

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 January 2013

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

Decision (including any steps ordered)

1. The complainant requested communications within the Department of Energy and Climate Change (DECC) and communications between DECC and other government departments concerning proposals for a new Europe-wide renewable energy target for 2030. DECC refused to disclose this information and cited the exception provided by regulation 12(4)(e) (internal communications).
2. The Commissioner's decision is that DECC applied this exception correctly and so it is not required to disclose this information.

Request and response

3. On 9 March 2012, the complainant wrote to DECC and requested information in the following terms:

"The European Energy Commissioner has put forward proposals for a new Europe wide renewable energy target for 2030. Please provide all internal correspondence relating to the new 2030 target from December 2011 up to and including March 2012.

By correspondence I mean

1. Emails

2. Email attachments

3. Letters

4. Notes taken during or after phone calls

5. Any other type of correspondence frequently used by the department.

This list is not exhaustive. Please include any other correspondence you consider to be relevant."

"The European Energy Commissioner has put forward proposals for a new Europe wide renewable energy target for 2030. Please provide all correspondence relating to the new 2030 target between DECC and

a) Department for Business, Innovation and Skills

b) The Treasury

c) Other departments of state

in the specific period starting December 2011 and ending March 2012.

By correspondence I mean

1. Emails

2. Email attachments

3. Letters

4. Notes taken during or after phone calls

Any other type of correspondence frequently used by the department".

4. The DECC responded on 4 May 2012. It stated that the requests were refused and cited the exception from the EIR provided by regulation 12(4)(e) (internal communications).
5. The complainant wrote to DECC on 25 May 2012 and requested that it carry out an internal review. The DECC responded with the outcome of the internal review on 23 July 2012. The refusal of the request under regulation 12(4)(e) was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 16 August 2012 to complain about the refusal of his request. At this stage the complainant indicated that he was dissatisfied with the reasoning given for the refusal of his request and referred to the arguments he had advanced when requesting an internal review.
7. During the investigation the DECC wrote to both the complainant and the ICO confirming that it was now citing two further exceptions in relation to some of the information falling within the scope of the requests:

Regulation 12(5)(a) (adverse effect on international relations)

Regulation 12(3) (personal information)

Reasons for decision

Regulation 2

8. This regulation defines what is environmental information. The first step for the Commissioner here is to consider whether the information falling within the scope of the requests is environmental in accordance with this definition and so whether the DECC correctly dealt with this request under the EIR.
9. Environmental information is defined within regulation 2(1) of the EIR as follows:

"any information in written, visual, aural, electronic or any other material form on –

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures designed to protect those elements".

10. The complainant requested information concerning proposals for a Europe-wide renewable energy target. The Commissioner believes that any information relating to this matter would be environmental information by virtue of regulation 2(1)(c). A decision as to whether this target should be introduced and what level it would be set at would be a policy that would affect the state of the elements of the environment such as air and atmosphere that are noted in regulation 2(1)(a). Therefore, the Commissioner considers the requested information in this case to be environmental as it is information on a policy that would affect the air and atmosphere and so the DECC was correct to respond to the request under the EIR.

Regulation 12(4)(e)

11. Regulation 12(4)(e) provides that a public authority may refuse a request for environmental information if the request involves the disclosure of internal communications. Consideration of this exception is a two-stage process; first it must be considered whether the request would involve the disclosure of internal communications. Secondly, this exception is qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure.
12. As to whether this request would involve the disclosure of internal communications, regulation 12(8) is specific that internal communications for the purposes of the EIR includes communications between government departments. The information in question here consists of either emails within DECC, or between DECC and other government departments, and attachments to those emails. The view of the Commissioner is that this information clearly constitutes internal communications and so the request would involve the disclosure of internal communications. The exception provided by regulation 12(4)(e) is, therefore, engaged.
13. Turning to the balance of the public interest, in forming a conclusion on the public interest here the Commissioner has taken into account the general public interest in improving the openness and transparency of the DECC and in central government more widely. He has also taken into account the specific factors that apply in this case and in relation to this information. This includes factors suggested by the complainant and by DECC.
14. Covering first those factors that favour disclosure of the information, the Commissioner considers the subject matter of the policy making in question here to be highly significant. The steps taken by government to limit the progress and mitigate against the impact of climate change are of the most fundamental public interest. Disclosure here would improve

transparency in this area and public knowledge of the steps being taken by the Government. The view of the Commissioner is that the subject matter of this information is a valid factor in favour of disclosure of this information of very significant weight.

15. When requesting internal review, the complainant advanced a number of arguments in favour of disclosure. The complainant emphasised the importance of policy in this area and the variety of stakeholders who could make use of the information in question. The cumulative effect of these arguments was essentially the same as the arguments advanced above and the Commissioner agrees with the complainant that there is a strong public interest in the disclosure of this information given its subject matter.
16. Turning to those factors that favour maintenance of the exception, DECC has argued about the importance of the preservation of a 'safe space' in which to allow policy development to be carried out. According to the argument advanced by DECC, this is necessary in order to avoid the creation of a 'chilling effect', whereby participants in the policy making process would be inhibited from participating in a fully free and frank way through concern about the possibility of future disclosure.
17. The complainant has referred to a decision of the First-tier Tribunal (Information Rights) in which it made the point that there is nothing inherent in the exception provided by regulation 12(4)(e) that suggests that it was designed to provide the protection argued by DECC. The Commissioner recognises this, but is also of the view that such arguments should be taken into account where this exception is cited if they are relevant to the content of the information, but that these will not necessarily tip the balance dependent on the other factors that apply.
18. As to the content of the information in question here, the Commissioner notes first that some of it could be fairly described as free and frank. Whilst it is not essential for the content to be of this nature for this to be a relevant factor, that the information includes such content is evidence that safe space and chilling effect arguments are relevant here.
19. Secondly, the Commissioner notes that the policy making to which this information relates was 'live'; that is, it was ongoing at the time of the request. The view of the Commissioner is that it is clearly in the public interest for government to be capable of making policy effectively. He also recognises that this could be made more difficult where information about a live policy is disclosed.
20. When taking into accounts arguments about harm to the policy making process, the Commissioner will consider how closely the arguments

relate to a specific process. If, for example, arguments are advanced about harm to the policy making process in general, these arguments will carry significantly less weight than where arguments are advanced about harm to a specific policy making process.

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

Right of appeal

25. 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

26. 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.
27. 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

**Gerrard Tracey
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