to have expected that their personal data would be disseminated publicly. The Commissioner is unable to identify any realistic public need for the public disclosure of this information and he therefore considers it unfair to release this name and contact information in these circumstances.

Right of appeal

33. 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

34. 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.
35. 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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